



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 557 of 1999**

**JOHN MBUGUA WAWERU. .... APPELLANT**

**VERSUS**

**JOHN NJENGA RUIYI. .... RESPONDENT**

**R U L I N G**

The matter before the court is a Preliminary Objection filed by the Appellant/Applicant on 24<sup>th</sup> May 2008 to the application by Notice of Motion dated 27<sup>th</sup> March, 2008.

The original notice of motion abovementioned seeks an order of the arrest and detention of the Respondent in prison, for contempt of court. The applicant in the alternative sought for the attachment of Respondents movable properties as punishment for the said contempt.

It is to the said application to punish for contempt of court that the Respondent filed the Preliminary Objection in a point of law summarized as follows: -

That the application seeking Orders of contempt is fatally defective and therefore cannot sustain any lawful orders to punish for contempt. The Respondent effectively on that ground and one or two others, seeks that the application as a whole be struck out or be nullified.

The facts show that the applicant is for leave to file the contempt application against one John Njenga Ruiyi, the Respondent. The court on 7<sup>th</sup> March, 2008 granted the application with orders that the intended Notice of Motion seeking contempt orders should be filed within 21 days. The Notice of Motion was actually filed on 27<sup>th</sup> March, 2008, within a period of 20 days. This raises the issue as whether the application filed beyond a period of 14 days as prescribed under Order 52(3)(2) of the Supreme Court Rules of England, is competent.

The Respondent argues that any such application which is filed out of the 14 days prescribed as stated above is invalid.

I have carefully considered the issue. It is not in doubt that the Civil Procedure Act Cap 21 and the Civil Procedure Rules which govern us here in Kenya have no local or independent provision on this issue. We accordingly rely on English Law as stated in the Rules of Supreme Court of England. The relevant orders and rules are Order 52/2 (1) and Order 52/3 (2). They provide thus: -

**“52/2(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)\_ (5).....”**

**“52/3-(1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to a Divisional Court and, unless the court or judge granting leave has otherwise**

**directed, there must be at least 8 clear days between the service of the notice of motion and the day named for hearing.**

**(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.”**

The above two rules can be summarized to this effect- that no proceedings for contempt of court order can be brought or filed unless leave of this court is first granted. And when such leave has been granted it lapses within 14 days of the granting.

In my view and finding the above requirement being a statutory one, nobody has power to extend the period within which the Notice of Motion to be filed as above stated, must be filed. If the court purported to extend the relevant period, whether consciously or not, its act would be null and void as being contrary to the written law. Any application accordingly filed outside the period of 14 days would be incompetent and invalid. It would be null and void and liable for striking out.

In this case the relevant Notice of Motion was filed on the 20<sup>th</sup> day after the leave was granted. This appears to have been encouraged by the order of the court which had granted leave for 21 days, inadvertently in my opinion. It was argued that it was not the fault of the applicant to have been granted 21 days instead of the court granting the prescribed 14 days. It was also argued that the Respondent of such application may not suffer any damage if the application for contempt is left to be argued to its logical end. However, this court thinks that the Respondent of the contempt application stands a risk of going to jail or pay a fine if found guilty under the application. Secondly, it was the applicant who filed the application for leave who did not specifically seek leave that complies with the relevant statute, but failed to do so and failed to bring the relevant requirement to the attention of the busy court. The pressure under which the court operates is notorious and it behaves the applicant who stands to benefit from the order to guide and assist the court. Finally, this court has no right to ignore an illegality, fatal in competency or invalidity of a court process before it, where same has been brought to its attention.

In these circumstances and for the reasons stated hereinabove, the Preliminary Objection raised has substance and merit. The Notice of Motion seeking contempt of court orders filed on 27<sup>th</sup> March, 2009 is hereby declared incompetent and null and void. It is hereby ordered struck out with no order as to costs however. Orders accordingly.

Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2010.

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**D A ONYANCHA**

**JUDGE**