



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO.7 OF 2001

GLADYS WANGUI KANGANGIPLAINTIFF/RESPONDENT

VERSUS

SAMUEL MAINA MUTUGIDEFENDANT/APPLICANT

R U L I N G

1. The applicant filed an application dated 21/8/2013 seeking the following Orders;
 - a. That the court be pleased to order the arrest and committal to civil jail for a period of 6 months of Gladys Wangui Kangangi, J.K Kibicho Advocate, D.M Kibicho advocate and C.Mwaura Advocates for disobeying the court order issued on 28/10/2011 in HCCC NO 465 OF 2011 at Nairobi.
 - b. That in the alternative the court do adopt the order dated 28/10/2011 in HCCC NO 465 OF 2011.
 - c. That the cost of this application be borne by the respondent.
2. The application is based on grounds *inter alia* that;
 - a. The plaintiff and her advocates have continued to proceed with execution of the decree in utter disregard of the order issued by the high court at Nairobi.
3. The plaintiff/Respondent raised a preliminary objection dated 12/11/2013 pointing out the following:
 - a. That the notice of motion application dated 21/8/2013 is incompetent, fatally defective for being in breach of Section 5 of the Judicature Act of the laws of Kenya and the Laws relating to commencement and institution of contempt proceedings.
 - b. That this Honourable court lacks jurisdiction to hear and determine the contempt proceedings.
 - c. That the Honourable court be obliged to strike out the Notice of Motion dated 21/8/2013 with costs to the plaintiff /Respondent

APPLICANT'S SUBMISSIONS

4. It was the applicant's submission that the application dated 21/8/2013 was not based on the

provisions of the Judicature Act. Instead the application is was based on Order 40 Rule 3 of the Civil Procedure Rules which empowers the court to punish litigants who disobey its orders. The applicant has stated that he has not cited the provisions of the Judicature Act anywhere in its application and that it is not for the respondent to dictate to the applicant the manner in which he should seek legal redress since the law provides several options that an aggrieved party can use. In the present case the applicant sought to have the respondent punished through order 40 rule 3.

5. On jurisdiction, the applicant submitted that the jurisdiction of the court to hear the application was vested under section 40 Rule 3 of the civil procedure rules. The applicant however admits that the court has unlimited original jurisdiction. The applicants issue though not brought out clearly is that the court should not be asked to execute the decree it issued while the stay orders the same court issued are still in existence.

THE RESPONDENTS SUBMISSIONS

6. The respondent in her submission opposed the applicant's application dated 21/8/13 through the notice of preliminary objection dated 12/11/13. She stated that it is trite law that the law that governs contempt proceedings within the Kenyan Jurisdiction is contained in section 5 of the Judicature Act and is the same law that is applicable in England.

Section 5(1) of the judicature act provides that 'The High Court of Kenya and the Court of Appeal shall have the same power to punish for contempt as is for the time being possessed by the high court of Justice in England and that power shall extend to the upholding authority and dignity for subordinate courts'.

7. The applicant quoted Order 51 Rule 2 of the rules of the Supreme Court of England which provides;

"No application for an order for committal against any person may be made unless leave to;

- i. *Make such an application has been granted in accordance with this rule.*
- ii. *An application for such leave must be made ex parte to a judge and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed to civil jail and the ground on which his committal is sought, and an affidavit to be filed before the application is made verifying the facts relied on.*
- iii. *The applicant must give notice of the application for leave not later than the preceding day to the registrar and must at the same time lodge with the registrar copies of the statement and affidavit."*

8. The respondent submitted that the applicant had not sought leave or complied with any of the requirements set out under order 51 rule 2 of the Supreme Court of England rules .The respondent cited and attached the following cases;

In ***NATIONAL BANK OF KENYA LTD VS COUNTY COUNCIL OF OLEKEJUADO &2 OTHERS 2013 Eklr*** it was held that contempt proceedings are special proceedings that are quasi-criminal in nature and hence the law must be followed to the latter. The court noted that the Judicature Act does not provide for either substantive or procedural law that governs contempt of court proceedings as was expressed in ***NAIROBI HCCC NO 456 OF 2011*** where the court stated;

"It is unfortunate and regrettable that nearly 50 years after independence our procedure with respect to punishment for contempt in our court is referable to the procedure, in the High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency for enacting our own law relating to such an important aspect of the rule of law. That being the case, ours is not to enact the law but to interpret the law enacted".

The court held that in absence of such legislation in our country, the law that governs contempt

proceedings in Kenya is the one applicable in England. The court proceeded to dismiss the application for failure to comply with the requirements set out Order 52 Rule 2 of the rules of the Supreme Court of England.

9. In the second case **NAIROBI HC MISC APPLICATION 226 OF 2012** the court also quoted NAIROBI HCCC NO 456 OF 2011 mentioned above and emphasised that the procedure to be followed with respect to punishment for contempt in our court is referable to the procedure in the High Court of Justice in England

10. UNDISPUTED FACTS

- a. That the present application for contempt of court proceedings was brought under the provisions of Order 40 Rule 3.

11. DISPUTED FACTS

- a. The Law applicable in contempt of court proceedings
b. Whether the court has jurisdiction to entertain the application.

12. ISSUES FOR DETERMINATION

- i. Whether Order 40 Rule 3 can be used to seek redress in contempt of court proceedings.
ii. Whether the court has the jurisdiction to hear and determine the contempt of court proceedings.

13. ISSUE NO. (i)

The following are decided cases where the above issue was discussed at length.

In the case of **AFRICAN MANAGEMENT COMMUNICATION INTERNATIONAL LTD VS JOSEPH MATHENGE MUGO & ANOR** the court held;

“In my view there exist two regimes in this country regarding punishment for contempt of court. This is to be found in section 5 of the Judicature Act and section 63 of the Civil Procedure Act.....To my understanding, it is equivocal that pursuant to section 63 (c) of the Civil Procedure Act, Order 40 Rule 3 will only apply where the breach relates to orders of an injunction.....A closer look at order 40 of the civil procedure act will show that the provision is silent on the procedure to be followed when bringing an application to punish for breach of a court under order 40 rule 3(1) does not require leave or service of the notice of motion to the attorney general. One cannot read into law that which is not expressed therein”

In the case of **KENYA ACCOUNTANTS SECRETARIES NATIONAL EXAMINATION BOARD VS PAUL KIPKELIMOI CHEMNUNG'OREM & 3 OTHERS (2014) eKLR (copy attached)** the judge explained.

“It is my opinion that the English law on the procedure for committal for contempt of court that applies by virtue of section 5(1) of the judicature act only does so when a lacuna exists in the Kenyan procedural rules. Order 51 of the Kenyan Civil Procedure Rules does not require personal service of the notice of motion brought under order 40 rule 3.....This court does consider the issue of personal service of the said notice of motion a requirement in Kenya in the case of applications for committal for contempt of court brought under order 40 rule 3 of the civil procedure rules 2010.....”.

In the case of **BERNARD ONDIEKI MOSETI VS CITY COUNCIL OF NAIROBI & ANOR** the judge held that;

‘The main issue raised is whether this court has jurisdiction to hear the application in

light of the procedure followed by the applicant. The conflict occasioned by two separate procedures governing contempt of court proceedings has been extensively discussed in various High Court decisions.....I hold that the jurisdiction and procedures provided for in the Judicature Act and Civil Procedure Act are separate and either can apply so long as the proceedings fall within the courts ambit. The difference is that while the jurisdiction conferred by section 5 of the Judicature Act is wide and encompass all forms of contempt of court proceedings, that of the civil procedure rules is limited to the circumstances laid down in the Act.....The civil procedure rules and act have in the recent past been subjected to far reaching review and amendment and had it been found necessary to subject the procedure under Order 40 Rule 3 of the civil procedure to the contempt of court procedure under section 5 of the Judicature Act, then this intention would have been expressly stated in the amended civil procedure rules and Act of 2010 .My understanding is that the jurisdiction of this court and procedures for contempt of court proceedings under the civil procedure act and rules is limited to instances where the civil contempt that is alleged is the breach of an injunction”.

In **MARY NJERI KABUNDI VS CHRISTINE MITHIRI** it was held as follows;

“Section 63(c) of the Civil Procedure Act and Order 40 Rule 3 of Civil Procedure Rules provide for consequences of breach of an order of injunction, and state that in cases of disobedience, or of breach of any such terms the court granting an injunction may order property of the person to be attached and may also order such person to be detained in prison for a term not exceeding three months.....The procedure to be followed in my view is provided under order 51 of the civil procedure rulesThe civil procedure rules do not provide for the requirement of leave or any time limits within which the substantive application for committal contempt of court pursuant to order 40 rule 3 should be made.....”

From the foregoing, it is clear that Order 40 Rule (3) Civil Procedure Rules can only be applied where the contempt is in regard to an injunction. In the present case the applicant alleges that the respondent is in contempt of a court order issued on 28/10/2011 staying all proceedings against Blue Shield policy holders during the moratorium declared by the statutory manager. An order such as the one referred to by the applicant in my view, is a restraining order and amounts to an injunction. Order 40 rule (3) Civil Procedure Rules does not provide for the procedure to be followed in instituting such an application. There is also no requirement for leave to be sought before such an application is filed. I do find that the applicant has moved the court under the right provisions of the law.

14.ISSUE NO (II)

Order 40 Rule 3(1) provides;

“In cases of disobedience ,or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be detained in prison for a term not exceeding six months.....”

An application under Order 40 Rule 3 should therefore be brought before the court that granted the injunction. In the above case of **BERNARD ONDIEKI MOSETI VS CITY COUNCIL OF NAIROBI & ANOR** the judge noted that the injunction alleged to have been breached was issued by Justice Mbogoli Msagha sitting in the Environmental and Land Division of the High Court and held that the court had jurisdiction to entertain the application for contempt of court, since it was also a Land and Environmental Court.

15.In the present case, the injunction that is alleged to have been breached was issued by the High Court at Nairobi. The applicant has brought his application before the high court at Embu. In my view this court and the court that issued the orders allegedly breached have equal jurisdiction. I

therefore find that this court has jurisdiction to hear and determine the application for contempt of court orders. I find the preliminary objection to be unfounded and dismiss it with costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH OF JULY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Ithiga for Mr. Ngige for Plaintiff/Respondent

Njue – C/c