CONTEMPT OF COURT

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW CASE NO.74 OF 2010
IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION BY THE SUBJECTS FOR ORDERS OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 OF LAWS OF KENYA

BETWEEN

THE REPUBLIC OF KENYA …….....……APPLICANT
AND
THE COUNTY COUNCIL OF NAKURU …….…....…… RESPONDENT

EX-PARTE

EDWARD ALERA T/a

GENESIS RELIABLE EQUIPMENT ……...……...1ST APPLICANT

BENARD M. MUIRURI T/a

MUIRURI & ASSOCIATES …….…….. 2ND APPLICANT

MAXWELL ONDIEKI MAKORI T/a

MAXCRYIS CONSULTANCY SERVICES …..... 3RD APPLICANT

RULING

This ruling relates to two applications. The first one was filed on 15th July, 2010 and is seeking *certiorari* to quash the decision of the respondent (the County Council of Nakuru) terminating a tenancy agreement between it and the applicants. The application also seeks an order to prohibit the respondent from evicting the applicants or attaching their office properties.

In granting leave to bring judicial review proceedings the court directed that leave would operate a stay of any intended action by the respondent against the applicants. The applicants have brought the second application dated 7th July, 2011 for mandatory order of injunction and also seeking that the

respondent's Clerk (J. Malinda), Engineer (Parsaloi K. Tokome) and Treasurer (Genson Sifuna Karani) be committed to civil jail for contempt of court. The relief for mandatory injunction was granted at the interlocutory stage. Starting with the application for judicial review, it is the applicant's contention that they took up tenancy in the business premises in question in 1986, 1985 and 2007 respectively. That they have not defaulted in rent payment; that they have been served with a notice to vacate those premises within 30 days, failing which; they risked eviction. The applicants further contend that without a resolution of the respondent the notices were issued without the necessary authority and are therefore unlawful.

In response the respondent through Joseph Mutua Malinda, the Town Clerk has denied threatening to evict the applicants and has maintained that the applicants were being relocated to pave way for the expansion of the Council Chambers; that the applicants had agreed to an arrangement reached with those who had sublet the premises to them (the appellants) to relocate to another council premises.

Parties filed written submissions which I have carefully considered together with authorities cited.

It is settled that an order of *certiorari* will issue to quash a decision made by a tribunal or body if the decision is made without or in excess of jurisdiction or where the rules of natural justice have not been complied with. Prohibition on the other hand is an order directed to an inferior tribunal or body prohibiting it from continuing with proceedings in excess of its jurisdiction or in contravention of the laws of the land, or where there is a departure from the rules of natural justice. See **Kenya National Examination Council v R Ex parte – Geoffrey Gathenji Njoroge & others** Civil Appeal No.266 of 1996. So, how has the respondent violated the law; or exceeded its authority; or breached the rules of natural justice?

It has been submitted for the applicants that the respondent has violated **sections 74 to 85** as well as **section 129** of the **Local** G**overnment Act** and **Part 1** of the **Third Schedule** of the **Rules**, specifically **Rules 6** and **10**. The former provisions (**sections 74 – 85**) deal with Council meetings. **Section 129** deals with powers and duties of the Town Clerk. **Part 1** of the **Third Schedule** also provides for the status, powers, duties and responsibilities of the Town Clerk, and certain officers.

I reiterate that the applicants have argued that the respondent issued the notice to vacate without proof that there was a resolution by the Council to that effect. On behalf of the respondent it is categorically averred that there was a Council meeting and a resolution was passed accordingly.

It is a rule of evidence (**section 112** of the **Evidence Act**) that a party who insists on the existence of any fact must prove its existence. The applicant has not proved that the decision to issue a notice to vacate was not authorized by the Council meeting. Indeed the notices are issued by D.M. Njihia for the Town Clerk. Without evidence that the author of the notice had no authority to issue the notices, I find that the applicants have not demonstrated that the respondent has violated any law or exceeded its powers.

I am also persuaded that the rules of natural justice were complied with. Indeed the applicants do not dispute that they have been accorded a hearing. They have only complained that the notice to vacate was too short. Considering that the notice was issued way back on **10th June**, **2010**, over one year ago and bearing in mind that the respondent has agreed with those who have sublet the premises to the applicants, to relocate the latter to an alternative premises, the applicants cannot be heard to complain that they have not been given an opportunity to be heard.

The application for judicial review fails and is dismissed with costs.

I turn to consider the application for contempt of court. It is the applicant's case that the contemnors, that is, the Council Clerk, Engineer and Treasurer are in disobedience of the stay orders issued at the stage of leave. That the contemnors despite those orders began to construct a stone wall surrounding the premises in question; that the Clerk re-issued a **60 day notice** to the applicants **on 9th May, 2011** to vacate the premises; that despite the applicants' advocate's letter to the respondents reminding them of the stay orders the respondent did not heed. Instead the Clerk directed the Enforcement

Officer, the Council Engineer and the Treasurer to demolish part of the suit premises after disconnecting electricity; that the contemnors using iron sheets have blocked the applicants' entrance.

In reply the respondent through its Clerk has deposed that the suit premises are within the respondent's offices which is a public office and cannot be shut to members of the public; that the respondent has not interfered with the applicant's premises but has only covered the area under construction in accordance with the building regulations. I have considered these arguments as well as the authorities cited. This application raises two broad questions, namely whether the proper procedure for instituting and prosecuting an application for contempt was followed and whether it has been proved that the contemnors violated the orders.

The application for contempt was commenced by a notice of motion and no leave was sought. Counsel for the applicant submitted that leave was not required as there was a violation of a court order.

The basis of the law of contempt of court in Kenya are **sections 5(1)** of the **Judicature Act** and **Section 63** of the **Civil Procedure Act**. Those provisions may be reproduced thus;

"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 upholding the authority and dignity of subordinate courts." (Emphasis added.)

Section 63(c) on the other hand provides that;

"63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed;-

(a) . . . . . .
(b) . . . .
(c) Grant a temporary injunction and in case of disobedience convict the person guilty thereof to prison and order that his property be attached and sold." (Emphasis supplied.)

It has been argued that the latter provision is specific to disobedience of injunctive orders while the former is the substantive law of contempt in Kenya, donating jurisdiction to punish for contempt to the Court of Appeal and the High Court.

Both the Judicature Act and the Civil Procedure Act do not prescribe the procedure for instituting and prosecuting contempt of court application.

Section 5(1) of the **Judicature Act** refers the local courts to the powers of the High Court of Justice in England in the exercise of the power to punish for contempt. This position was confirmed by this court H.G. Platt, J, (as he then was) and D.C. Porter, Ag. J, (as he then was) in **The matter of an Application by Gurbaksh Singh & Sons Ltd**. Misc. Civil Case No.50 of 1983 where they said:

"The second aspect concerns the words of section 5 – *"for the time being"*, which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules."

The Contempt of Court Act, 1981 with recent amendments remains the substantive law of contempt of court in England. Similarly the procedure continues to be that provided for under **order 52** of the Rules of the Supreme Court. It may be mentioned here that the Rules of the Supreme Court are being gradually replaced by the Civil Procedure Rules following the **Woolf Reforms.** Rules, regarding contempt of court are still retained in the **Rules of the Supreme Court** in **Schedule 1** of the **Civil Procedure Rules**.

Has the procedure of instituting and prosecuting contempt of court application been adhered to? The High Court of Justice in England is that court comprising the three divisions, namely, the Chancery, the Queens Bench and the Family Divisions. **Schedule 1** of the **English Civil Procedure Rules** has slightly modified the procedure for bringing contempt of court application. It has not, however, interfered with the requirement that leave (now called permission) be obtained before the application is made; that the application for permission must be accompanied by a statement setting out the name, and description of the applicant, the name, description and address of the contemnor, and the grounds upon which his committal is sought; the application for permission must also be accompanied by an affidavit verifying the facts relied on.

The requirement that the applicant must give notice of the application for permission not later than the preceding day to the Crown Office (equivalent of the Attorney General's Chambers – State Law Office in the case of Kenya) – See **Hon Mwangi Kiunjuri v Wangethi Mwangi** HCCC No.1833 of 2003 has been retained.

The procedure as it is today after permission has been granted may be summarized as follows:

i) Unless within 14 days after permission was granted the claim form (the substantive application) is made, the permission shall lapse (**Order 52 Rule 3 (2**).

ii) The substantive application, accompanied by a copy of the statement and affidavit in support of the application for permission must be served personally on the contemnor. **(Rule 3 (3),** unless the Court or Judge has dispensed with service or if it or he thinks it just to do so **(Rule 3 (4)**

iii) Under **Rule 5** the High Court and the Court of Appeal may of its own motion make an order of committal against a person guilty of contempt of court.

iv) The court hearing an application for an order of committal must do so, as a general rule, in public, except where the application relates to, adoption. guardianship, custody and maintenance of an infant, or where proceedings relate to a person suffering from a mental disorder, or where it appears to the court that in the interest of justice or for reasons of national security the application should be heard in private.

v) No grounds shall be relied on at the hearing of an application for contempt, except those set out in the statement, or in the claim form or application notice.

vi) If the contemnor wishes to give oral evidence on his own behalf, he shall be entitled to do so.

That will suffice in so far as the procedure is concerned. It is clear that the instant application is not in compliance with any of the rules set out above.

As was held in the case of **Jacob Zedekiah Ochino & Another v George Aura Okombo & 4 others**, Civil Appeal No.36 of 1989, contempt of court proceedings being an offence of a criminal character, as a man may be sent to jail (**Re Breamblevile Ltd**. (1969) 3 All ER 1062 at p.1063, the correct procedure must be followed in bringing the application for contempt.

I have said in my previous decisions on contempt of court and I will reiterate it here that the state of the law of contempt of court in this country is most unsatisfactory. It is unacceptable today that courts in Kenya must make reference to the laws of England in dealing with matters of contempt of court. Because of this, both courts and counsel have adopted different procedures in such matter.

The concern of the state of the law of contempt is consistently being raised by the courts. For instance, in 1990 in the case of **Gitobu Imanyara v R** (1990) LWR II, this court comprising A.M. Cocker, J (as he then was) and E. Torgbor, J expressed their concerns on the state of the law in the following words:

"We also feel that time is now appropriate for legislation laying down a procedure to be followed by

courts in Kenya in contempt of court proceedings."

Six (6) years later these sentimentals were reiterated by Bosire, J (as he then was) in **Isaac Wanjohi and Another V Rosaline Macharia**, Nbi H.C.C.C. No.450/1995, when his Lordship said:

"The applicants' legal advisers seem to be unsure as too many other legal counsel in this country as to the procedure to be followed in moving the court for orders in the event of breach of an injunction order made pursuant to the provisions of order 39 of the Civil Procedure Rules."

And in a more recent decision, Ojwang, J made the following candid recommendation in the case of Abdullahi Dadacha Dima V Arid Lands Resource Exploitation & Development, H.C.C.C. No.1322 of 2003:

"Through the Deputy Registrar, and with the approval of His Lordship the Chief Justice, this ruling shall be availed to the office of the Honourable the Attorney General and that of the Chairman of the Kenya Law Reforms Commission, to appraise them on the unsatisfactory state of the law relating to the exercise of the contempt jurisdiction of the courts in Kenya."

Having failed to comply with the procedure set out above the applicants have failed in discharging the burden required of them. For the above reasons this application fails and is dismissed with costs.

Dated and Delivered at Nakuru this 23rd day of September, 2011.

W. OUKO
JUDGE