



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO 868 OF 2003 (O.S.)**

1. **STEPHEN NDUGWA**  
2. **MUTUNGA REBIRO ADVOCATES.....APPLICANTS**

**VERSUS**

**OKACH AND COMPANY, ADVOCATES.....RESPONDENT**

**RULING**

1. The Respondent in the originating summons herein, it is apparent from the court record, is one **GEORGE OWINO OKACH** (trading under the name and style of **OKACH & COMPANY, ADVOCATES**). In this ruling therefore all reference to the Respondent will be a reference to the said George Owino Okach.
2. The relevant history of this matter is as follows. The Applicants applied by originating summons dated 19<sup>th</sup> August 2003 under **Order LII, rule 7** of the **Civil Procedure Rules** then in place for orders to enforce the Respondent's professional undertaking in the following terms –
  - i. That the Respondents be directed to honour their professional undertaking “in the transaction involving purchase, delivery and transfer of motor vehicle KQA 084 S whereof they acted for Patrick Wambua trading as Softreach Enterprises”.
  - ii. That the Respondent in satisfaction of the undertaking do pay the Applicants a sum of KShs 300,000/00 with interest at the rate of 25% per annum from 28<sup>th</sup> May 2008 until payment in full.
3. Order LII, rule 7 (now **Order 52, rule 7** of the **Civil Procedure Rules, 2010** (the **Rules**) provided -

**“7. (1) An application for an order for the enforcement of an undertaking given by an advocate shall be made –**

  - a. if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or
  - b. in any other case, by originating summons in the High Court.

**(2) Save for special reasons to be recorded by the judge, the order shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made.”**

4. On 18<sup>th</sup> December 2003 the Court (Visram, J) directed the Respondent to honour his professional undertaking in the following terms -

**“COURT:**

**In the absence of the Respondents, and in the absence of any replying affidavit, it is hereby ordered that the Respondents advocates do honour their undertaking within the next 14 days in terms of prayers 1 and 2 of the application dated 19/8/2003. Costs in the cause.”**

5. The Respondent did not honour his undertaking as directed above, and on 10<sup>th</sup> June 2004 the Court (Ransley, J) further ordered as follows -

**“ORDER**

**The order of 4.2.2004 varied to state that the payment is to be made within 14 days from service, with a penal notice endorsed thereon. Thereafter if the Respondent makes default an application is to be made for his committal to civil jail”.**

The reference in this order to 4<sup>th</sup> February 2004 is clearly erroneous. The record of 10<sup>th</sup> June 2004 shows clearly that the advocates for the parties addressed the court on the order of 18<sup>th</sup> December 2003. There was not any order made on 4<sup>th</sup> February 2004 that could have been varied. The order which Ransley, J varied was the order made on 18<sup>th</sup> December 2003.

6. To my mind, the order of 18<sup>th</sup> December 2003 was the **first instance** order requiring the Respondents to honour their professional undertaking as sought in the application within 14 days. That order was varied by the order of 10<sup>th</sup> June 2004 so that the 14 days would run from the date of service of the order upon the Respondent.

7. The order of 10<sup>th</sup> June 2004 also contained an order for **enforcement** in the event of default. The enforcement would be by way of application for committal to civil jail for disobedience of the order requiring the Respondent to honour his professional undertaking. That is why the order of 10<sup>th</sup> June 2004 had also required that the varied order to be served upon the Respondent be endorsed with a **penal notice**.

8. The record of the court shows that that the Respondent was duly served with the order of 10<sup>th</sup> June 2004. He did not honour his professional undertaking as directed.

9. The Applicants then applied by **chambers summons dated 30<sup>th</sup> August 2004** for leave to commence contempt proceedings against the Respondent. Leave as sought was granted by an order entered **on 9<sup>th</sup> November 2004** (Kihara Kariuki, Ag J). The learned judge further directed that the substantive contempt application be filed within thirty (30) days.

10. The **substantive contempt application** was filed on 8<sup>th</sup> December 2004 by **chamber summons dated 6<sup>th</sup> December 2004**. The Respondent’s reaction to that application was a notice of preliminary objection dated 28<sup>th</sup> January 2005.

11. The application was fixed for hearing on 3<sup>rd</sup> March 2005. On that date the Court (Ransley, J) made a preliminary order in the following terms –

**“ORDER: The matter is for committal of the Respondent to civil jail. Stood over to 18.5.2005, but if the Respondent has not paid money pursuant to my order of 10/6/2004 then the Respondent is committed to civil jail.”**

On 18<sup>th</sup> May 2005 the court (Ransley, J) confirmed the order of 3<sup>rd</sup> March 2005 as follows –

**“Order: The Respondent is committed to civil jail for 30 days.”**

12. The Respondent then applied by **notice of motion dated 20<sup>th</sup> May 2005** for review and variation of the orders of 3<sup>rd</sup> March 2005 and 18<sup>th</sup> May 2005. Interim stay of execution of those orders was granted pending hearing and disposal of the application which was extended from time to time. The record of the court shows that the parties then started negotiating to settle the matter.

13. Thereafter the Respondent applied for **leave to file and serve a third party notice** upon his former client on whose behalf he gave the professional undertaking. That application was allowed by a deputy registrar on **1<sup>st</sup> August 2006**. It is of course arguable whether it was proper or necessary to allow a third party to be brought into an advocate/client matter under Order 52 of the Rules, particularly where the matter had reached where it was at. To my mind this would only have the effect of unnecessarily complicating a matter that ought to be as summary as possible under the Rules. It is not readily apparent from the court record whether a third party notice was indeed filed and served.

14. The Applicants then applied by **chamber summons dated 10<sup>th</sup> April 2007** for a warrant of arrest to be issued against the Respondent to be executed by the police, and for the Respondent to be committed to civil jail for 30 days as ordered on 18<sup>th</sup> May 2005. This application was granted as prayed on **6<sup>th</sup> May 2009** (Ali-Aroni, J).

15. Then on **25<sup>th</sup> May 2009** the Court (Ali-Aroni, J) recorded the following consent order –

**“By Consent:**

**The Respondent do pay the sum of KShs 700,000/00 plus costs of the suit by monthly instalments of KShs 50,000/00 beginning 25<sup>th</sup> of June 2009 until payment (in full). That the parties (do) agree on costs within 30 days or (the same be) taxed. In default of any one instalment warrant of arrest and committal to civil jail to issue.”**

16. It appears that the court file thereafter disappeared for a considerable period of time. The same eventually resurfaced or was reconstructed. The Respondent never honoured the consent order of 25<sup>th</sup> May 2009.

17. Because of the passage of time the Applicants applied for notice to show cause to be served upon the Respondent. That notice to show cause was eventually dealt with by a deputy registrar on 22<sup>nd</sup> July 2011 after a number of adjournments in order for the Respondent to personally attend before the deputy registrar. She directed that the Respondent be arrested and committed to civil jail for a period of 30 days. He was not in court.

18. Two (2) days before then, on 20<sup>th</sup> July 2011, the Respondent had applied by **notice of motion dated 19<sup>th</sup> July 2011** under various articles of the **Constitution of Kenya, 2010** and **sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21**. This application is the subject of this ruling. He seeks the following main reliefs –

i That there be a declaration that the proceedings in this matter in so far as they relate to execution proceedings are irregular, un-procedural and not provided for in law.

ii That there be a declaration that the Respondent’s right to a fair trial will be prejudiced and/or compromised if the proceedings before this court are allowed to proceed in the manner applied for in court.

iii. That there be a declaration that the **United Nations International Covenant on Civil and Political Rights** is part and parcel of the Laws of Kenya.

iv. That there be a declaration that the orders sought by the Applicants are in violation of the aforesaid UN Convention.

v. That there be a declaration that the orders sought by the Applicants in the proceedings herein are inconsistent with constitutional provisions and if issued would be a violation of the Respondent's fundamental rights and freedoms.

vi. That there be a declaration that the provision of the Civil Procedure Rules, and in particular Order 22, rule 34 and sections 38, 40 and 42 of the Civil Procedure Act are inconsistent with the Constitution of Kenya and thus null and void to the extent of the inconsistency.

vii . That in so far as the "proposed mode of execution" is in violation of the Respondent's fundamental rights and freedoms and/or a threat thereto, the same be declared as null and void and be forthwith terminated.

19. The grounds for the application appearing on the face thereof are rendered as follows –

(i) That the Applicants have sought execution of a purported decree herein by way of committal to jail of the Respondent.

(ii) That there is no regular decree enforceable under the execution of decree provisions of the Civil Procedure Act.

(iii) That the purported decree arises out an undertaking by a firm of advocates.

(iv) That the mode of enforcement being sought is not provided for in law.

(v) That the manner of execution sought is a threat to the Respondent's fundamental rights and freedoms.

(vi) That the Respondent suffers from a serious disease under the meaning of section 43 of the Civil Procedure Act.

20. There is a supporting affidavit sworn by the Respondent, George Owino Okach. He has deponed, *inter alia*, that he is an advocate of this Court practicing law under the name and style of Okach & Company, Advocates. He has owned up the consent order recorded on 25<sup>th</sup> may 2009 but has otherwise given in the affidavit what appears to be a selective history of these proceedings.

21. The Respondent has also deponed, *inter alia*, to his health problems and inability to meet his obligations under the consent order of 25<sup>th</sup> May 2009; that he was unable to honour the professional undertaking that was the basis of these proceedings because of his ill-health and also the fact that he was unable to trace his client on whose behalf he had given the undertaking; and that he intends to sue his said erstwhile client for indemnity.

22. The Respondent also sought interim stay of execution of the order of 22<sup>nd</sup> July 2011 pending hearing and determination of his application. The same was granted and on 30<sup>th</sup> September 2011 it was extended until the application is heard and determined.

23. I cannot find on the court record any papers filed by the Applicants in response to the notice of motion dated 19<sup>th</sup> July 2011. But they participated in the hearing thereof, which hearing was by way of written submissions. The Respondent/Applicant's submissions were filed on 6<sup>th</sup> March 2012 while those of the Applicants/Respondents had been filed earlier on 2<sup>nd</sup> December 2011. I have duly considered those submissions, including the cases cited.

24. The history of this matter, which I have set out in detail above, shows that the Respondent's

application is entirely misconceived. It is misconceived in that the Respondent has proceeded upon the basis that the Applicants, in obtaining a warrant of arrest and committal to civil jail against him, were purporting to execute a non-existent decree of the court for a sum of money. That is not the position at all. The Applicants did not at any time apply to execute any decree against the Respondent by his arrest and committal to civil jail.

25. As already seen, the originating summons by which the Applicants commenced these proceedings was under Order 52, rule 7 for enforcement of an advocate's professional undertaking. On **18<sup>th</sup> December 2003** the Court (Visram, J) gave the **first instance** order directing the Respondent to honour his undertaking as sought in the originating summons "within the next 14 days". This order was varied by the order of **10<sup>th</sup> June 2004** (Ransley, J) so that the 14 days would run from the date of service of the order upon the Respondent, and for the order to be endorsed with a penal notice.

26. The order of 10<sup>th</sup> June 2004 also contained an order for **enforcement** in the event of default of the first instance order. The enforcement would be by way of application for committal of the Respondent to civil jail for disobedience of the first instance order.

27. As it happened, the Respondent did not honour the first instance order and the Applicants applied by **chamber summons dated 30<sup>th</sup> August 2004** for leave to commence **contempt proceedings** against him. **Leave was granted** by the order granted on **9<sup>th</sup> November 2004** (Kihara Kariuki, Ag. J).

28. A **substantive contempt application** was then filed by **chamber summons dated 6<sup>th</sup> December 2004**. A **preliminary order for committal** was made on **3<sup>rd</sup> March 2005**. The Respondent was to be committed to civil jail unless he would have honoured the order of 10<sup>th</sup> June 2004 by **18<sup>th</sup> May 2005**. The order was confirmed on that latter date as the Respondent had not honoured his undertaking as directed by the court.

29. It is thus clear that the order of arrest and committal to civil jail issued against the Respondent was punishment for being in contempt of the order of 10<sup>th</sup> June 2004. It was **not** in execution of any decree!

30. What is more, the Respondent in effect endorsed all the proceedings taken and orders made against him so far when he entered into the consent of 25<sup>th</sup> May 2009 recorded before Ali-Aroni, J. He did not honour that consent. The further order for his arrest and committal to civil jail issued by the deputy registrar on 22<sup>nd</sup> July 2011 was **not** in execution of any decree. It was simply in furtherance of the order of 18<sup>th</sup> May 2005 that committed him to civil jail for being in contempt of the order of 10<sup>th</sup> June 2004.

31. It is now **nearly ten (10) years** since the first instance order was issued on 18<sup>th</sup> December 2003. It is **over eight (8) years** since the order for the Respondent's committal (for being in contempt of the order of 10<sup>th</sup> June 2004) was made on 18<sup>th</sup> May 2005. The Respondent has obstructed the cause and course of justice that long!

32. This charade must now come to an end. The Respondent has been abusing the court process to avoid meeting his obligation as directed by the first instance and enforcement orders. It is the kind of conduct that brings to disrepute the processes of the court and greatly undermines the rule of law, especially when it is perpetrated by an officer of the court. It must stop!

33. The Respondent's application by notice of motion dated 19<sup>th</sup> July 2011 is entirely misconceived. It is designed to undermine the dignity and authority of the court and the rule of law. It is hereby struck out. Nobody has any constitutional right to flout an order of the court with impunity as the Respondent has done in this case.

34. The interim stay of execution now in place is hereby vacated. The Respondent shall be arrested and committed to civil jail as already ordered unless he shall forthwith and fully purge his arrant contempt of

the order of 10<sup>th</sup> June 2004. It is so ordered.

35. The Applicants shall have the costs of this application.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF DECEMBER 2013**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2013**