REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)
Miscellaneous Application 40 of 2009

REBECCA WANJIRU.....PLAINTIFF

VERSUS

ALEX KADENGE MWENDWA .....1st DEFENDANT

LORNA MWENDWA.....2ND DEFENDANT

RULING

The applicant who is the Respondent to this preliminary objection presented an application by way of chamber summons, dated 21st January 2009, seeking leave of court, to apply for an order of court, to commit to a civil jail one Alex Kadenge Mwendwa and Lorna Mwendwa, for contempt of court, by disobeying the order of the court, issued on 23rd December 2008 by Hon. A Muchelule (Now J) and that costs be provided for. The same was presented under S 5 (1) of the judicature Act Chapter 8, Laws of Kenya and order 52 rule 2 of the rules of the supreme court of England. A perusal of the record reveals that, the application is supported by a supporting affidavit sworn by one Rebecca Wanjiru on the 21st day of January 2009. it is also supported by a statement of facts also dated 21st day of January 2009. There are also annextures RW1 which is a notice of Penal consequences, whose heading indicated that the same was issued in respect of orders issued in Milimani Commercial Court CMCC NO 7964 OF 2008. There is an accompanying order and an affidavit of a process server whose date of deponement is not indicated. It is evident from its heading, that it was meant to be filed in CMCC 7964 of 2008. These are the papers which were presented to the duty judge Waweru J, on 22/1/2009 and his lordship granted the orders sought, with an order that the application for contempt be filed within 7 days from that date. The application objected to was filed in pursuance of that order.

The substantive application has been presented by way of a notice of motion dated 23rd day of January 20009 and filed on 26/1/2009. Its heading indicates clearly that it was filed in pursuance to leave granted by Waweru J on the 22nd day of January 2009. It indicates further that the application is brought pursuant to order L rule 1 CPR, section 5 (1) of the Judicature Act, Cap 8, Laws of Kenya, section 3A of the CPA and order 52 rule 3 of the supreme court of England. It seeks two orders namely:

"(1) That Alex Kadenge Mwendwa and Lorna Mwandwa the Respondents herein be committed to Civil jail for contempt of court, for disobeying the order of the court, given by the Hon. A. Muchelule (Chief Magistrate, now Judge) on 23rd December 2008.

(2) That the Respondents do pay costs of this application."

The application is supported by grounds in the body of the application, supporting affidavit sworn by Rebecca Wanjiru on 23rd day of January 2009, a statement of facts, an annextures RW1 being an affidavit purported to have been sworn by a process server on a dated not indicated, court, order issued on 23rd day of December 2008 by AO. Muchelule Chief Magistrate (now J), notice of penal consequences issued 23rd December 2008, a letter from the applicants counsel to the intended contemnors dated 12th January 2009 informing them of the intention to apply for committal proceedings, photographs of what appears to be a demolition scene.

The Respondents were served with the papers. Their counsel filed a notice of appointment of advocate dated 18th February 2009 and filed on 19th February 2009 and then presented a notice of preliminary objection dated 10th March 2009. It raises 3 grounds of objection namely:

"(1) The plaintiff/applicant has not complied with procedure laid down under order 52 rule 2 of the supreme court of England.

(2) The plaintiff/applicant has otherwise contravined the procedure laid down under order 52 of the supreme court of England regarding contempt and the Judicature Act Chapter 8 of the Laws of Kenya.

(1) The application as filed is incurably defective and a non-starter and the same ought to be dismissed at this preliminary stage with costs".

It is the said preliminary objection, which is the subject of this ruling. The sum total of the arguments of counsel for the objector is simply a reiteration of the three grounds of objection, namely that since the applicant cited the provision of Order 52 of the supreme court, of England Rules of procedure, then it is imperative that they comply with the same.

- It is their stand that the applicant has not complied with the said rules and for this reason, their application is defective abinitio and ought to be struck out.

- The defaults were enumerated as follows:-

(a) Notice which ought to be served on to the crown office whose equivalent is the Attorney Generals office, has not been exhibited and the assumption is that it was not served.

(b) The verifying affidavit has not been exhibited.

(c) Notice to the Registrar was not given. On that ground counsel for the Respondent urged the court, to strike out the application with costs to them.

In response counsel for the applicant relied on the following submissions:-

- That the procedure talked about by the objector govern applications to a Divisional court, there is no other procedure to any other court.

- The judge who granted leave to apply for contempt proceedings was satisfied with the paper work presented to him.

- They contend the objection is misplaced as the leave obtained can only be challenged by way of appeal.

- Lastly that nothing is mandatory under Order 52 on that ground urged the court, to dismiss the P.O

In reply to the applicants' submissions, counsel for the preliminary objector urged the court, to go by the provisions laid out in order 52 and hold that the procedure adopted by the applicant is wrong.

- secondly, that no authority has been cited by the applicant to show that leave to apply for contempt of court orders can only be challenged on appeal.

Due consideration has been made by this court, of the above rival arguments, and the same has been considered in the light of the relevant law relied upon by the disputants, and in this courts opinion, the following issues have arisen for determination by this court namely:

(i) Whether leave granted to apply for contempt proceedings can only be challenged on appeal.

(ii) Whether objection raised by the respondent objector satisfy the ingredients established for raising a Preliminary Objection.

(iii) Whether the objector has a genuine complaint and in other words whether the objection is sustainable.

(iv) What are the final orders to be issued herein.

As regards the appeal being the only way to challenge leave granted, the court, is of the opinion that this has not been proved by any authority of either the superior court or the Court of Appeal. Neither is such a mode provided for by section 5 of the Judicature Act, or the order 52 of the Supreme court of England. As such objection by way of preliminary objection has not been ruled out. The preliminary objection will therefore be ruled upon on merit.

As for the ingredients necessary for sustaining a preliminary objection, this court, has no where else to look to save the famous case of MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD (1969) EA 676. At page 7000 Law JA as he then was at paragraph D-E had this to say.

" *So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out - pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court, or a plea of limitation or a submission, that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".*

Where as, Sir Charles New Bold, P. on page 701 on the same subject at paragraph of – a P.O, had this to say " *a preliminary objection is in the nature of what used to be ademmurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".*

Applying the above principles to the facts herein, the court, is satisfied that the ingredients are satisfied because of the following –

(i) The issue has a risen from the pleadings presented to court by the applicant.

(ii) If it succeeds it will dispose off the application because once declared a nullity and struck out, the proceedings will have been disposed off as nothing would have been left to be deliberated upon.

(iii) Issues of a pleading being a nullity abinitio is a pure point of law.

(iv) The assumption that all facts presented by the opposite party are correct, in that there is no argument that the applicant sought and was granted leave to apply for contempt proceedings on the basis of the documentation mentioned herein above.

(v) There are no other facts that are to be ascertained. No judicial discretion is being sought, as there is non to be exercised in the circumstance displayed here in, because if the pleading is found to be a nullity, it remains a nullity, and a proper candidate for striking out and there is no way such a pleading

can be saved.

As for the merits, it is on record that the procedure to be applied when a litigant wishes to apply committal of a contemnor to civil jail is not laid down in section 5 or any other section of the Judicature Act, save that the Jurisdiction is exclusively vested in the high court which is then mandated to adopt the procedure followed by the supreme court of England as set out in order 52. A copy has been handed to the court. A perusal of the same reveals the following.

- vide order 52 rule 1, donates powers to punish for contempt to the high court, or the court of appeal. It goes further to give instances when such powers is to be exercised namely: -

(i) Where contempt is committed in connection with proceedings before (a) Divisional court of the Queens Bench Division, or.

(ii) Criminal proceedings except where the contempt is (omitted in the face of the court, or consists of disobedience to an order of the court, or a breach of an undertaking to the court or

(iii) Proceedings in or in an inferior court (b) is (omitted otherwise than in connection with any proceedings then subject to paragraph (4) an order of committal may be made only by a Divisional court of the queens Bench Division (does not apply to contempt of the court of appeal (3) where contempt is (omitted in connection with any proceedings in the high court an order of committal may be made by a single Judge of the queens bench Division.

(iv) where by virtue of any enactment the high court has power to punish or take steps for the punishment of any person charged with anything in relation to a court which would if it had been done in relation to the high court, have been a contempt of that court, an order of committal may be made by a single judge of the Queens bench .....

- Order 52 rule 2 governs applications to Divisional courts and it states:-

" *O.5212 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.*

(2) An application for such leave must be made exparte to a Divisional court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name and address of the person sought to be committed and the grounds on which his committal is sought and by an affidavit filed before the application is made verifying the facts relied on.

(3) 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 lodge in that office copies of the statement and affidavit.

(4) Where an application for leave under this rule is refused by a judge in chambers, the applicant may make a fresh application for such leave to a Divisional court

(5) An application made to a Divisional court by virtue of paragraph (4) must be made within 8 days after the judges refusal to give leave or if a Divisional court, does not sit within that period on the first day on which it sits thereafter.

(1) <u>On application for orders after leave to apply has been granted (0.52,1.3) 3-1</u> "*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 and 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 therein for the hearing.*

(2) Unless within 14 days after such leave was granted the motion is entered for hearing, the leave

shall lapse.

(3) Subject to paragraph (4) the notice of motion accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2 must be served personally on the person sought to be commited.

(4) Without prejudice to the power of the court or judge under order 65 rule 4 the court, or judge, may dispense with service of the notice of motion under this rule if it or he thinks it suit to do so".

-Application to a court, other than Divisional court (O.52 r.4) 4- (1) "*where an application for an order of committal may be made to a court, other than a Divisional court, the application must be made by motion and be supported by an affidavit.*

(2) Subject to paragraph (3) the notice of motion stating the grounds of the application and accompanied by a copy of the affidavit in support of the application must be served personally on the person sought to be committed.

(3) Without prejudice to its powers under order 65 rule (4), the court, may dispense with the service of notice of motion under this rule if it thinks it fit to do so.

(4) This rule does not apply to proceedings brought before a single judge by virtue of order 64, rule 4.

- Saving for power to commit without application for purpose of (0.52 r.5)

"*(5) Nothing in the fore going provisions of this order shall be taken as affecting the power of the high court, or court of appeal, to make an order of committal, of its own motion against a person guilty of contempt of court."*

- Saving for other powers (O.52 r.9)

(9) Nothing in the foregoing provisions of this order, shall be taken as affecting the power of the court, to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any enactment inline manner, as if he had been guilty of contempt of the high court, to pay a fine or to give security for his good behavior, and those provisions so far as applicable, and with the necessary modifications shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal"

The other rules namely rule 6 applies to provisions relating to hearing procedure, rule 7 relating to power to suspend execution of committal order, and rule 8 which relates to discharge of persons committed are beyond the scope of this ruling on objection to the procedure of application, hence the inability of this court to set them out herein.

It is to be noted however that none of the disputants cited any case law either originating from the superior court, or the Court of Appeal in which the said provision of order 52 supreme court, of England procedures have been construed. That not withstanding this court, is not precluded form sourcing on its own any that it has judicial notice of. This court, had has occassion to rule on a similar application, in its ruling delivered on 4th day of March 2009 in the case of AFRICAN REINSURANCE REGISTRATION VERSUS KAGEMA MURAYA AND ANOTHER NAIROBI HCC NO 411 OF 2007. case law on the subject is discussed running from page 11 of the ruling line 7 from the bottom through to page 25 line 7 from the bottom. The cases centre on various aspects of contempt law procedures. As such, this court, will confine itself to those aspects that touch directly on the procedure subject of this ruling on objection. There is the case of ADOPT A LIGHT VERSUS NAIROBI CITY COUNCIL NAIROBI HCC NO 637 OF 2006 decided by Azangalala J on the 25th July 2008 quoted with approval at page 11 of the said own cited ruling. The relevant learned judge's observations is found at page 13 line 7 from the top and it runs thus:-

"*(i) Where as the finding at page 8 line 7 from the bottom runs thus:-*

" *I must also confess that in my reading of the two court of appeal, decisions, the same do not direct a wholesale adoption of the entire English procedure and practice as in my view, such a direction would impede the proper administration of justice. Their operation would indeed result in injustice taking into account the circumstances of certain parts of this country where litigants may not readily access the high court and the office of the Attorney general"*

At page 18 of the said own quoted ruling, there is quoted with approval the case of FIDELITY COMMERCIAL BANK LIMITED VERSUS SHAM SHEVALI KARIMKURJI AND ANOTHER NAIROBI MILIMANI COMMERCIAL HCC NO 1276 OF 2001 decided by Ransely J (as he then was) on the 30th day of January 2006. The background information of that case is setout at page 19 of the said own quoted ruling. It runs from line one from the top. Since it is relevant to the objection proceedings herein, there is no harm in setting them out herein. It is to the effect that, "*a preliminary objection was raised against a motion brought under section 5 of the Judicature Act because no prior notice of the proceedings had been given to the Attorney General and as such the court was urged to strike out the said motion"*. At page 2 of the ruling, the learned judge construed order 52 rule 2 and 4 of the supreme court of England and arrived at the conclusion that "*order 52 rule 2 refers to applications to a divisional court. Where as rule 4 refers to applications to a court, other than a divisional court. In the learned judges opinion, notice to the crown applies to applications to a divisional court, where as no such notice is required for an application to a court, other than a divisional court"*.

At line 12 from the bottom of page 2 of the ruling the learned judge opined that:- "*I would only say that in my view the high court of Kenya is an equivalent to the Queens Bench Divisions in England and in Kenya no Divisional court exists."*

The main objection raised against the substantive application for contempt, in the said cited own ruling, was raised because the applicant did not serve notice of the intention to file an application for contempt on the Attorney General as required by order 52 of the Supreme court of England practice rules. It is on record, in that own ruling, that this court, made observations to the effect that "*decisions of the superior court cited there in had demonstrated that the requirement of notice applied to applications directed to the Divisional courts in England. Further that since the high court of this jurisdiction and the Court of Appeal exercise the same powers of contempt of court orders like the high court in England, it follows that applications directed to a court, equivalent to the Divisional court, of England would require notice to be served on to the office of the Attorney General. This court, went on to observe that however since the high court which is the lowest court mandated with the jurisdiction to punish for contempt is equivalent of a Queens Bench Division court of England, the service of a notice to the Attorney General would not be necessary and like wise lack of service of the same would not be fatal. The court went on to observe further that though all the cited cases were by courts of concurrent jurisdiction, this court, had no reason to depart from that sound reasoning on this aspect of the law"*.

This court has had occasion to read a decision of Mwera J decided on 7/2/2002 in MILIMANI COMMERCIAL HCCC NO 1872 OF 2001 IN THE CASE OF LEONARD NJOROGE KARIUKI VERSUS MUOROTO THUITA INVESTMENT. At page 3 of the ruling , the learned Judge quoted with approval the decision of Bosire J as he then was (now JA) in the case of ISAAC WANJOHI AND ANOTHER VERSUS MACHARIA NAIROBI HCC NO 450/95 . At page 6 line 2 from the bottom the learned judge quoted Bosire J in that case of Isaac wanjohi thus:-

" *It would appear to me that applications for committal for contempt of court made in this country fall in the category of those applications in England made to courts, other than the Divisional courts. Consequently no leave would ordinarily be necessary although it is common practice in Kenya improperly so in my view, to commence committal proceedings in every case by an application. The authority for that cannot be possibly be the rules of the supreme court of England"*

This too was a high court, decision, and therefore not binding on this court. However it fortifies the stand taken by Azangalala J, Ransely J, as he then was, and this court, in the own decided decision cited

above. It goes to show that although it has been the practice in Kenyan courts, to commence contempt of court, proceedings by service of a notice to the Attorney General, and application for leave, which is a notorious practice, and infact it has been accepted as the proper norm and tradition, none the less there is no basis for it and certainly it does not receive support from the order 52 of the supreme court of England rules which apply specifically to Divisional courts an establishment unknown to this jurisdiction.

This court, still holds the same view as previously held and supported by the decided decisions of the superior courts, that failure to issue notice to the Attorney General by the applicant herein before filing an application for leave is not in principle, as a matter of law as explained. As such this court, would not penalize the applicant for non compliance. However as a matter of notorious practice and since the applicant opted for it, then he was obligated to comply to the letter. He should have given the notice.

Another a normally noticed was that there is no verifying affidavit and secondly the exhibits relied upon are not attached to any affidavit. In normal notorious practice, these would be attached to the verifying affidavit. The failure to annex them to the verifying affidavit, the application for leave is fatal as in that form, it would not have had any evidence to support breach as there would have been no proof of the existence of an order allegedly breached, notice of penal consequence ignored, and a return of service evidencing service of the order alleged to have been breached. It is also worth noting that the exhibited return of service, though purportedly signed does not have a date on which it was deponed endorsed contrary to the requirement of section 5 of the oaths and statutory declarations Act Cap 15 Laws of Kenya which provides:-

" *Every commissioner for oaths before whom any oath or affidavit, is taken, or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.*" Failure to comply is fatal. Once the R/S is faulted there is nothing to show that the order was served.

Issue was raised that the objector should have appealed against the decision to grant leave instead of filing a preliminary objection. Due consideration has been made of this Rwal argument and the court, makes a finding that in the absence of existence of a provision or case Law that leave can only be challenged by way of appeal the mode of challenge subject of this ruling cannot be ousted it is proper.

Having held that although the application for leave to apply for contempt proceedings is not necessary as the application was meant to invoke the jurisdiction of the high court, whose equivalent in England is the Queens Bench Division court, and not a Divisional court, unknown in this jurisdiction, and not with standing that the paper work in support of the application has been found faulty in terms of paper work in the manner stated above, the question for determination is whether the substantive application is to proceed for determination on its own merit or not. In this courts' opinion, having ruled that since the applicant moved to seek, relief from the high court the defects in the application for leave is in consequential as the same was unnecessary, as reasoned herein, the substantive application can stand on its own and be disposed off on merit unless if it has defects of its own fatal to it.

This court, has given due consideration of the same and has found that the same exhibits relied upon by the applicant when seeking leave, are the same ones relied upon by the applicant to support the substantive application. Observation of the same as noted earlier on, reveals that, they are plagued by the same disease, in that they are not annexed to the supporting affidavit. They are floating. There is no provision for floating exhibits. The requirement is that they be referred to in the paragraphs of an affidavit as provided for in rule 9 of the oaths and statutory declaration Act and the format in the 3rd schedule there to. Once the exhibits are faulted, there is nothing to show existence of an order, service of the order, and penal notice, in the absence of which an application for contempt of court cannot stand.

For the reasons given in the assessment the court moves to make the following orders.

(1) The preliminary objection to the application for leave by reason of failure to serve notice of the institution of the same on to the Attorney Generals office, is disallowed for the reason that the procedure is applicable to applications, to a divisional court in England. Where as the application here in was

directed to the high court.

(2) Decisions emanating from the superior court, cited herein, have demonstrated that the high court of this jurisdiction is the equivalent of the Queens Bench Division court in England.

(3) The same decisions have demonstrated that a Divisional court is a lien to this Jurisdiction.

(4) The findings in no 1, 2, and 3 above not withstanding, it is the finding of this court, that despite there being no basis for the practice, the Kenya courts, have now developed, a notorious practice, accepted as the norm, of seeking leave in the first instance, before applying for contempt.

(5) Where the notorious practice has been resorted to, an applicant will not be faulted solely on the basis that it has no basis.

(6) Where the notorious practice is however resorted to, the party invoking it has to comply with all its requirements of giving notice and even if giving a notice is excused, there has to be a verifying affidavit, and where exhibits are relied upon, these have to be annexed to the verifying affidavit as required by rules 9 and 3rd schedule of the oaths and statutory declaration Act Cap 15 Laws of Kenya.

(7) The application for leave subject of this ruling was defective for lack of notice and secondly the exhibits were floating as they had not been annexed to the affidavit or any verifying affidavit, and as such the entire application for leave is a proper candidate for striking out and it is accordingly struck out.

(8) The striking out of the application for leave does not invalidate the substantive application because leave was not required in the first instance, as the applicant intended to seek the jurisdiction of the high court and not a divisional court.

(9) The holding in number 8 above not withstanding the court, is not precluded from interrogating as to whether the substantive application is properly before it in the form it is. As mentioned, it is faulty in that the exhibits relied upon are not annexed to the supporting affidavit in accordance with the requirement of the 3rd schedule of the oaths and statutory declaratory Act Cap 15 Laws of Kenya.

(10) Once the exhibits are faulted, there is nothing to show existence of an order, service of the same, more so when the R/S relied upon is undated and as such breach of the order has not been demonstrated.

(11) In the absence of demonstration of existence of a breach of a court order, there is no basis upon which a contempt of court proceeding can be anchored. For this reason the substantive application too is faulted and struck out.

(12) Though the P.O was not upheld as noted by reason of the applicants processes being faulted, and struck out, the respondent will have costs of the application.

Dated, Read and delivered at Nairobi this 22nd day of May 2009.

R.N.NAMBUYE

JUDGE