REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 51 of 2006

HELMUT MARTIN MULLER
PETRA JULIANE MULLER …….……………….…….APPELLANTS
VERSUS
SAIDIA KWA MOYO FOUNDATION (NGO) ……..RESPONDENT

R U L I N G

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Mr. Kithi (Counsel for the respondent) has raised a Preliminary Objection challenging the application which is for contempt proceedings, on grounds that the Judicature Act requires parties to adopt the practice in England. It was his contention that although leave of court was sought before contempt proceedings begun, it must be borne in mind that these provisions emanate from the provisions of Order XXXIX which has exclusive provision in law on how contempt shall be dealt with under rules 2(3) – these are exclusive of the Judicature Act. It is his argument that if in the original suit, orders complained of were made under Order XXXIX, then a party must commence contempt under Order XXXIX Rule 2(3), which would therefore make the present application fatally defective.

It is further argued that even if the first limb of this Preliminary Objection does not hold, then the application would still not stand because the rules and practice in England Order 52 rule 2(3) require that before such proceedings commence, the Crown (in this case the AG) would have to be served, yet here there is no evidence that Government was given notice of the intended proceedings and the applicant has not properly invoked the jurisdiction of this court and therefore has no capacity to proceed with the application.

Mr. Kithi urges this court to be guided by the decision in **Dancun Manuel Rurigi v K Rlys HCCC 235 of 2007 page 3**, so this court should find the entire process is flawed,a nd strike out the application.

The preliminary objection is opposed, and Mr. Odhiambo submits that the application is properly before the court saying there is no way that the respondent would have filed and proceeded with an application for contempt under Order XXXIX – as the order lay in coming before this court, which has jurisdiction. As for having service effected on the Attorney General, Mr. Odhiambo's argument is that the same was required because the defendant was a State Corporation, which is represented by the Attorney General, unlike in the present case. Mr. Kithi insists that in all contempt proceedings, the Attorney General has to be served as these are quasi judicial proceedings.

There are two seemingly contesting provisions regarding contempt proceedings –

One is provided for under Order XXXIX Rule 2(3) Civil Procedure Rules and the other is found under section 5 of the Judicature Act – which approach should the applicant have adopted.

The question of procedure was considered in the case of **Isaac J. Wanjohi and Another v Rosaline Macharia HCCC No. 450 of 1995,** in a passage by Bosire J, (as he then was), to the effect that:

> ***"The guiding principle appears to me to be that, he court in deciding whether or not proceedings are incompetent, must consider whether the rules of Court flouted are mandatory or directory. If mandatory, it would have no jurisdiction to consider a matter. If directory, it must proceed to consider whether any prejudice has been occasioned to either party and to state out or dismiss the proceedings for non-compliance with rules of court, if prejudice has been caused."***

Order XXXIX Rule 2 A (2) provides:-

> ***"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…"

In the present instance the applicant had secured restraining orders against the respondents on 14th August 2009 in SRMCC 356 of 2009 – those orders were obtained pursuant to an application made under Order XXXIX Rules 1, 3 and 9 of the Civil Procedure Rules. So should the applicant have relied on Order XXXIX Rule 2A (2) or should he have moved court under section 5 of the Judicature Act, and in so doing, abide by the Supreme Court of England Practices? Would it then mean that if the order breached relates to injunctive orders, the court should only be moved under Order XXXIX Rule 2A(2).

Bosire J in the Isaac Wanjohi case seems to have resolved the issue by stating:

> ***"….The power donated to the Court by Order XXXIX Rule 2(3) is independent of the provisions of section 5 of the Judicature Act. A party aggrieved by disobedience of an injunction order made under Order XXXIX Rule 1 or 2 of the Civil Procedure Rules, appears to be excluded from involving the jurisdiction under section 5 of the Judicature ct…Subordinate courts have no power to punish for contempt under that section. The power donated by Order XXXIX rule 2(3) is basically available to the court which granted the order respecting which breach is complained of. A subordinate court will therefore exercise powers under that rule to deal with breathed of its orders made under it…"***

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So is a breach of an order of injection made under Order XXXIX of the Civil Procedure Rules punishable under section 5 of the Judicature Act?

My view is that procedurally contempt under the Civil procedure Rules, applies in situations before the subordinate courts and before the High Court, relating to injunction while contempt under the Judicature Act is exclusive to the High Court (in all other situations of contempt) and Court of Appeal at least that seems to be the emerging jurisprudence. So ideally applicant ought to have moved the court (in fact the subordinate court) under Order XXXIX Rule 2A (2).

The Applicant here, elected to move the court under the Judicature Act (which does not specify nature of contempt) then he ought to have complied with the Supreme Court Practice Rules order 52 Rule 2.

This is because under section 5(1) of the Judicature act provides as follows;

> ***"The High Court and 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 the power shall extend to upholding the authority and dignity of subordinate courts"***

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In so providing, then it means that the objectives of an applicant in an application expressed to be brought under section 5 of the Judicature Act, are set out in Order 45 and 52 of the Rules of the Supreme Court of England. Mandatory language is used in Order 52 of the Supreme Court rules, which means that non compliance becomes fatal to the application.

It is necessary to address the issue of procedural law because very often, parties to a suit perceive that courts are more concerned with developing theory rather than substance. The importance of procedure was brought out clearly by Newbold P. in the case of **Mawj v Arusha General Store (1970) EA** in which he said:

> ***"…a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. I should like to make it quite clear that this does not mean that rules of procedure should not be complied with – indeed they should be – but non compliance with the rules of procedure of court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated, if no injustice has been done to the parties."***

Has the applicant observed rule 52 of the Supreme Court rules as was set out in the matter of an application of **Gurbaksh Singh and sons Ltd Misc. Civil Case NO. 50 of 1983.**

Order 52 rule 2 provides that an application must be supported by a statement setting out the name and description and address of the person sought to be committed and the grounds on which his committal is sought and by an affidavit, to be filed before the application is made) verifying the facts relied on.

Applicant has observed these procedural requirements except that Mr. Ktihi says Order 52 rule 2(3) was not observed, that provision states;

> "***The applicant must give notice of the application for leave not later than the preceding day, to the Crown Office and must at the same time lodged in that office, copies of the statement and affidavit."***

The equivalent of the Crown Office in the Kenyan set up would be the Attorney General's office. What is the rationale for this requirement? It's probably because contempt proceedings are quassi criminal in nature. That requirement is not a creature of case law, as Mr. Odhiambo seems to suggest, whilst referring to the **Duncan Manuel Mwirigi v Kenya Railways Corporation Case (2008) 2KLR** – rather, it is actually a mandatory requirement under Order 52 rule 2(3) which makes it mandatory for the State Law Office to be served at leave stage. It is apparent the Attorney General was not served with copies of statement and affidavit before the leave stage, and that renders the application fatally defective. The Preliminary Objection therefore has merit and is upheld with the result that the application herein is struck out for non compliance with Order 52 rule 2(3) of the Supreme Court Practice Rules.

The applicant shall bear costs of the application.

Delivered and dated this **23rd** day of **June 2010** at Malindi.

H. A. Omondi
JUDGE