



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Appeal 103 of 2003**

**CONTEMPT OF COURT**

- Only High Court and court of Appeal competent to make orders for contempt of court Judicature Act (cap 8, Laws of Kenya) s. 5(1).
- This is so despite section 63(c) of the Civil Procedure Act, and Order XXXIX Rule (2)(3) of the Civil Procedure Rules.
- An order for contempt to be served personally on the person against – whom committal is sought with a notice of penal consequences.
  - An application is incompetent for want of both jurisdiction and procedure.

**KABERIA M'KUCHIANA .....APPELLANT**

**V E R S U S**

**PETER KAMANJA.....RESPONDENT**

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**(An appeal from the Ruling of N. Kimani Principal Magistrate Delivered at Maua Law**

**Court on 4.11.2003 in**

**Maua PMCC No. 13 of 2002)**

**JUDGEMENT**

By a Memorandum of Appeal dated 15.09.2003 and filed on 22.09.2003 the Appellant herein being

dissatisfied with the Ruling/Order made on 4.09.2003 by N. Kimani Principal Magistrate Maua Law Courts in Maua Principal Magistrates Civil Case No. 13 of 2002, appealed to this court on five grounds that:-

1. the learned Principal Magistrate erred in law and in fact in finding that the appellant was in breach of the court's order of 4.04.2002.
2. the learned Magistrate erred in law and in fact in failing to find that the appellant had not been served with any formal order of his ruling of 4.04.2002 by the Respondent,
3. the learned Magistrate erred in law and in fact in failing to find that the appellant had not been served with any penal notice in respect of the orders of 4.04.2002,
4. The learned magistrate erred in law and in fact in that he failed to appreciate the issues of law and fact raised against the application dated 26.06.2003 before making the orders of 4.09.2003.
5. the orders of 04.09. 2003 were made without any evidence at all and were contrary to procedure and law.

In support of the grounds of appeal, Mr. Haron Gitonga learned counsel for the appellant filed on 2.06.2009 written submissions dated 20.05.2005. Mr. Kiautha Arithi learned counsel for the Respondent had earlier filed the Respondent's submissions on 6<sup>th</sup> April 2009. The submissions were dated 3.04.2009.

Although there are five grounds of appeal in this appeal, there is nearly one issue for determination namely, whether the orders of 4.09.2002 were made without any evidence at all and whether they were contrary to procedure and law.

Mr. Arithi in his written submissions held the view particularly in relation to grounds 4 and 5 of the appeal that the procedure to be followed in subordinate courts in matters of contempt proceedings is as outlined in Order XXXIX rule 2(3) of the Civil Procedure Rules, and that a subordinate Court could therefore exercise powers under that rule to deal with any breach of its orders in much the same way as the superior courts and that the procedure adopted for punishment for contempt before the subordinate court was proper and that the law was followed to the letter. Counsel therefore submitted that the appeal had no merit and ought to be dismissed with costs to the Respondent.

As expected, Mr. Haron Gitonga learned counsel for the appellant urged to the contrary.

Counsel submitted on all the five grounds, that there was no evidence of sense of the order of 4.04.2002 as no formal order was extracted with requisite Penal Notice endorsed thereon (grounds 1, 2 & 3) and on grounds 4 and 5, counsel submitted inter alia.

- (1) that a formal order with a penal notice had not been served upon the Appellant as required by law,
- (2) that the Respondent had not proved the disobedience of the court orders as had been alleged by the Respondent;
- (3) that the orders complained of had not specified the piece of land in dispute,
- (4) that the standard of proof for contempt was higher than that of balance of probability.

Counsel for the Appellant observed that the learned magistrate had in his ruling of 4.09.2003 without assigning any reason at all, ignored those issues and did not make any finding at all of any of them. Counsel referred to several authorities namely

- (1) Kisumu **HCCC No. 44 of 2003 MARGARET OGWENO OKOTA VS GABRIEL ONYANGO WADE & JOSEPH AWUOR WADE** a decision of Warsame J. that a court will exercise its discretion

in matters of contempt of court where there is adequate material evidence of the alleged contempt.

(2) In Civil Appeal No. 36 of 1989 , the Court of Appeal allowed an appeal against the order for committal for contempt on the grounds that:-

(a) Notice of Penal consequences was not endorsed on the order served.

(b) The order was not served personally on the person against whom committal is sought with notice of penal consequences.

(c) Contempt is dealt with under section 5 of the Judicature Act and Order XXXIX rule 2(3) of the Civil Procedure Rules.

(d) An application was incompetent for want of procedure.,

(3) In **Joseph Kobia & others Vs J. K. Mubea (Meru HCCC No. 131 of 2007)** Hon Mr. Justice W. Ouko in both a comprehensive and lucid binding ruling considered the law and procedure relating to contempt of court proceedings and dismissed an application for contempt of court for non compliance with the both the substantive and procedural law applicable to contempt of court proceedings.

Without reinventing the wheel, it is perhaps necessary to recapitulate the law and procedure applicable to contempt of court proceeding. The law applicable to contempt of court is set out in Section 5 of the Judicature Act, (Cap 8 Laws of Kenya) which section reads-

**(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.”**

**(2) an order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original jurisdiction of the High Court.**

And section 63(c) of the Civil Procedure Act, (Cap 21, Laws of Kenya) provides:-

**“63. In order to prevent the ends of justice being defeated, the court may, if it is so prescribed-**

**(a-b)**

**(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;**

Lastly Order XXIX rule 2A (2) of the Civil Procedure Rules provides-

2A (1) .....

**(2) In case of disobedience, or of 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 determined in prison for a term not exceeding six months unless in the meantime the court directs his release.”**

In his very well considered and researched Ruling in **JOSEPH KOBIA & OTHERS VS J.K. MUBEA** (supra) Hon. Mr. Justice Ouko, after referring firstly to Section 72(1) of the Constitution which permits the High Court or the Court of Appeal to deprive a citizen of his personal liberty in execution of an order for contempt of the court, secondly, Section 63(c) of the Civil Procedure Act which also provides that in case of a disobedience of an injunctive order, the alleged contemnor may be committed to prison or his property attached and sold and thirdly, Order XXXIX Rule 2A (2) of the Civil Procedure Rules which

again gives the Court power to punish for contempt of court by imprisonment for a period not exceeding six months among other punishments, observed at p.104 that these provisions do not provide for procedure for commencement and prosecuting cases for contempt of court and concluded that the law regarding contempt in Kenya is completely alien, and to unrepresented litigant a thicket.

I, with respect entirely agree with the learned judges opinion on the matter. I only also agree with the learned Judge's opinion at p.12 of his Ruling in the said case that by dint of the above captioned provision of the Judicature Act and Section 72(1) of the Constitution only the Court of Appeal and the High Court are empowered to punish for contempt of court.

Although the learned judge noted at p. 13 of his judgment, that that view was arguable in view of the provisions of section 63(i) of the Civil Procedure Act and Order XXXIX rule 2A (2) of the Rules which indeed simply refer to "**the court.**" I think the language of Section 63 itself is clear that

**"In order to prevent the ends of justice from being defeated the court may, if it is prescribed added must mean that the court may only punish for contempt if it is so prescribed in law. The law which prescribed for punishment for contempt of court is section 72(1) of the Constitution and the procedural law is Section 5 (1) of the Judicature Act which like Section 72 (1) of the Constitution vests the power to punish for contempt in the Court of Appeal and the High Court. I think section 5 (1) makes the view of the law of contempt clear and that the power shall extend to upholding the authority and dignity of subordinate courts – that any contempt before the subordinate courts will be punished by the High Court and/or the court of appeal so as to uphold the authority and dignity of the of the subordinate courts".**

If this were not so, it would be a major contradiction in the law between the Procedure and Practice in the subordinate courts and the High Court and the Court of Appeal. Whereas the practice in both in the High Court and the Court of Appeal would be pegged to the practice in the High Court of Justice in England, the practice in the subordinate courts would be both direct and instant, under Order XXXIX Rule 2A(2). The procedure prescribed by Order LII Rule 2 (Order 52, rule 2) of the Supreme Court Rules would be totally ignored in the subordinate courts.

Order 52 rule 2 of the Supreme Court Rules prescribes a two stage procedure-

- (a) An application ex parte for leave to bring an application for committal of any person, setting out the particulars prescribed and be supported by one affidavit,**
- (b) Notice of the application must be given to the Crown Office – in our case the Attorney General,**
- (c) If leave is refused, it may be renewed after 8 days.**
- (d) When leave is granted, the Application must be made by a motion and there be 8 clear days between the service of the notice and the date named for hearing.**
- (e) Leave lapses unless the motion is entered within 14 days after leave.**
- (f) The motion, the statement and affidavit in the application for leave must be served personally upon the person sought to be committed,**
- (g) Only a judge may dispense with service of the notice of the Motion if it or he thinks just to do."**

That procedure has been acknowledged by the Court of Appeal in **MWANGI MANGONDU VS NAIROBI CITY COUNCIL (Appeal No. 95 of 1988)**. In **RE: BREAMBLEVALE LTD [1969]3 ALL ER. 1062**, Lord Denning noted that contempt proceedings being an offence of a criminal character, it must be proved beyond reasonable doubt.

In **MUTIKA VS BAHARINI LTD [1985] K.L.R. 227** the Court Appeal stated that proof in

contempt of court cases in Kenya must be higher than on balance of probability almost but not exactly, beyond reasonable doubt.

These authorities conform to the provisions of section 5(2) of the Judicature Act, that an order of the High Court made by way of punishment for contempt of court shall be appealable as it were a conviction and sentence made in the exercise of the ordinary original jurisdiction of the High Court.

In this case, there is no dispute that the Appellant was fined for contempt of court on two previous occasions on being found guilty of breach of court orders under Order XXXIX rule 2A(2) of the Civil Procedure Rules. The appellant is not complaining about those two previous occasions. His appeal and complaint relates to conviction on a third occasion, an alleged breach of orders of 15.05.2003. The appellant denies having committed the breach it was incumbent upon the Respondent to prove such breach to a standard higher than the balance of probabilities and almost beyond reasonable doubt.

The Appellant complains however of an equally serious procedural lapse. The original orders of 4.4.2002 were never extracted, and served upon the appellant with a Penal Notice warning the appellant of the consequences of disobeying the said orders. Failure to prove service of the order endorsed with a penal notice was fatal to the Respondent's application, and it indeed ought to have been dismissed by the learned trial magistrate.

Contempt of court proceedings are criminal in nature. That is the effect of section 5(2) of the Judicature Act. The High Court acts in exercise of its original criminal jurisdiction. The subordinate courts do not have similar jurisdiction. The trial magistrate could not therefore make a finding that the Appellant was guilty of contempt because he had been guilty of contempt on two previous occasions. Every criminal offence must be separately charged and separately proved. The Appellant was certainly wrongly and unprocedurally punished for contempt of the same orders on two previous occasions. However, because the appellant is not complaining about those two previous occasions I will make no orders on those previous orders except to find that they too were with unprocedural land made without jurisdiction and therefore illegal.

In light of the foregoing discussion, there was not only no evidence of disobedience of the court ordered on 4.4.2002 and even if there was such evidence the learned trial magistrate had no jurisdiction to punish the appellant.

For all those reasons, the appeal herein is allowed, the orders of 4.09.2003 by the trial magistrate are set aside and I direct that the fine of Ksh.10,000/- be refunded to the applicant.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 17<sup>th</sup> day of July 2009

**M. J. ANYARA EMUKULE**

**JUDGE.**