Contempt of Court
Can the Government or Government Officer be committed for contempt?

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL MISC. APPLICATION NO.100 OF 2002

UASIN GISHU QUARRY LIMITED.....APPLICANT

VERSUS

COMMISSIONR OF LANDS.....RESPONDENT

RULING

This dispute was instituted by the applicant, Uasin Gishu Quarry Limited against the Commissioner of Lands by way of judicial review for orders of mandamus.

The dispute arose from the compulsory acquisition of the applicant's parcels of land by the respondent in 1988. The amount for compensating the applicant was at that time assessed at Kshs.10,594,314/=. Since that time, this figure has escalated to Kshs.19,500,475/= out of which 16,000,475/= has so far been paid, leaving a balance of Kshs.3,500,000/=.

A consent was recorded by the parties on 20th February, 2006 where it was agreed as follows (summarized):

i) that the respondent would pay the balance of Kshs.3m within 7 days from 20th February, 2006

ii) that the total sum plus interest would be paid by 30th August, 2006

iii) that in the event of default of any of the above terms, the respondent (the Commissioner of Lands) undertook liability for contempt of court.

I find the last term interesting. I do not know if it was envisaged that the Commissioner of Lands would turn himself in to be committed to civil jail or offer an asset or assets under his charge for the purpose of sequestration for failure to comply with any one of the above conditions. I wish he remained true to his undertaking as that would have spared me writing this ruling. The truth of the matter is that none of the conditions have been honoured and the Commissioner of Lands has now been cited for contempt.

As a matter of fact and to add insult to injury, so to speak, the respondent appeared before the Hon. Justice Maraga on 7th December, 2009 and a further consent was recorded. In that consent, it was agreed that the respondent would pay Kshs.3,479,760.34 within 60 days and interest accrual was suspended during the 60 days period; that in default, payment of interest to continue to accrue from 29th September, 2009. This consent like the earlier one has also not been honoured justifiably prompting the applicant to institute the instant application for committal of the respondent to civil jail for contempt of court.

In a belated replying affidavit filed on the same day of the *interpartes* hearing of the application and which ought to have been struck out but for the emerging philosophy of overriding objective (0_2) - that courts must be slow in striking out pleadings on technicalities, the respondent has passed the blame to the Ministry of Finance for failing to avail funds to settle this long outstanding debt. The respondent has also averred that he was not served with the motion as required by the law and further that being a pubic officer, public debt or liability cannot attach on him.

I have considered these arguments and the two authorities cited by either side, **Kisya Investments Limited** Vs. **Attorney General and R.L. Odupoy**, H.C. Nbi. Civil Case No.2832 of 1990 and **Sher Karuturi Limited** Vs. **V/d Berg Roses (K) Limited**, Nakuru HCCC NO.347 OF 2008.

Following repeal of the former Constitution and there being no equivalent provisions to **section 72(1)** and **77** of the **repealed Constitution** in the present Constitution, **section 5** of the **Judicature Act** provides the basis and the law of contempt of court. It provides:

"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 supplied)

I would like to emphasize two points in the forgoing provision. This country has no contempt of court laws.

By dint of section 5 aforesaid, the superior court must keep abreast with the development of substantive contempt laws and procedures in England. The High Court of Justice in England exercises the power to punish for contempt of court under Order 52 of the Rules of the Supreme Court. Those rule have been set out in the case of **Sher Karuturi Limited** (supra) and I find no need to reproduce them here. In any case, the applicant has complied with the procedure of instituting and prosecuting the application.

The only three questions falling for determination are:

i) whether the respondent was personally served with the motion for contempt

ii) whether the respondent is in contempt of court and if so

iii) what is the punishment?

In terms of **Order 52 rule 3(1)** aforesaid, the motion must be served upon the contemnor. The court or judge may dispense with the requirement of service of the motion.

In the matter before me, I am satisfied that the respondent was fully aware of these proceedings and has filed a replying affidavit and even participated in the arguments through counsel. The respondent has twice voluntarily given an undertaking to settle the debt.

No doubt attempts have been made to do so in the past before the last consent of 7th December, 2009. Six months later, when this application was made and one year today, not single penny has been paid with the result that the penalty clause on interest has set in, exposing the Government to make payments which, with proper planning could be avoided.

According to **Halsbury's Laws of England, Fourth Edition paragraph 52,** it is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court within the time specified in the judgment or order, or to disobey a judgment or order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction.

It cannot be denied, not even by the respondent that he gave an undertaking with clear terms and a timeline to settle the applicant's claim.

Lately, a distinction is being drawn between mere failure to comply with a court order as opposed to being in contempt of court. I find no use in that distinction in this matter as the respondent made the undertaking knowing only too well the bureaucratic budget process in the Government. Failing to honour an undertaking made to court in the circumstances of this case amount to contempt of court.

Ordinarily, a contemnor in a civil cause would under the English law face any one or more of the following sanctions:

i) Committal in civil jail for a fixed term commensurate with the seriousness of the contempt

ii) Sequestration of the property of an individual or corporation in contempt

iii) Imposition of a fine as an alternative to committal or sequestration.

iv) An injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt.

However, enforcement or execution of any of the above sanctions against the Government of Kenya and any official of the Government of Kenya must be in accordance with the laws of Kenya.

First it is common ground that the respondent is an officer of the Government of Kenya. The preamble to the **Government Proceedings Act** (the Act) provides that it is:

"An Act of Parliament to state the law relating to the civil liability and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the government in certain cases involving the affairs or property of the government; and for purposes incidental to and connected with those matters."

Section 21 of the **Act** acknowledges that a court can in civil proceedings in which the government is a party issue an order against the Government, or against a Government department, or against an officer of the Government in favour of any person. Where such order relates to payment of money by way of damages or otherwise a certificate in the prescribed form must be issued and served upon the Attorney General.

Section 21(3) aforesaid further stipulates that:

"(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable and the accounting officer for the Government department concerned <u>shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing on the certificate</u> to be due to him together with interest, if any, lawfully due thereon"

(Emphasize mine)
Subsection 4 is important. It provides:

"(4) Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs

and no person shall be individually liable under any order for the payment by the Government department, or any officer of the Government as such, of any money or costs."

(Emphasize added)

I do not wish to add to these clear provisions of the law, save to add that **Order 28 rules 2(1)(a), (2)** and **4** of the **Civil Procedure Rules** reiterates the insulation of the government and its officers from execution or attachment. It provides that:

"2(1) Except as provided by the Government Proceedings Act or by these Rules:

(a) these Rules shall apply to all Civil Proceedings by or against the Government …….. ……

(2) No order against the government may be made under

- **Order Xlll rule 4 (impounding of documents)**

- **Order XXl (execution of decrees and orders)**

- **Order XXll (attachment of debts)**

……..."

It follows that no order in an application for contempt of court can be made for committing any officer of the Government for acts or omissions done or not done in the course of that officer's official duty in the Government service. See **Kisya Investments Limited** (supra). The judges in **Kisya Investments Limited** (Visram, J, as he then was and Ibrahim, J) explained that the Executive cannot make payments not authorized by the legislature; that due to Government procedures, red-tape and large number of claims, payments cannot be made immediately even if ordered by the court.

In conclusion, I cannot do better than reiterate the learned words of Simon Brown, J in the case of **M** Vs. **Home Office and Another** (1992) 4 All ER 97 at P.114). He said:

"Point of high constitutional importance though this is, and reluctant though any court must be to proclaim the crown beyond the reach of its ultimate coercive power, it is, I believe, difficult to regard this as a black day for the rule of law or the liberty of the subject. The court is not abrogating a historic responsibility for the control of executive government. Rather, it is recognizing that when it comes to the enforcement of its decisions, the relationship between the executive and the judiciary must, in the end, be one of trust. Parliament essentially made it so in 1947: the postulate implicit in sections 21 and 25 of the 1947 Act is that the Crown will be true to its obligations. But if not – if it fails to observe them – it will be answerable to Parliament. It is not, then, given to the courts to exercise the power of punishment. It goes without saying that nothing in this judgment affects the long established principle that the Crown not only is bound always and in all respects to abide by the rule of law but also must submit, to the court's jurisdiction to rule upon all disputed issues."

On appeal that ended up in the House of Lords, **M** Vs. **Home Officer** (1993) 3 All ER 537, the question was posed whether the courts have jurisdiction to make a finding of contempt against the Crown and what is the effect if such a finding were to be made? Answering that question, Lord Woof said:

"The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a minister of the Crown in his official capacity. Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, I do not believe there is any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but against a government department or a

minister of the Crown in his official capacity……..…….. While contempt proceedings usually have those characteristics and contempt proceedings against a government department or a minister in an official capacity, this does not mean that a finding of contempt against the government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice…….... A purpose of the court's powers to make findings of contempt is to ensure orders of the court are obeyed. …….. In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorized government departments or the Attorney General."

That is sufficient answer; that the court can indeed find a specific government department or officer guilty of contempt of court. I have found and do hereby declare that the respondent is in contempt of court.

In view of the provisions of **section 21`(3)** of the **Government Proceedings Act** and **Order 28 rules 21(1)(a)** and **(2)** and **4** of the **Civil Procedure Rules**, what is the effect of a finding by the court that a government department or officer is in contempt of its order? Is such a finding efficacious without any accompanying sanction?

Again Lord Denning provides the answer in the same case **M** Vs. **Home Office** (supra):

"…….The Crown's relationship with the courts does not depend on coercion and in exception situation when a government department's conduct justifies this, a finding of contempt should suffice. In that exceptional situation, the ability of the court to make a finding of contempt is of great importance. It would demonstrate that a government department has interfered with the administration of justice. It would then be for parliament to determine what should be the consequences of that finding."

The historical explanation for the state's immunity with regard to punishment for contempt can be traced to the English theory that assumed that the Crown can do no wrong. The immunity must not appear to be used by the State to frustrate her subjects. I reiterate that the manner this claim has been handled for the last twenty two (22) years should be of great concern to the Attorney General, the Principal Legal Advise to the Government of Kenya, who is enjoined by **Article 56(7)** of the **Constitution** to defend the public interest. A claim of Kshs.10.5m in 1988 has grown to Kshs.19.5m and I bet it will be over 25m when finally settled. Yet this is but only one claim. There could be more. Such wasteful and nugatory payments must be avoided.

Article 40(3)(b) prohibits the State from depriving a person of his property unless the deprivation is for a public purpose or in the public interest. The deprivation must be carried out in accordance with the Constitution and any Act of Parliament that:

" i) requires prompt payment in full of just compensation to the person . . . . '' (Emphasissupplied)

By delaying payments for over 22 years the State has in fact deprived the applicant of his property in contravention of the Constitution.

To ensure this matter is finally concluded and bearing in mind the role of the Court *vis a' vis* the Executive as enumerated in the foregoing paragraphs, this court can only make the following orders:

i) that this ruling be served upon the Hon. Attorney General to consider suitable measures to take in concluding this dispute and

ii) the respondent, Zablon Mabea, the Commissioner of Lands to appear before me with counsel on 3rd March, 2011 to appraise the court.

Costs awarded to the applicant.

Dated, Delivered and Signed at Nakuru this 21st day of December, 2010.

W. OUKO

JUDGE