



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 88 OF 2014

SYNRENIS LIMITED. APPELLANT

VERSUS

CHRISTOPHER OMULELE T/A OMULELE & CO. ADVOCATES. RESPONDENTS

RULING

1. This is a ruling on the applicants Chamber Summons dated 27th May, 2014. The same is expressed to be brought under Section (5) of the Judicature Act Cap 8 Laws of Kenya, Sections 3, 3a, 63 (c) & 3 and 89 of the Civil Procedure Act and Order 52 Rule 2(2) of the Rules of the Supreme Court. The summons seeks the leave of this court for the Applicant to apply for an order of committal to prison against Christopher Omulele, Tito Munyalo Muli and Elijah Mputhia Irura for a period of six months and/or for sequestration of their property for disobedience of the court order issued on 27th March, 2014.
2. The summons was supported by a statutory statement dated 27th May, 2014 and the verifying Affidavit of Arun Devan sworn on 27th May, 2014.
3. When the matter came up for hearing before this court on 29th October, 2014, Mr. Muli appearing for the alleged contemnors indicated that he wished to be heard since he had already filed a Replying affidavit to the summons. Mr. Kithi Learned Counsel for the applicant objected to Mr. Muli being heard on two grounds. Firstly, that under Rule 9 of the Advocates Practice Rules, where an advocate is likely to be a witness in a matter he cannot appear in such a matter; that since Mr. Muli had already sworn a Replying affidavit seeking to give evidence in the matter, he had no right of audience. Secondly that the application was ex-parte in any event.
4. Responding to the objection, Mr. Muli submitted that Rule 9 of the Advocates Act was a subsidiary legislation and that it offended the right to be heard under the Constitution and that since the Applicant had allowed the alleged contemnors to file a Replying Affidavit, they could not be barred from being heard. The court ordered that the issue of the right of audience of Mr. Muli and the contemnors be determined together with the application on merit in this ruling.
5. Rule 9 of the Advocates Practice Rules provides: -

“9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

6. In the current proceedings, the alleged contemnors are three in number. These are; Christopher Omulele, Tito Munyalo Mule and Elijah Mpuhia Irura. Mr. Muli indicated that he was acting for himself and for the other two alleged contemnors. He actually swore the Replying Affidavit that is sought to oppose the summons. In my view, the spirit of Rule 9 of the Advocates Practice Rules is to maintain objectivity in Advocates conduct in the handling of a matter before court. Once an Advocate is likely to be a witness, the likelihood of losing objectivity is but real. There may be no clear demarcation of where his personal interest begins and where it ends. I think that rule is a sound rule for the administration of justice in our courts.

7. In this regard, I do not agree with Mr. Muli that the rule infringes upon the constitutional right to be heard. The rule seeks to maintain objectivity and dispassionate representation of litigants by Advocates. It seeks to prevent an embarrassment being metted out on an advocate who at one stage may be required to move from or leave the bar and take the witness box. If he takes the witness box, who then will conduct the litigants case from the bar? In this regard, I hold the view that that rule is a sound rule of practice and does not infringe the right of a litigant to a choice of Advocate or to be heard.

8. In the present case, Mr. Muli being also a party to the proceedings is entitled to be heard in his own right as a party but not as an advocate for the other two alleged contemnors.

9. Further, applications for leave to commence committal proceedings under Order 52 of the Supreme Court Practice have always been ex-parte. Ex-parte in my view mean, being heard alone, in the absence of the other party. It was meant the court to consider and sieve those applications that come before court that may be frivolous and an abuse of court process. It is for the court to first be satisfied on a prima facie basis that there is an issue to be investigated before allowing an applicant to commence proceedings that may only be meant to vex the proposed respondents. In this regard and for the two reasons aforesaid, I hold that Mr. Muli was not entitled to be heard. The alleged contemnors are to be heard if and once leave is granted. To turn an ex-parte application into an inter parte application would in my view be akin to determining the committal application itself. Accordingly, I uphold Mr. Kithi's objection. I strike out the Replying Affidavit of Tito Munyalo Muli sworn on 22nd October, 2014. I will not consider his submissions at this stage.

10. In an ex-parte application for leave to commence committal proceedings, what an applicant has to satisfy the court is that there was an order made by the court, the same was either served upon the alleged contemnor or the contemnor had knowledge of such order and that despite such knowledge and or service of the same, the alleged contemnor has disobeyed that order.

11. Before me there is a detailed statutory statement verified by an Affidavit by one Arun Devani on 27th May, 2014. There was an order of stay given by Waweru J on 27th March, 2014. It is alleged that the Advocates for the Respondent in the appeal who is also one of the alleged contemnors was present in court when the order was being made and that those Advocates refused to deposit a banker's cheque sent to them as directed in the order of 27th March, 2014. That subsequently, the alleged contemnors proceeded to cause the Applicants motor vehicle to be sold or disposed off despite the said order of stay.

12. I have seen that order which was exhibited in the Verifying Affidavit of Arun Devani. I have also seen an Affidavit by Eliud Sianga sworn on 20th May, 2014. I have also considered the averments in the statement and verifying affidavits that the actions of the alleged contemnors were intended to frustrate a lawful court order.

13. Accordingly, I am satisfied that a prima facie case has been established by the Applicant that a court order may have been disobeyed in circumstances that might amount to contempt of court That case needs to be investigated by granting the Applicant leave to commence those proceedings, which I hereby do. I allow the application as prayed. Let that Motion be filed and served within seven (7) days of the date

hereof.

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A MABEYA

JUDGE

Dated, signed and delivered at Nairobi this 26th day of November, 2014.

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JUDGE