

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 642 of 2012

CHARLES KAGEMA MURAYA.....APPLICANT

VERSUS

DAVID MUTHOKA MUTANGILI..... RESPONDENT

RULING

The only issue for determination in this application is the consequence of the failure to give notice to the Attorney General before making an application to institute contempt of court proceedings.

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 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*** (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 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 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, he bound himself 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 is the subject of the present ruling. 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.**

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 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. An application is under the provisions of Order 51 rule 12 of the Civil Procedure Rules made when the same is filed. It therefore follows that service on the office of the Attorney General with the notice of intention to commence contempt of court proceedings, the statement and affidavit is required to be done ***before*** the application for leave is filed. At least one day after the said service the applicant is at liberty to file the application 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. 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 that the office of the Attorney General was served on 23rd November 2012 while these proceedings were instituted on 15th November 2012. The notice having been served after these proceedings were commenced, the said service was not in compliance with the law.

The applicant has, however, through his learned counsel **Mr Macharia** urged the Court to consider the overriding objective in determining this matter. The Court recognises that the establishment of Courts of justice, of course, implies that they will mete out justice tempered by rules, which, it is hoped, will preserve parity between all persons for whom the Courts have been established. See **Mulla's Code of Civil Procedure 13th Ed. Vol. 1 at P.158 Et Seq.**

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. Accordingly, the special procedure provided by the law must be strictly adhered to since there are good reasons for 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.

Dated at Nairobi this 7th day of December 2012

G V ODUNGA
JUDGE

Delivered in the absence of the parties.