



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 38 OF 2013**

**1. A P D**

**2. H V..... APPLICANTS**

**VERSUS**

**R J V.....RESPONDENT**

**RULING**

This miscellaneous cause arises from a dispute between the parties regarding the estate of the late **H R V** being Mombasa Succession Cause No. 44 of 2013. The applicants (being mother and daughter) **A P D** and **H V** are the wife/partner and daughter of the deceased while the respondent **R J V** is a son to the deceased from a previous union. On 26<sup>th</sup> September, 2013, the applicants sought leave to commence contempt proceedings as against the respondent. The court granted leave as prayed. In pursuance to that leave the applicants on 27<sup>th</sup> September, 2013 filed an application seeking that

- “1. R J V be committed to prison for a maximum of 6 months for contempt of court orders made on the 26<sup>th</sup> July, 2013.**
- 2. The costs of the contempt proceedings be borne by the respondent.”**

On 28<sup>th</sup> February, 2014 the respondent filed an application seeking *inter alia* the following orders

- “(b) The application notice dated 27<sup>th</sup> September, 2013 be struck out with costs to R J V.**
- (c) In the alternative and only if the application notice dated 27<sup>th</sup> September, 2013 is not struck out the court be pleased to order and compel A P D and H V to attend court for cross-examination at and during all the days that the application notice dated 27<sup>th</sup> September, 2013 for committal of the applicant for alleged contempt comes up for hearing.**
- (d) The court be pleased to summon various witnesses including Mr. Jared Magolo, Juma ali Mohamed, Emily Adhiambo and one Emmanuel who is he caretaker employed by H V and A P D to manage or secure House Numbers 38 and 39 belonging to the estate as H R V, deceased as well as a Corporal Otieno of Nyali police station and Michael Oduor a police officer currently attached to Provincial Police Headquarters to give evidence during the hearing of the Application Notice dated 27<sup>th</sup> September, 2013 in event that Application Notice**

is not struck out.

(e) the court be pleased to order and direct the Court Bailiff with the assistance of the police to enter into House No. 38 and the servant quarter for that house at Shree Links for the purposes only of taking photographs and compiling a list of the contents of that house and in the event that the Court Bailiff and the police are denied entry to forcibly break the padlocks and the locks for that purpose and to present to the court a report of their findings.

(f) The hearing of the Application Notice dated 27<sup>th</sup> September, 2013 be stayed pending the hearing and determination of this application.

(g) A P D and H V be ordered to pay the costs of this application in any event.”

That application was certified urgent and prayer (f) thereof was granted such that the application seeking to strike out the contempt proceedings was directed to be heard and determined first. Counsel for the respondent filed Grounds of Opposition dated 30<sup>th</sup> April, 2014. The application was disposed of by way of oral submissions. MR. KINYUA appeared for the applicant whilst MR. MOGAKA acted for the respondent. The three main issues which arise for determination by this court are as follows

1. Should the application notice dated 27<sup>th</sup> September, 2013 be struck out.
2. Should the court grant prayers (c) and (d) of the present application to summon the various persons named as witnesses.
3. Should the court grant prayer (e) of the present application?

1. **Should the court strike out the application notice dated 27<sup>th</sup> September, 2013?**

I have considered the submissions of Mr. Kinyua on this aspect of the application. He was basically elucidating to the court the reasons why there cannot be said to have been any contempt on the part of the applicant. Similarly the grounds stated in support of this application as well as the supporting affidavit of ‘R J V’ do not show any grounds upon which the Application Notice ought to be struck out without proceedings to hearing on its merits. The issues being raised in support of this prayer to strike out in my view actually amount to direct responses to the Application Notice and are therefore really a reply to the said application. Order 51 rule 14(1) of the Civil Procedure Rules provides for the various ways in which a respondent may reply to an application. Instead of choosing one of the options provided in Order 51 rule 14 (1) the applicant herein has chosen to respond by way of filing an application to strike out. This is irregular. The applicant in his affidavit avers that he has been condemned unheard. That is not the case. The applicant is fully entitled to respond to the application filed seeking to have him committed to civil jail and certainly no orders will be made by the court unless and until both parties have been allowed an opportunity to be heard. I am not persuaded that there exists any legal or valid reason to strike out the Application Notice dated 27<sup>th</sup> September, 2013 as prayed. The applicant should proceed to file his reply thereto in compliance with Order 14 rule 14 (1) and allow the matter to proceed on its merits. I therefore disallow this prayer for striking out.

2. **Should the witnesses sought be called for cross-examination?**

The applicant herein has through prayers (c) and (d) prayed that ‘A P D’, H V’, an Advocate of the High Court, several police officers and other persons be summoned to appear in person for cross-examination during the hearing of the Application Notice dated 27<sup>th</sup> September, 2013.

The procedure to be followed in contempt of court application was laid down by the Court of Appeal in the case of **Christine Wangari Chege vs. Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. The procedure to be followed was set out by Order 52 rule 1 and 4 of the Rules of the Supreme Court of England (hereinafter referred to as the RSC). These Rules were cited by my learned brother Hon. Justice Hilary Chemetei in the case of **Oriental Commercial Bank Limited vs. Rajni K. Somaia [2014] eKLR**, where the learned Judge held as follows

**“The coming into operation of the Civil Procedure (Amendment No. 2) Rule 2012 of England has substantially changed the mode of instituting contempt proceedings. Part 81 now provides for different procedures depending on the type of contempt. Section 2 of part 81 provides for the procedure to be followed when instituting and prosecuting contempt in enforcement of a judgment, order or undertaking to do or abstain from doing an act.”**

Part 81:10 provides the procedure as follows

**“81:10-(1) A committal application is made by an application notice under part 23 in the proceedings in which the judgment or order was made or the undertaking was given.**

**(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under part 23.**

**(3) The application notice must:-**

**(a) Set out in full the grounds on which the committal application is made and must identify, separately and numerically each alleged act of contempt including if known, the date of each of the alleged acts; and**

**b. Be supported by one or more affidavits containing all the evidence relied upon.**

**(4) Subject to paragraph (5) the application notice and the evidence in support must be served personally on the respondent.**

**(5) The court may**

**(a) dispense with service under paragraph (4) if it considers it just to do so; or**

**(b) make an order in respect of service by an alternative method or at an alternative place.”**

It appears from the above amendment that a person filing for contempt is only required to file an **application notice** setting out the grounds on which the **application** is premised and supported by an **affidavit containing all the relevant evidence** [my emphasis]. It follows that [no] leave or notice to the crown is required. The application ought to be served upon the respondent personally.

It is clear therefore that application notices for contempt in enforcement of a court order such as the instant one need only to be supported by affidavits containing all the relevant evidence. The use of affidavits rather than oral evidence is a legal procedure designed to expedite civil matters where a party wishes to proceed by way of oral evidence, he/she must satisfy the court that there exists sufficient reason to have the person summoned. In the case of **Registered Trustees of Deliverance Church vs. Pastor Simon Muchoki and Another [2004] eKLR Ojwang J** (as he then was) stated that

**“The fundamental principle behind reliance on affidavits in interlocutory application is that they provide essential facts in short form and thus help to expedite the determination of the matters in dispute. To serve this purpose however an affidavit is expected to be truthful. While this test is not always achieved, it is easy to identify an affidavit that is in bad form; for example, if it is a replying affidavit it fails to address the clear averments in the original affidavit to which it is responding; it may be evasive, vague, argumentative and wholly unhelpful in terms of the need to ascertain the relevant matters of fact.”**

While the matter before court is not an interlocutory application, I am of the mind that the same reasoning regarding the use and purpose of affidavits holds true here. There is no legal entitlement for the applicant

to face his examiners in court more especially where no specific falsehood has been pointed out to exist in any of the affidavits filed. By prayer (c) the applicant seeks to have court order the attendance of A P D and H V to be summoned on **all the days** that the application notice is in court for hearing. This is not a criminal trial and the persons named are not accused persons. There is no reason or basis for the court to order their attendance in court on **all** the days of the hearing. The mere fact that the applicant does not agree with the averments made in the affidavits is not a reason to call these persons for cross-examination. The applicant is quite at liberty to file an affidavit in reply to put forward his own version of events. No basis has been laid for the court to summon the other persons sought. I find that prayers (c) and (d) of this present application have no basis and the same are hereby dismissed.

**3. Should court order the Bailiff to break into the House No. 38?**

Once again I am not persuaded of the merit of this particular application. What is in issue is the application notice for contempt. If the applicant requires to obtain photographs as annexures then all he needed to do was apply for court to order that he be granted access. I find that the applicant R is bringing in too many extraneous matters possibly in an attempt to cloud the issues. He is advised to stick specifically to the matter at hand. I similarly dismiss prayer (e) of this application. Based on the foregoing I find no merit in the application dated 28<sup>th</sup> September, 2013. The same is dismissed with costs to the respondents herein A P D and H V.

**Dated and delivered in Mombasa this 24<sup>th</sup> day of September, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Olwande h/b for Applicants

Mr. Otieno h/b Mr. Kinyua for Respondent

Court Clerk Mutisya