REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Miscellaneous Application 405 of 2007

PETER NYAMU KARAGURI

MUHURI KARAGURI .....APPLICANTS

VERSUS

ATTORNEY GENERAL OF KENYA.....1ST RESPONDENT

LAND REGISTRAR NYERI.....2ND RESPONDENT

B. W. MWAI.....3RD RESPONDENT

SIMON KABACHIA KARUGURI.....4TH RESPONDENT

AMINA JUMA KARANJA.....5TH RESPONDENT

MUTHONI MWANGI.....6TH RESPONDENT

AND

SYLVESTER GACHERU MWANGI.....INTERESTED PARTY

RULING

Before me is a Motion on Notice dated 7th May 2012 expressed to be brought under the provisions of Order 40 Rule 3(1) and 3 of the Civil Procedure Rules, Section 3, 3A, 1A, 1B and All Other Enabling Provisions of the Law seeking the following orders:

1. That this Honourable court be pleased to cite the Land Registrar Nyeri, B. W. Mwai, Simon Kabachia Karuguri, Muthoni Mwangi and Sylvester Gacheru Mwangi for contempt of court orders issued on 27th April 2007.

2. That this Honourable Court be pleased to commit Land Registrar Nyeri, B. W. Mwai, Simon

Kabachia Karuguri, Muthoni Mwangi and Sylvester Gacheru Mwangi to civil jail for six months for contempt of court orders.

3. That the property of Simon Kabachia Karuguri, Muthoni Mwangi and Sylvester Gacheru Mwangi be attached.

4. That transfer of Gikondi/Gikondi/1862 to Sylvester Gacheru Mwangi be cancelled and/or revoked.

5. That costs of this application be provided for.

The application is supported by the annexed affidavit sworn by **Peter Karaguri Nyamu**, one of the applicants herein on 7th May 2012. According to him, on 24th April 2007 he filed a *Certiorari* application to quash the proceeding made by Land Disputes Tribunal at Mukurwe-ini on 1st April 2003. On 25th April 2007 the Honourable Court granted leave and that leave was to operate as stay of all the proceedings and transfer and or dealings in LR. No. Gikondi/Gikondi/609 (original) Gikondi/Gikondi/1787 and 1788 and any other subsequent transfers complained of until further orders of this Honourable Court. Consequently, on 28th April, 2007 the said order was registered in the lands office upon payment of the requisite fees and a search conducted on 28th May 2009 reflected that the order had been duly registered. The said orders were similarly served upon **B. W. Mwai, Simon Kabachia Karuguri** and **Muthoni Mwangi** while **Sylvester Gacheru Mwangi** is aware of the orders of 25th April 2007. It is his case, however, that despite the said Land Registrar Nyeri, **B. W. Mwai, Simon Kabachia Karuguri** and **Muthoni Mwangi** being aware and/or having been served with the said orders, in full disobedience they have proceeded to sell and transfer the suit land to **Sylvester Gacheru Mwangi** on 15th December 2010 and that the said respondents, **Sylvester Gacheru,** the interested party, their servants and/or authorized agents disobeyed the said order by dealing with the suit parcel of land by transferring the and registering Gikondi/Gikondi/1862 in the name of the interested party who was issued with a title on 23rd December 2010. It is therefore the applicants' position that the Respondents and the interested party have clearly demonstrated that they are in contempt of court and cannot be heard by this Honourable court unless they purge the contempt.

On behalf of the ex parte applicants it was submitted that under Order 40(3) (sic) of the Civil Procedure Rules, no leave is required to institute contempt proceedings. That position, it is submitted, is reinforced by the Court of Appeal authority of **Mutitika vs. Baharini Farm Ltd [1985] KLR 227** and **Bernard Kongo Njau vs. City Council of Nairobi & Another Nairobi High Court (Environmental and Land Division) Case No. 495 of 2009** where it was held that a person who is aware of an order and disobeys the same shall be liable having obstructed justice. It is further submitted that the standard of prove (sic) in contempt of court proceeding is higher than on a balance of probability but not beyond reasonable doubt.

On the part of the 3rd, 4th and 5th Respondents, it was submitted that in order for the Court to commit for contempt, it must be satisfied that there was such an order as is said to have been disobeyed; that the order was extracted and a copy issued; that the certified copy of the order was served on the parties to whom it was directed and personally so; that the party upon whom the order is served is capable of obeying it as and at the time it was served; that the party cited is in contempt of court by disobeying the court's order; and that I the event title to land was involved, the order was registered as an encumbrance. According to the said respondents the applicant obtained conditional orders to apply for orders of certiorari and that leave was granted on condition that the same would collapse unless the main motion was filed and served within 21 days of the date of such grant. That date, it is submitted, was on 25th April 2007 and todate no such application has been served. They further contend that they were not served with the court orders since what was purportedly served is an order dated 16th April and not June.

The Respondents further submit that matters of procedure are vital in cases of alleged contempt of court and where certain procedures are not followed, they end up being fatal to the motion. Order 52 rule 2 of the Supreme Court Practice Rules, it is submitted, is mandatory that leave must be sought in order to cite for contempt. However, no such leave was sought and/or obtained hence the application ought to fail at

this stage. Relying on **Loise Margaret Waweru vs. Stephen Njuguna Githuri Civil Appeal No. 198 of 1998**, it is submitted that the Notice of Motion must be served personally on the respondent. Similarly the order and the penal notice is also required to be served personally since contempt of court is an offence of a criminal character and a person may be sent to prison for it. It is therefore submitted that the necessary elements to be proved beyond reasonable doubt have not been proved hence the application ought to fail.

In my considered view, Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey

orders made both *ex parte*and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant".

The conditions necessary for an order of committal for contempt are now well established. It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence. Therefore the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. In other words the Court will only punish for contempt of injunction if satisfied that the terms of the injunction are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt. See **Republic vs. Commissioner of Lands & 12 Others *Ex Parte* James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

I am well aware that Order 40 Rule 3 of the Civil Procedure Rules permits the court granting an injunction to order the property of a person guilty of disobedience or breach of a court order to be attached and for the person to be detained in prison for a term not exceeding 6 months. Strictly speaking an order made under that provision is not an order for contempt of court but simply an order for enforcement of an injunction granted pursuant to Order 40. In other words that provision is limited to cases where an injunction is granted under the said order. In other cases the procedure under section 5 of the Judicature Act ought to be followed. That section borrows the procedure set out under Order 52 of the Rules of the Supreme Court of England.

In this case what was granted and what is alleged to have been disobeyed is not an order of an injunction. Rather it was an order for stay granted under Order 53 of the Civil Procedure Rules. Accordingly, it is my view and I so hold that section 5 of the Judicature Act as read with Order 52 of the Rules of the Supreme Court of England were the applicable provisions.

Order 52 rule 2 of the Rules of the Supreme Court of England provides an elaborate procedure for the institution and prosecution of contempt of court applications. Under rule 2 subrule (3) of the Order 52 of the Rules of the Supreme Court, it is stated, in mandatory language, that the notice of the application for leave is to be given to the Crown Office not later than the preceding day and the applicant must at the same time lodge in that office copies of the statement and affidavit. It is settled that the equivalent of the Crown Office in Kenya is the Office of the Attorney General. Order 52 rule 2(1) of the Rules of the Supreme Court of England provides that no application to a Divisional Court for an order of committal against any person may be made unless permission to make such an application has been granted in accordance with the rule. Subrule (2) provides that an application for such permission must be made *ex parte* to a Divisional Court 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 and the grounds on which his committal is sought and by an affidavit to be filed before the application is made verifying the facts relied on.

Under both Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England,

the applicant must first seek leave to institute the proceedings and once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. Under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity having been made without jurisdiction since the subrule states that "unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse". See **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**

From the foregoing it is clear that a party who intends to institute contempt of court proceedings ought to prepare a notice of intention to institute contempt of court proceedings. That notice is to be accompanied by copies of the statement and affidavit setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and an affidavit verifying the facts relied on. Those documents are required to be served on the Attorney General at least one day before the application for leave is made. In other words the documents being served on the Attorney General are to be so served before the same are filed in Court to notify the Attorney General of the processes that the applicant intends to institute.

It is clear that the foregoing procedure was never adhered to by the applicant herein and that renders the proceedings for contempt incompetent.

Apart from that I have looked at the proceedings for 25th April 2007 in which the applicant alleges the stay was granted. However, it is clear from the said proceedings that **Emukule, J** expressly ordered that "leave granted shall not operate as a stay in terms of prayers 4 and 5 of the Chamber Summons. Where the applicant got the impression that the stay was granted, I am not able to find.

It follows that the application seeking committal based on a non-existent order is unmerited.

Accordingly, the Notice of Motion dated 7th May 2012 fails and is dismissed with costs to the 3rd, 4th and 5th Respondents.

Dated at Nairobi this 26th day of March 2013

G V ODUNGA
JUDGE
In the presence of:
Mrs Onyango for Mr Nyakingana for the Applicants.

Mr Kagunya for Mr Njengo for the 3rd, 4th and 5th Respondents.