REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 284 of 2012

JANET NYANDIKO.. PLAINTIFF

VERSUS

1. NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES...1ST DEFENDANT/RESPONDENT

2. GIDEON KYENGO...2ND DEFENDANT/RESPONDENT

3. AGGREY NYANDONG..3RD DEFENDANT/RESPONDENT

4. EPHANTUS NJERU...4TH DEFENDANT/RESPONDENT

5. PETER NDUNGU...5TH DEFENDANT/RESPONDENT

6. EDWIN BARASA JUMA...6TH DEFENDANT RESPONDENT

7. SARAH SARKOI...7TH DEFENDANT/RESPONDENT

RULING

By a Motion on Notice dated 2nd August 2012 expressed to be brought under the provisions of Section 5(1) the Judicature Act Cap 8, High Court Practice and Procedure Rules 9Part 1 Rule 2, 3(1), 3(3) Cap 8 Laws of Kenya, Section 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rule 3 Order 51 Rule 1 of the Civil Procedure Rules and all enabling Provisions of the Law, the Plaintiff/applicant herein seeks the following orders:

1. THAT this application be certified as urgent and be heard at the earliest possible moment during the Summer Vacation of this Honourable Court and service be dispensed with in the first instance by reason of its urgency.

2. THAT this Honourable Court be and is hereby pleased to cite the 1st Respondent's Managing

Trustee Mr Tom Odongo, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents herein for contempt of Court and further serve six (6) months in civil jail.

3. <u>THAT</u> the costs of this Application be borne by the Respondents.

The application is based on the following grounds:

1. <u>THAT</u> the Honourable Court issued an order in favour of the Applicant on 26th July 2012 in HCCC No. 284 of 2012.

2. <u>THAT</u> the order was duly extracted and served on the respondents on 27th July 2012.

3. <u>THAT</u> despite the order being served, the respondents have blatantly refused to comply with its provisions.

4. <u>THAT</u> unless contempt proceedings are filed and the Respondents put in Civil jail they will put the authority and dignity of this Court to a disrepute.

The application is supported by an affidavit sworn by **Janet Nyandiko**, the Plaintiff/Applicant herein on 2nd August 2012. According to the said affidavit, he obtained mandatory orders herein ordering the Respondents to open all doors and gates to the suit property and allow her quite possession of the property known as LR No. 140/193 situated at Nyayo Estate-Embakasi. Service was, according to her, effected on the Respondents by a process server, one **Enos M. Lubutsi**, on 27th July 2012 but despite the said service the respondents have refused to comply as directed and continue to be in possession of the suit property and have continued to unlawfully lock the said house and have refused to reopen the same thus making a mockery of this court by repeatedly frustrating his efforts to have the house reopened. To deponent, the Respondents are ridiculing the authority and dignity of this Court and seem to be taking pride in the same. Unless, therefore, the Respondents are duly committed to civil jail the Court's reputation will suffer immensely and the Respondent are only going to take the orders of the Court seriously if committed to jail. The court must step in and protect its dignity and sanctity of its orders and ensure justice and fair play as no prejudice will be suffered by the respondents if the orders sought are granted.

The application was opposed by a replying affidavit sworn on 24th October 2012 by **Hellen Koech**, a Legal Officer of National Social Security Fund (hereinafter referred to as the Fund). According to her, since the 2nd to 7th defendants are agents and/or employees of the Fund, they cannot be personally held liable for acts undertaken in the course of their duty and as such the applicant's claim against them cannot lie. According to her, the orders which were granted by the Court were unprocedurally extracted without reference to the respondents and/or their advocates and was served on the respondents' advocates rather than personally on the Managing Trustee of the Fund. According to the deponent a Contempt of Court Application cannot lie against the Managing Trustee of the Fund. Despite that the Managing Trustee forwarded the keys to the suit premises to the Respondent's advocates for onwards transmission to the applicant who forwarded the same to the applicant's advocates. According to her the Fund has fully complied with the order of 26th July 2012 hence rendering the contempt of court proceedings superfluous, vexatious and purely academic. It is further her view that since the applicant did not seek leave of the Court before instituting the present application the application is premature. The pursuit of this application, therefore, is a delay tactic intended to deny justice to the Fund as the Applicant continues to enjoy the said interim orders to the detriment of the Pensioners who have invested their monies in the subject property and therefore the application ought to be dismissed.

On 25th October 2012, the Court granted directions with respect to the filing and exchange of submissions in respect of the said application and fixed the matter for further orders on 19th November 2012. Although the applicant was directed to file and serve her submissions first, when the matter came up on 19th November 2012, the applicant had neither filed nor served her submissions although the respondents had filed theirs. Accordingly, the only submissions on record are the ones filed on behalf of the

respondents.

In the respondents' submissions, the applicant has not complied with the provisions of section 5(1) of the Judicature Act, Chapter 8 Laws of Kenya under which the applicant is required, based on the decision in **Republic vs. County Council of Nakuru Ex parte Edward Alera T/A Genesis Reliable Equipment & 2 Others [2011] eKLR**, to seek leave before instituting the present proceedings and secondly, that the application in the present proceedings was not served personally on the Managing Trustee of the 1st Respondent. Accordingly, it is submitted that the Motion must fail. It is further submitted that the Fund having complied with the orders granted by the Court the present application is superfluous and has been overtaken by events and the continued pursuit of the present application must be interpreted as an attempt to achieve an ulterior motive and therefore an abuse of the process of the court and a deliberate attempt to delay the justice for the Fund while the applicant continues to live in a house she has not paid for. Since the 2nd to 7th respondents are agents and/or employees of the Fund, it is submitted that they cannot be held personally liable for acts properly undertaken in the course of duty.

Having considered the foregoing, it now trite that Court orders are not made in vain and are meant to be complied with and therefore 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 made clear in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990** where the Court of Appeal similarly stated that it is essential for the maintenance of the rule of law and good order that the authority of and dignity of the Court be upheld at all times and that the Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.

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".

In this case, the order in question was granted on 26th July 2012. From the copy of the affidavit of service which is annexed to the supporting affidavit, the 1st defendant was duly served on 27th July 2012. Although it is indicated in the said affidavit that all the respondents were served, the only persons indicated at the back of the order to have been served apart from the 1st defendant were the defendants' advocates, the second defendant and the 4th defendant. Therefore the orders sought against the 3rd, 5th, 6th and 7th defendants cannot be granted. Again, as already stated above the application is expressed to be brought under Section 5(1) the Judicature Act Cap 8, High Court Practice and Procedure Rules, Part 1 Rule 2, 3(1), 3(3) Cap 8 Laws of Kenya, Section 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rule 3 Order 51 Rule 1 of the Civil Procedure Rules and all enabling Provisions of the Law. A distinction must be made between cases in which what is sought is an order of committal to jail for contempt of court under the foregoing provisions and where a party seeks an order under Order 40 rule 3(1) of the Civil Procedure Rules. Under the latter the Court has powers, in cases of disobedience, or of breach of the terms of an injunction, to order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. An application for such orders can pursuant to rule 3(3) thereof be made by notice of motion in the same suit.

However, in the instant case what was granted was an order for mandatory injunction. Such orders, it is now well settled, can only be granted under the inherent powers of the court reserved under the provisions of section 3A aforesaid and not under Order 40. See **Belle Maison Ltd. vs. Yaya Towers Ltd. Nairobi HCCC No. 2225 of 1992.**

It follows that in cases where it is alleged that there is a breach of an order for mandatory injunction the same must be dealt with under a different legal regime other that Order 40. In my view the correct provision in the circumstances of this case is section 5 of the Judicature Act. It has now been settled that, by dint of Section 5 of the Judicature Act, the High Court and the Court of Appeal in Kenya exercise the same power to punish for contempt of court as that exercised (for the time being) by the High Court of Justice in England. Section 5 of the Judicature Act provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of the subordinate courts. Our Judicature Act does not therefore itself expressly provide any substantive law governing contempt of court nor is it self sufficient. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England, is that the court comprises three (3) divisions – the

Chancery, the Queens Bench and the Family Division. The jurisdiction of the High Court of Justice in England in matters of contempt of court is provided for in the Rules of the Supreme Court. Order 52 rule 2 of these Rules 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 except in vacation when it may be made to Judge in Chambers 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.

As the applicant's application has invoked both Section 5(1) of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, she bound herself to the procedure provided for contempt proceedings both under section 5 of the Judicature Act and Order 52 of the Supreme Court of England and that means the applicant must first seek leave to institute the proceedings, which in this case she has done. The application itself should also provide for the name, description and address of the person sought to be committed. 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.**

The law on the issue of service of the order stresses the necessity of personal service that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order. Keeping the importance of personal service of the order in mind service on the advocates does not constitute personal service since it is the personal service on each of the contemnor that is required to be effected. See **National Hospital Insurance Fund Board of Management vs. Boya Rural Nursing Home Ltd Civil Appeal No. 46 of 2005.**

The person sought to be committed to jail has to be specified in the application, that is the name, description and address, together with the grounds on which his committal is sought. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to do it. This requirement is important because the court will only punish as a contempt, a breach of injunction, if satisfied that the terms of injunction are clear and unambiguous, that the Defendant has a proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt.

Once a contemnor has been committed for contempt Order 52 rule 8(1) of the Rules of the Supreme Court of England states that the Court may, on application of any person committed to prison for contempt, discharge him. This means that a contemnor may, in suitable circumstances proved to the court, be discharged whether it arose from or in civil or criminal proceedings. The issue therefore is left at the discretion of the court which discretion will be exercised judicially taking into account the circumstances of the case. Where committal to jail is to enforce obedience to an order of the court, it will not in every case be continued until the order is obeyed and the contemnor may be released if it is clear that further

imprisonment will not secure compliance provided that he has sufficiently been punished for his disobedience. The application to discharge should if possible, be made to the court which made the order of committal by a notice of motion but there are no hard and fast rules about it. It can therefore be dealt with by any Judge of the High Court in which the order was made if the Judge who made it is not available. Such motion takes precedence over all other applications in the relevant file at a given time. The contempt proceedings are intended to uphold the authority and dignity of the courts. It follows, therefore that if the court is satisfied that the contemnor's conduct has been genuinely reformed to the extent once more fully recognising the authority, the court may, in its discretion, revise the punishment earlier meted against the contemnor. Such power and authority of the court is not donated under Order 45 Civil Procedure Rules, but under the English Order 52 rule 8 of the Supreme Court Rules and imported to our jurisdiction by section 5 of the Judicature Act (Cap 8). The exercise of such jurisdiction and discretion, is not intended to reverse the contempt order made on the ground that such order is in any way wrong or contrary to the law but the court discharges the contemnor on the basis that the conduct of the contemnor which threatened or stood to undermine the integrity, dignity, honour and authority of the court has been purged to the satisfaction of the court and that the contemnor has satisfactorily undertaken not to repeat such conduct. The court would even have authority and power under the circumstances, to take a different course other than discharging the contemnor. For example the court may in suitable case, substitute the imprisonment term, not with a discharge from prison *per se* but with a fine or taking of security for good future conduct or behaviour, or even grant an injunction against the repetition of the act of contempt. The conclusion, therefore, is that the only limitation is that such discretion must be exercised carefully and judicially. See **Re Barrell Enterprises [1972] 3 All ER 631; Yager vs. Musa [1961] 2 QB 214.**

Therefore since contempt of Court proceedings are largely meant to maintain the dignity of the Court the fact that the respondent has complied with the order at the time of the hearing of the application is a factor which the Court may properly take into account.

I have perused the record and I have not been able to find an order granting leave to the applicant to commence these proceedings. Nor has the procedure outlined above been followed by the applicant. The failure to comply with the said procedure cannot in my view be brushed aside as being merely technicalities of procedure when it is taken into account that the consequences of granting an application of this nature are penal and the proceedings are quasi-criminal. It follows that the present proceedings are incompetent.

Apart from the incompetency of the proceedings, from the record, it is apparent that the court order has now been complied with. Whereas the fact that a Court order has been complied with does not necessarily bar a Court from punishing a person for contempt where such contempt is proved, as already stated above, compliance may, in appropriate cases be taken into consideration. In the circumstances of this case, it is my view and I so hold that it would not be appropriate to grant the orders sought.

In the result the application dated 2nd August 2012 fails and is dismissed with costs.

Dated at Nairobi this 29th day of November 2012

G V ODUNGA
JUDGE

Delivered in the presence of Miss Ndegwa for the Applicant