



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Application 226 of 2012**

**BURUBURU FARMERS LIMITED.....APPLICANT**

**VERSUS**

**JOSEPH KIONGO & 2 OTHERS .....RESPONDENT**

**RULING**

By a Notice of Motion dated 17<sup>th</sup> April 2012, the applicant herein seeks leave of the Honourable Court to institute contempt of court proceedings against the respondent herein. The said application is expressed to be brought under the provisions of Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya, Order 52 rule 2(2) of the Rules of the Supreme Court of England, 1965, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 51 Rules 1 and 3 of the Civil Procedure Rules and all other enabling provisions of the law.

That application by its very nature is ordinarily ex parte.

When **Ms Khisa** appeared before me on 19<sup>th</sup> July 2012, I adjourned the matter to enable the applicant comply with the provisions of Order 52 of the Rules of the Supreme Court aforesaid. On 5<sup>th</sup> December 2012, **Ms Khisa** appeared before me and informed me that she had complied with the said provisions.

From the record, the application for leave was filed on 3<sup>rd</sup> May 2012 and by dint of Order 51 rule 12 of the Civil Procedure Rules all applications or other process are deemed to have been made when filed in court. Accordingly, the application for leave is deemed to have been made on 3<sup>rd</sup> May 2012.

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 or procedural 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. 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*** (emphasis mine) 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.

As the applicant's application has invoked both Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, it bound itself to the procedure provided for contempt proceedings both under section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England and that means the applicant must first seek leave to institute the proceedings, which is the subject of the present ruling. 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 the 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.

In this case it is clear from the record that the office of the Attorney General was served with the notice on 10<sup>th</sup> August 2012 three months after the application was made. It is clear that the procedure under Order 52 aforesaid has neither been followed, nor a step taken to regularise the position by for example seeking extension of time to comply, assuming the same is capable of being regularised. It follows that the notice having been served after these proceedings were commenced, these proceedings are not in compliance with the law.

The applicant has, however, through its learned counsel **Ms Khisa** urged the Court to consider the failure to serve the Attorney General before the institution of these proceedings as a technicality and proceed to exercise its inherent jurisdiction pursuant to section 3A, 1A and 1B of the Civil Procedure Act and allow the application considering the fact that the applicant stands to suffer irreparably. In appropriate cases, overriding objective may be considered in order to ensure justice is attained. However, it must be remembered that contempt of court proceedings are special proceedings and are quasi-criminal in nature.

Under the provisions of Section 3 of the Civil Procedure Act, it is expressly stated that "in the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force". The procedure for institution of contempt of court proceedings is provided for under section 5 of the Judicature Act which provision imports the procedure provided for under Rule 52 of the Rules of the Supreme Court of England. By dint of section 3 of the Civil Procedure Act, it follows that sections 1A and 1B of the Civil Procedure Act are inapplicable since those provisions are expressly stated to be exercisable by the Court "in the exercise of its powers under this Act or the interpretation of any of its provisions". The inherent powers of the Court, on the other hand, it has been held, are not to be invoked unless there is no specific procedure provided by the law to deal with the issue for determination. Here there is a specific procedure provided for instituting contempt of court

proceedings.

As was held in *Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992* there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. With specific reference to contempt of court proceedings, it was held in *Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002* that in contempt applications procedures have to be strictly adhered to and all necessary steps taken before a committal order can be made. Accordingly, the special procedure provided by the law must be strictly adhered to since it is assumed that the legislature in its wisdom must have considered that there were good reasons for borrowing such stringent procedures.

It would however be prudent if this country moved fast and enacted its own code dealing with contempt of court rather than by reference to pieces of legislation applied in other jurisdictions whose circumstances may not be suitable to ours. In *Nairobi High Court (Civil Division) Civil Case No. 456 of 2011 – John Mugo Gachuki vs. New Nyamakima Co. Ltd* I expressed myself *inter alia* as follows:

**“It is unfortunate and regrettable that nearly 50 years after independence our procedure, with respect to punishment for contempt in our Court is referable to the procedure in the High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law as enacted”.**

In the foregoing premises as the Notice to the Attorney General was served after the application for leave was made the present applicant is incompetent and is struck out but with no order of costs. In my view the applicant’s contention that it stands to suffer irreparably is unmerited since the application has not been determined on merits and there is nothing preventing the applicant to properly move the court for redress of its grievances.

Dated at Nairobi this 7<sup>th</sup> day of December 2012

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of Mr Patel for Ms Khisa for the applicant