



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

MISC. CIVIL APPLICATION NO. 405 OF 2010

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
 COMMITTAL TO PRISON FOR CONTEMPT OF COURT**

-AND-

**IN THE MATTER OF: SECTION 5 OF THE JUDICATURE ACT (CAP.8, LAWS OF KENYA)
 AND ORDER 52, RULE 2 OF THE RULES OF THE SUPREME COURT OF ENGLAND**

-BETWEEN-

- 1. WILLY CALVIN ODIRA**
- 2. EUNICE AWUOR NEWAAPPLICANTS**

-AND-

DIAMOND SHIPPING SERVICES LIMITED.....RESPONDENT

RULING

By their application dated **26th October, 2010**, the applicants moved the Court under Rule 3 of the High Court (Practice and Procedure) Rules, Section 5 of the Judicature Act (Cap. 8, Laws of Kenya), Order 52, Rules 2 and 3 of the Rules of the Supreme Court of England, and Sections 3A and 63 of the Civil Procedure Act (Cap.21, Laws of Kenya).

The application primarily seeks two orders:

(i) *“THAT, this Court do grant leave to the applicant to apply for orders of committal to prison for contempt and further and/or consequent orders against any officer of the respondent directly responsible in the respondent for wilfully disobeying and continuing to disobey the Court’s order issued by the Senior Principal Magistrate on **14th May, 2009** and specifically committing one **VIJAYAKUMAR PAYATHUPARAMBIL GOPALAKRISHNAN** alias **VIJAY** to prison for contempt”;*

(ii) *“THAT, this Court do issue a warrant of arrest and produce before this Court the respondent and any officer directly responsible in the respondent herein to show cause why they should not be punished by way of committal to jail or by way of such other sentence as the Court may deem just*

to mete out for their open contempt of the lower Court Order given on **13th May, 2009** and issued on **14th May, 2009**.”

The application rests on the following grounds:

(a) on **13th May, 2009** **Mr. R. Kirui**, Senior Principal Magistrate, made an order which was issued on **14th May, 2009** compelling the defendant, by mandatory injunction, to release to the plaintiffs the delivery notes for certain motor vehicles: 1 unit, used Toyota Vitzs Chassis No. NZE 121-0027-812; and 1 unit used Toyota Corolla Fielder, Chassis No. ZZE124-0006084, to the plaintiffs;

(b) despite being duly served with the Court's order and truly being aware of the terms, contents and tenor of the aforesaid Order, the respondent by itself, servants and/or agents has wilfully, deliberately and unjustifiably neglected, refused and/or ignored to abide by and comply with the aforesaid Order;

(c) the actions of the respondent are wilful, deliberate and blatant, open contempt of the Court's Order;

(d) the respondent nevertheless still continues to act in contempt of the aforesaid Court Order.

The first plaintiff swore a supporting affidavit on **26th October, 2009** providing the evidence to support the prayers herein.

In the nature of this application, it came up before the Court *ex parte*, and learned counsel **Mr. Obura** duly made submissions.

Counsel submitted that the Principal Magistrate, in CMCC No.1244 of 2009, on **13th May, 2010** made an order, a mandatory injunction requiring the respondent to release to the applicants certain delivery notes in relation to two motor vehicles. The said order was duly served upon the respondent, who, while not seeking the setting aside of the order, failed to comply with the same – and the resulting contempt is a continuing offence.

Counsel submitted that by virtue of Order 52 of the Rules of the Supreme Court of England, which are applicable in this case, an application of this kind is to be brought *ex parte*.

Learned counsel submitted that while the perceived contemnor is a corporate body, the offending person is well identified as an officer of the company – the Operations Manager of the respondent; this official is the one who was served with the Court order dated **13th May, 2009** and is the one who ought to have ensured implementation of the same.

Counsel prayed for leave to commence contempt proceedings against the company's official whose particulars were specified.

The evidence to support the application is straightforward, and the legal basis of the application is clear enough.

I hereby allow the first prayer, and grant leave to the applicant to file a substantive motion seeking the committal of one **VIJAYAKUMAR PAYATHUPARAMBIL GOPALAKRISHNAN** alias **VIJAY** to jail for contempt.

The costs of this application shall be incorporated in the main action for contempt.

The applicant shall commence action as hereby authorized promptly, and within 21 days of the date hereof.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 15th day of November, 2011.

**H.M. OKWENGU
JUDGE**