



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – NAIROBI
CIVIL CASE NO. 336 OF 2010

GATONYE VICTOR KARIUKI 1ST PLAINTIFF

PETER NDOLO KILONZO 2ND PLAINTIFF

FIRST CREDIT LIMITED 3RD PLAINTIFF

VERSUS

JOHN GUTO 1ST DEFENDANT

MOFFAT OMBOGA ONCHIEKU 2ND DEFENDANT

DAVID OENGO OINO 3RD DEFENDANT

RULING

The substantive application in this matter is one by Chamber Summons dated 25th October, 2010 seeking punishment of the alleged contemnor for contempt of court by having knowingly and willfully disobeyed the orders of this Court issued on 1st October, 2010.

Before the application could be heard, the Respondents filed a notice of preliminary objection dated 7th December, 2010 on the grounds that the entire application offends the express provisions of the law and is an abuse of the court process. They also allege in the said notice that the application is not compliant with the **Judicature Act** and contravenes the express provisions of the **Constitution of Kenya**.

On 29th March, 2011, the alleged contemnor (hereinafter referred to as the “interested party”) also filed a notice of preliminary objection dated 28th March, 2011 raising preliminary points of law through the substantive application as follows:-

1. ***That, the said application is frivolous, unmeritorious, vexatious and an abuse of the due process of law as the said Richard Katola is non-suited in the instant suit.***
2. ***That, the application offends the mandatory provisions of the Government Proceedings Act and the Civil Procedure Act as the officer (sic) of the Hon. Attorney General has not been enjoined on behalf of the Commissioner of Police and neither has it been served with a***

mandatory Notice against it for the current allegations.

3. That, mandatory requirements for contempt of court proceedings i.e. personal knowledge and receipt of the Honourable Court's Order has yet to be complied with.

The two preliminary objections came for hearing together. Mr.

Wachakana for the interested party argued that the main application in this matter is vexatious, frivolous and an abuse of court process. He submitted that the interested party was non-suited as he was neither a Plaintiff nor a Defendant in this case. Therefore, no *locus* has been established to move against him. Counsel further argued that the interested party was acting on behalf of the Commissioner of Police and executing orders of the Commissioner. Proper procedure would have been to enjoin the Attorney General for the Commissioner of Police in terms of the provisions of Cap.40 of the Laws of Kenya. He referred to the case of **NJAU v. CITY COUNCIL OF NAIROBI [1983] KLR 625** and submitted that there was no evidence that the interested party had any knowledge of the matter before the Court.

On his part, Mr. Onsembe for the Respondent associated himself with the submissions made by Mr. Wachakana and submitted that these fortified his own preliminary objection filed in December, 2010. He submitted that in the manner in which the application stands, the Defendants are unable to answer to the issues therein as the interested party is not a party to the suit. Going to the specific prayer sought in the substantive application, he stated that prayer (b) was incompetent as it was not clear in the way it was framed. He also further stated that prayer (c) should have been the subject of independent pleadings. He therefore submitted that the application was fatally defective and incompetent. He also argued that the order of contempt was contrary to the letter and spirit of **Section 2 (6) of the Constitution of Kenya** and that the alleged penal notice was neither dated nor signed. It was further his contention that the alleged order of 1st October, 2010 issued on 6th October, 2010 was not clear as to status quo and therefore prayer (b) of the application was substantively different from the order which was alleged to have been disobeyed. He urged the Court to disallow the application.

Mr. Aduda for the Applicants referred to the definition of a preliminary objection as contained in **MUKISA BISCUIT MANUFACTURING CO. LTD. v. WEST END DISTRIBUTORS LTD [1969] EA 696** and submitted that the preliminary objection cannot be founded on matters of fact which are not admitted. It is founded on points of law and admitted facts. He submitted that the application was not frivolous, vexatious or an abuse of the process of the Court and urged the Court to dismiss the preliminary objection in order to uphold the dignity of the Court.

In a short reply, Mr. Wachakana argued that Counsel for the Applicants had not replied to the issue whether the interested party was before the Court or not since the Attorney General ought to have been joined but he was not joined. His point of law was that the correct procedure should be followed to the letter. Adding his voice in reply, Mr. Onsembe argued that **Section 5 of the Judicature Act** had not been complied with and the application was defective as the Respondents don't know the person to whom they are responding.

After considering the pleadings and submissions of the respective Counsel, I note that in **MUKISA'S CASE (supra)** Law, J.A. said of preliminary objections at page 700 –

“... so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of

Contempt of court is a quasi criminal matter. It does not entail the invocation of the **Civil Procedure Rules** whereby a plaint would have to be filed. It is only in cases where a plaint needs to be filed that a notice of the intention to sue should be served on the Attorney General under **Section limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...**”n 13A of the **Government Proceedings Act, Cap. 40 of the Laws of Kenya**. However, the procedure for enforcing contempt of Court is summarily directed at the offender personally without

joining the Attorney General as a party. To join the Attorney General as a party to this case on behalf of the Commissioner of Police as suggested by learned Counsel for the interested party would amount to holding the Government vicariously liable for disobedience of court orders by its officers. That would be self-defeating and contradictory as it would boil down to saying that the same Government issuing the orders is the one disobeying those orders.

In the circumstances of this case, it is alleged that the contemnor acted on the instructions of the Commissioner of Police in disobeying the court order but there is no proof of the allegation. I therefore find that it was not necessary for the Commissioner of Police to be joined in these proceedings through the Attorney General as none of them was privy to what transpired. If the interested party disobeyed court orders, he did so as an individual on whom such orders had been served and he would only have himself to blame. Neither the Commissioner of Police nor the Attorney General can bail him out.

As a parting shot, I feel bound to revisit the wise words of Sir Charles Newbold, P., in **MUKISA'S CASE (supra)** wherein His Lordship stated as follows:-

“The preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop.”

I find these words most appropriate to this matter. All the issues raised in the perceived preliminary objection are issues that rightly belong to the realm of arguments in the substantive application. They should therefore be preserved for that arena.

For the above reasons, I find that the preliminary objection is not merited and it is hereby dismissed.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th day of July, 2011.

L. NJAGI
JUDGE