REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 342 OF 2008

MOHAMMED T. KOMEN……..…….....……1ST
PLAINTIFF/APPLICANT
MAGDALINE T. KOMEN…….....……..2ND
PLAINTIFF/APPLICANT
WILLIAM KIPROP KOMEN…….……….....…….3RD
PLAINTIFF/APPLICANT
(suing as the legal Representatives and administrators of the estate of Kibowen Komen (deceased)
VERSUS
ABDULGHANI MOHAMMED KOMEN…….....……..1ST
DEFENDANT/RESPONDENT
ABDULKADIR MOHAMMED…….…….....……2ND
DEFENDANT/RESPONDENT

SIMON MARIDANY……..…….....……..3RD
DEFENDANT/RESPONDENT

RULING

This Ruling relates to a Preliminary Objection dated 10th December 2009 and filed on 11th December 2009 by the Respondents against the Applicants/Plaintiffs) Chamber Summons dated 31st March 2009 and filed on 1st April seeking orders for attachment of the property of the 1st Plaintiff and one Tony Hughes or that the 1st Defendant be detained in prison for a term no exceeding six months for disobeying a court order.

The Preliminary Objection sets four grounds -

(a) that the application is bad in law, incompetent, misconceived and inept,

(b) that the application is fatally defective and choreographed to extinguish the respondents,

(c) that the application is motivated by malice, invective and deceit,

(d) that the application is an abuse of the process of the court.

In order to determine this question, it is necessary to set out albeit briefly, the basis of the application filed on 1st April 2009 but dated 31st March 2009.

The Plaintiff/Applicants were granted orders of *status quo* restraining all parties herein and their representatives and agents from 18th December 2008, and these status quo orders were extended to 19th January 2009, and again on 3rd March 2009, pending a Ruling on 21st May 2009. The Ruling was delivered on 10th July 2009, and the delay was explained. Temporary orders of injunction were issued on 10th July 2009, pending the hearing of the suit. The Respondents acted against these orders by restarting the ploughing and cultivation of the suit land. The plaintiffs brought an application claiming disobedience of the orders of injunction, and therefore contempt of court orders.

The application is expressed to be brought under Order XXXIX rule 2A(2) of the revoked Civil Procedure Rules *(now Order 40, rule 3 of the Civil Procedure Rules 2010)* which says -

"3(1) - In cases of disobedience, or breach of any such terms, the court granting an injunction may 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."

The Preliminary Objection was argued by Mr. Koech on the premises that **firstly**, there were no injunctive orders on 3rd March 2009 and on 18th December 2009, there were only status quo orders for all parties in the suit, so that if any party had been in contempt, the procedure to institute such proceedings would have been under Section 5 of the Judicature Act, *(Cap. 8, Laws of Kenya)*, and there is no provision for status quo orders. **Secondly**, Mr. Koech argued, the court should have been moved under Order 52 of the Supreme Court Rules of England, that notice should have been issued to the Attorney General, and an application for leave to institute such contempt proceedings. Counsel asked that the application be dismissed for being based upon the provisions of Order XXXIX rule 2 of the Civil Procedure Rules.

Mr. Mutonyi who, with leave of court, filed written submissions in reply to the submissions by Mr. Koech held a contrary view, that no such leave was required, and that the application was in order, and the Preliminary Objection be struck out with costs to the Respondents *(plaintiffs).*

Before considering the respective counsel's arguments, I will first set out the factual situation on the record. Temporary orders of injunction were issued on 12th November 2008, and were extended on 26th November 2008, 15th December 2008, and apart from the order allowing the Defendants harvest maize, the court ordered "all parties to maintain the status quo obtaining as today *(18.12.2008)* until the hearing of the application on 3.03.2008), the status quo obtaining on that date was that of interim injunctive orders as issued and extended to that date and to 3rd March 2009.

After argument *inter partes* on 3rd March 2009, the interim orders were extended to 21st May 2009, and even though they may have lapsed after 21st May 2009, they were certainly reinstated on 10th July 2009 when the ruling on the application was made, and the injunctive orders were granted pending the hearing and determination of the entire suit. For counsel to argue that there were no interim orders on 3rd March 2009 is factually incorrect. There were valid and binding interim orders of injunction.

Having established that factual position, I now turn to the consequences for disobedience or breach of those orders, and the procedure for instituting applications for punishment of such breach or disobedience of those orders. Because of the topical nature of the subject, I will set out *in extenso* Mr. Mutonyi's submissions before hazarding my own opinion on the procedure for institution of contempt proceedings arising under Order 40 rule 3 of the Civil Procedure Rules 2010 *(formerly Order XXXIX rule 4 of the Civil Procedure Rules).*

Mr. Mutonyi submitted that this court had jurisdiction to hear and determine an application for contempt without leave first being sought, where like in this case, the contempt arises from a breach of an order granted pursuant to the provisions of Order XXXIX. Mr. Mutonyi gave the following reasons in support of this submission.

Firstly, counsel said, Section 5 of the Judicature Act provides that the High Court has the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England.

Secondly rule 4 of Order 52 of the Supreme Court Rules provides for the procedure of commencing contempt of court proceedings in courts other than a divisional court. The proceedings are commenced by a Notice of Motion, and no leave is required before such an application can be brought.

Thirdly, a Divisional Court in relation to the High Court of Justice in England and Wales as defined by Section 66 of the Senior Courts Act 1981 is a court sitting with at least two Judges. It may be a matter before the Chancery Family or Queens Bench Divisions. The Divisional Court is in fact not a separate court or division of the High Court but refers to the number of Judges sitting. In Kenya, since a Judge sits alone, his or her court is a court other than a Divisional Court, and that the applicable rule of procedure is rule 4 of order 52 of the Supreme Court Rules where no leave is required.

Fourthly, counsel argued, if two or more Judges were sitting to hear this case, then that would be equivalent to a Divisional Court and leave would have been necessary under rule 2 of Order 52 of the Supreme Court Rules.

Counsel relied on the following cases. In **ISAAC J. WANJOHI & ANOTHER VS ROSELINE MACHARIA** *(Nairobi HCCC No. 450 of 1995*), Bosire J, held thus -

"The High Court of Justice in England is only one of the three Divisions of the Supreme Court, the other two being The Court of Appeal, and the Crown Court. The High Court of Justice is also divided into three Divisions, notably the Chancery, the Queens Bench and Family Divisions. In the High Curt of Kenya we occasionally have certain matters which are heard by two or more Judges. The Judges handling such matters in Kenya would in a way be regarded as a Divisional court.

It would appear to me that applications for committal for contempt of court made in this country fall in the category of those applications in England made to courts other than the Divisional Courts. Consequently no leave would ordinarily be necessary although it is common practice in Kenya, improperly so in my view, to commence committal proceedings in every case by an application for leave to bring the application. The authority for that cannot possibly be, the Rules of the Supreme Court of England."

In **KIMANI NGUNJIRI VS. DAVID MANYARA** *(Nakuru H.C.C.C. No. 59 of 2005)*, Musinga J held as follows -

"Order 52 Rule 2 clearly states that no application to a Divisional Court for an order of committal against any person can be made unless leave to make such an application has been granted. Order 52 Rule 4 relates to applications made to a court other than a Divisional Court. In such courts, there is no requirement for leave to apply for committal proceedings. All that is required is that the application be made by motion and be supported by an affidavit."

Counsel also contended that the application herein was brought under Order XXXIX rule 3(2), and that no leave was required. He relied on the dictum of Bosire J. in **ISAAC WANJOHI'S** case where the learned J. said -

"However, because of our O. 39 Civil Procedure Rules, O.45 RSC appears to be excluded. Excluded because O.39 having been promulgated with authority of SS. 63 and 81 of the Civil Procedure Act, anything done under it is by virtue of S.33 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, done under the Civil Procedure Act. The jurisdiction of Kenya Courts being exercised in accordance with S.3 of the Judicature Act and the power exercisable under O.39 being independent of S.5, the logical conclusion to draw is that Parliament intended the power to be exercised independently and without recourse to any other written law except where express provisions to the contrary exist in that other written law."

And the observation of Musinga, J in **KIMANI NGUNJIRI'S** case where the learned J. said -

"Order XXXIX Rule 2A(2) of the Civil Procedure Rules also expressly allows this court to punish for disobedience or breach of its orders. It states as follows:-

"In cases of disobedience, or breach of any such terms, the court granting an injunction may 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 released.

I therefore hold that the application by the applicant is competent as no application for leave to institute the committal proceedings was required."

As I have observed above the question of punishment for contempt of court is a topical subject as the matter arises in the court regularly when litigants try all ways to avoid compliance and obedience to court orders. The twin questions arise, which court has jurisdiction to punish for such breach and disobedience of court orders, and what is the procedure for instituting applications seeking orders for punishment of breach or disobedience of court orders, collectively referred to as contempt of court?

There are in my view two schools of thought to this question. On the question of jurisdiction, one school of thought postulates that any court has power to punish for contempt in respect of an act of breach or disobedience committed by the alleged contemnor in the face of, or before the court. The other school of thought holds the view as enunciated by Section 5 of the Judicature Act which says -

"5(1) 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 and upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."

Technically therefore, and although it is not in issue here, only the High Court and Court of Appeal, and tomorrow, the Supreme Court, have the power to punish for contempt of court. Acts of rowdiness, such as ringing of cell-phones in court and other acts of disturbance before the court cause unnecessary distractions and disruption of court business and are regarded as acts of contempt before the court and are punished at once by the presiding magistrate or judge. This power is inherent in all courts so as to maintain the integrity and dignity of the court(s). It is power which the courts will continue to exercise until its limits are clarified by formal legislation. This however is not the concern of this Ruling.

The concern of this Ruling is the procedure for bringing applications to court to punish the more formal and deliberate acts of breach and disobedience of orders of court. These breaches or acts in contempt of court are represented by acts done clearly contrary to the orders of court. An example is where there is an order of injunction restraining a party from doing a particular act, like entering and ploughing a field, and the party so restrained does the exact opposite. He enters the field, and ploughs and plants etc. He does all acts contrary to the orders of court. Such acts are clearly contemptuous of the existing orders of court and they constitute breaches of the respective orders of court. The question then becomes what is the procedure for punishment of such acts?

Both the Hon. Mr. Justice Bosire *(now a Senior Judge of Appeal)* and my senior brother, the Hon. Mr. Justice Musinga, whose decisions are relied upon by the applicants herein, hold the view already cited above, that no leave of court is necessary because Order XXXIX rule 2A(2) of the Civil Procedure Rules specifically allows the court to punish for disobedience or breach of its orders. Rule 2A(2) aforesaid states -

"In cases of disobedience, or breach of any such terms, the court granting an injunction may 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 otherwise."

On the basis of the above provision, the Hon. Mr. Justice Bosire held in the case of **ISAAC J. WANJOHI & ANOTHER VS ROSELINE MACHARIA** *(supra)* held that ***"the application is competent because no application for leave to institute the committal proceedings was required."*** The Hon. Mr. Justice Musinga came to the same view in the case of **KIMANI NGUNJIRI VS. DAVID MANYARA** *(supra).*

I have considered the above submissions of counsel and the decisions by the learned Judges in the above cited cases and with the greatest respect in which I hold both learned Judges, I have come to a different view. These are my reasons.

Firstly, Section 3 of the Civil Procedure Act, *(Cap. 21 Laws of Kenya),* provides that -

"3. 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."

My understanding of the above provision is that where another written law provides for a different procedure for determining disputes or a matter, the procedure laid down in that other written law shall be applicable and followed.

In the case(s) of contempt of court, the law applicable is Section 5 of the Judicature Act. Section 5 lays down the procedure to be followed by the court in the event of breach or disobedience of a court order. It donates to the High Court and the Court of Appeal the jurisdiction to punish for such breach or disobedience *(or generally contempt of court orders).*

As I have said before in similar rulings, it is not contempt for the face of the magistrate or Judge, it is contempt for the rule of law, the majesty of the law. Such incident is one cited under Order XXXIX rule 2A(2) of the former Civil Procedure Rules, *(now Order 40, rule 3(1) of the Civil Procedure Rules 2010)* which is in *pari materia* with the former rule. The question here is whether, rules of the Supreme Court permit proceedings for contempt to be brought without leave of court.

Order 52 of the Supreme Court Rules sets out the procedure that is followed by the High Court of Justice in England. Order 52 rule 1(2) states as follows -

"1 (1) …

(2) where contempt of court -

(a) is committed in connection with -

(i) any proceeding before a Divisional Court of the Queen's Bench Division, or,

(ii) criminal proceedings, except, where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, or

(iii) proceedings in an inferior court, or

(b) is committed otherwise than in connection with any proceedings, then, subject to paragraph (4) an order of committal may be made only by a Divisional Court of the Queen Bench Division.

(3) where contempt of court is committed in connection with any proceedings in the High Court, then, subject to paragraph (2) an order of committal, may be made by a single judge of the Queens Bench Division except where the proceedings were assigned or subsequently transferred to some other Division, in which case, the order may be made only by a single judge of that other Division.

The reference in this paragraph to a single judge of the Queens Bench Division, shall in relation to proceedings in any court the judge or judges of which are, when exercising the jurisdiction of that court, denied by virtue of any enactment to constitute a court of the High Court, be construed as a reference to a judge of that court,

(4) where by virtue of any enactment the High Court has power to punish or take steps for the punishment of any person charged with having done anything in relation to a court, tribunal or person which would, if it had been done in relation to the High Court, have been contempt of that court, an order of committal may be made by a single judge of the Queen's Bench Division.

In my understanding, Order 52 rule (2) only confers jurisdiction to the High Court's respective divisions and to a single judge as appropriate. It does not lay down the procedure for instituting actions or taking steps to institute contempt of court proceedings. The procedure is laid down in Order 52 rule (2) which states -

"2 - (1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to a Divisional Court except in vacation when it may be made to a 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 the committal is sought and by an affidavit to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office (State Law Office) and must at the same time lodge in that office copies of the statement and affidavit.

(4) - (5) relate to right of appeal where leave to commence committal proceedings is denied by a single judge."

Mr. Mutonyi submitted that as no Divisional Court, as defined in Section 66 of the Senior Courts Act 1981, exists in Kenya and the Kenya Judges sit as a single judge, in determining applications for contempt, then the applicable provision is rule 4, *(where no leave is required),* and not rule 2 *(where leave is required - i.e. before the Divisional Court).* Order 52, rule 4 states -

"4 - (1) where an application for an order of committal may be made to a court other than a Division Court, the application must be made by motion and be supported by an affidavit.

(2) subject to paragraph (3) the notice of motion, stating the grounds of the application must be served personally upon the person sought to be committed.

(3) Without prejudice to its powers under Order 65 rule 4, the court may dispense with service of the notice of motion under this rule it thinks just to do so.

Section 1 of the Judicature Act enjoins the High Court, the Court of Appeal and all subordinate courts to exercise their respective jurisdiction in conformity with the Constitution, all other written laws, and the statutes of general application of the United Kingdom, cited in Part I of the Schedule to the Act, modified in accordance with Part II of the Schedule, and to apply the common law, doctrines of equity and statutes of general application, so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

The Rules of the Supreme Court of England have a long history. The Senior Courts Act 1981 as its name denotes, was only enacted in 1981, and is not therefore a statute of general application in Kenya. The equivalent Senior Courts of Kenya are the High Court, the Court of Appeal and the Supreme

Court at the apex, and Employment Labour Relations Court *(perhaps the Industrial and the Environmental Court when established)*. Section 162(1) of the Constitution of the Second Republic refers to them as the superior courts.

The power conferred upon the superior courts by Section 5 of the Judicature Act is the power to punish for contempt. The instances of contempt are those described in Order XXXIX rule 2A(2) *(now Order 40, rule 3(1)),* but there are many other instances, I have referred to above, contempt in the face of the court, *(which is reserved under Order 52 rule 5 of the Supreme Court Rules to make an immediate order of committal against a person guilty of contempt, in the face of the court)*. These are all instances, and not rules of procedure for instituting contempt of court proceedings. Another example would be the offence of assault or murder prescribed under the Penal Code, but the procedure is prescribed under the Criminal Procedure Code. The Supreme Court Practice, gives many other instances of contempt, disobedience of a writ of *habeas corpus*, to an order of mandamus, prohibition or certiorari, and in its supervisory power, over subordinate courts, it has power to protect lower courts, by punishing contempt for obstruction of the administration of justice.

The question then becomes, in the absence of a Divisional Court, as defined in the Senior Courts Act in England at Wales, should applications be made without first seeking leave of the court.

Ours is a fused jurisdiction, and although there are now Divisions of the High Court, these are, in my view clearly intended to ease administration of justice, and not to conclave or cocoon any group of judges, or confer jurisdiction to any particular division. If this were so, single judge stations would have no jurisdiction to punish for contempt. The jurisdiction in Kenya is conferred upon every Judge of the High Court irrespective of the Division or station she or he works in. The distinction of jurisdiction between the Divisional Court of the Queens Bench *[order 52 rule 2]* and a court other than a Divisional Court *(Order 52, rule 4)* is not applicable in Kenya. The application for leave to commence contempt proceedings made before a Division Court *[in England or Wales]*, is equivalent in Kenya to an application for leave before any Judge in Kenya.

The substantive application by Motion under Order 52 rules (3) & (4) and must be made by Notice of Motion are in conformity with Order XXXIX rule 2A(2) (*now Order 40, rule (3).*

Finally, what is the purpose of the power punish for contempt of court? According to the authors of the Supreme Court Practice, the **"term contempt of court"** is of ancient origin having been used in England certainly since the thirteenth century and probably earlier. It is based not on any exaggerated motion of the dignity of individuals by the judges, witnesses or others, but on the duty of preventing any attempt to interfere with the administration of justice - **A. G. VS. TIMES NEWSPAPER [1991] 1 ALL E.R. 994, H. L.**

I would further, therefore hold that in the circumstances of Kenya, there is no distinction between a Divisional Court *(which is non-existent in our law)* and a single Judge, who constitute the High Court whether presiding singly or sitting with two or more judges. An application for leave to commence proceedings would be therefore necessary. I would therefore uphold the preliminary objection that such leave is a condition precedent to commencement of contempt of court proceedings. I would further hold that because of its criminal nature, notice shall as a matter of cause be given to the State Law Office - the Director of Public Prosecutions, as required by Order 52 rule 2(3) of the Supreme Court Rules.

I therefore uphold the Respondent's Preliminary Objection and strike out the motion dated 17th August 2009 but deny them costs, as this is a family dispute.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE