



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**Criminal Appeal 343 of 2006**

**NEWTON KOGI KIBURI .....PLAINTIFF**

**VERSUS**

**MEENYE AND KIRIMA ADVOCATES .....DEFENDANT**

**RULING**

The background information is that, there exist Nairobi HCCC No. 4493 of 1993, orders were made in this file on 19<sup>th</sup> day of October 1994. The following orders were made:

- (1) That the application dated 11<sup>th</sup> October 1994 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant be and is hereby dismissed
- (2) That the monies lying with the firm of Meenye and Company Advocate be deposited within seven (7) days in a joint account in the names of Meenye and Company Advocate and Mutua Mboya NZ1ssi and Company Advocates with Barclays Bank Limited, Queensway Branch.
- (3) That the application dated 11<sup>th</sup> October 1994 be heard on 7<sup>th</sup> November 1994.
- (4) That the 1<sup>st</sup> and 2<sup>nd</sup> Dependants to pay to the plaintiff the cost of the application to be taxed and certified by the taxing officer of this court.

Apparently the orders were not obeyed prompting the applicant file Nairobi misc Application No 1574 of 2003 by way of chamber summons based under section 51 of the judicature Act and section 3A of the Civil Procedure Act, and order 52 rule 2 of the Supreme Court of Appeal of England. Among others it sought leave of court, to file applicant to the act commerce contempt of court proceedings against the respondent herein, Mr. G.K. Meeenye, and Mr. Mutua Mboya, the application dated 16<sup>th</sup> December 2003 and the same was heard inter parties on 28/5/2004.

The ruling was delivered by J.B. Ojwang Judge on 17<sup>th</sup> September 2004.

*“Although it was contested, it is observed at page 6 of the ruling, and leave is required to be granted ex parte and any objection to the same can only be challenged during the substantial hearing.”*

Armed with the leave granted, the applicant presented the application under review by way of notice of motion under section 5 of the Judicature Act, cap 8 laws of Kenya under section 2 rule 3 and 4 of the

supreme court rules of England and all other enabling provisions but it is dated 25<sup>th</sup> February 2005 and filed on 30<sup>th</sup> August 2005. The orders sought are 3 namely:

1. That this Honourable court hereby commit G.K. Meenye and Mutua Mboya, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein to prison for a maximum period of six (6) months for refusing to obey or continuing to disobey this Honourable court orders of 19<sup>th</sup> October 1994.
2. That this Honourable court, do hereby issue a writ of sequestration directed to a firm of licenced court brokers to sequestrate such real or personal property of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that is G.K. Meenye and Mutua Mboya for their continued flagrant disobedience of this Honourable court order of 19<sup>th</sup> October 1994.
3. That costs of this application be borne by 1<sup>st</sup> and 2<sup>nd</sup> Respondent in any event.

The grounds in support are set out in the body of the application, verifying affidavit, annexures, written skeleton arguments and case law. The major ones are:-

1. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent despite being fully aware of the terms of this Honourable Courts' order of the 19<sup>th</sup> October 2003 requesting them to deposit the money held by the said firm of Meenye and Mutua Advocates in HCCC No. 4493/1003 in a joint interest earning account in the names of Meenye and Kirima advocate and Mutua Mboya and NZissi advocates in the Barclays Bank Limited, queesway Branch Nairobi have nonetheless flagrantly disobeyed and are still disobeying the said orders.
2. They contented that the substantive application is proper because the application for leave was contested and allowed. A preliminary objection was raised to the application under review and the same dismissed.
3. The existence of the order, its service as well as the service of the penal notice is not in dispute.
4. The first Respondent has deponed in the replying affidavit that they shared out the money with the 2<sup>nd</sup> Respondent after negotiations which negotiations, the court was not aware of.
5. That the Deponement of the 2<sup>nd</sup> Respondent in the replying affidavit confirms that the order was not obeyed.
6. That the disobediences need to be vindicated as the contemnors are not remorseful, nor desirous of purging the contempt as in doing so the court would be protecting its authority, as ruling otherwise would be allowing the respondent interpreting the court order in disobedience.
7. The court is urged to aid in the recovery of the money subject of these proceeding.

The Respondent have opposed the application on the basis of the replying affidavit and skeleton written arguments. The salient features of the same are as follows.

1. In the further verifying affidavit, deponed by one Daniel Munene Kabogo on 14<sup>th</sup> December 2005 and filed on 20<sup>th</sup> December 2005. The central theme is that, the counsels negotiated and agreed to share the said money equally between the parties and the matter ended there. There is also the replying affidavit Francis M. Mutua sworn on 19<sup>th</sup> July 2007 whose central theme is that the applicant asked for and took away the entire file concerning the subject orders way seek in 1997 and at no time did the applicant ask him to comply with the said order.
2. That at the time he was on record, the order was not implemented and he does not know why as he does not have his file which he would handed over to the applicant.

In addition to the above, there are grounds set out in the written skeleton arguments. In respect to the 1<sup>st</sup> Respondent the following were stressed namely:-

1. That the 1<sup>st</sup> Respondent had instructions to act for known courts namely Daniel Munene Kabogo and Harison Kabogo Njuguna who gave him instruction to settle the matter in Nairobi HCCC 4493/1993 and at no time did the 1<sup>st</sup> Respondent act for the applicant.
2. That the instructions to settle the matter has been confirmed by one of his clients Daniel Munene Kabogo.
3. That the application was presented 10 years after the matter had been settled in HCCC 4493/93.
4. They contented that the application is an abuse of the due process of the court because :-

(a) The application is dated 25/2/2005 whilst the affidavit in support was sworn on 16<sup>th</sup> December 2003. Whereas the order was made on 19/10/94 and extracted on 5<sup>th</sup> March 2003 and served on 4<sup>th</sup> September 2003.

This court has given due consideration to the grounds for and against the application and makes the following observations:-

1. That the application for leave is supported by verifying affidavit with annexures which are duly commissioned. As noted earlier on the record herein above, the said application for leave to commence contempt of court, proceedings was granted by J.B. Ojwang Judge despite it having been contested, which leave was granted on 17/9/2004.
2. upon granting of the said leave it was not until 25<sup>th</sup> February 2005, a period of about five months and 9 days that the applicant, dated the application for contempt which application was filed on 30<sup>th</sup> August 2005, a period of 11 months and 13 days from the date of the granting of leave, and a period of 6 months and 5 days from the date of dating of the application.
3. It was observed from the body of the said application that the orders sought to be vindicated were issued on 19<sup>th</sup> day of October 1994. They were extracted on 5<sup>th</sup> March 2004 a period of 8 years and 14-15 days later.
4. From 5<sup>th</sup> March 2003 when the orders were extracted it was not until 1<sup>st</sup> September 2003, a period of 5 months and 26 days that the said orders were allegedly served as per the content of the R/S annexed to the application for leave annexure NNK3.
5. It is further observed that the documentations relied upon in support of the substantive application for contempt are either not commissioned, if they are being annexed for the first time, or the copies of the exhibit which had been annexed in support of the application for leave to apply for contempt proceedings.
6. The grounds in the body of the application and the verifying affidavit have not offered by any explanation of why it took the applicant such along time to seek vindication of the said orders.
7. The further replying affidavit of Daniel Munene Kabogo sworn on 14<sup>th</sup> December 2005 and filed on the 20<sup>th</sup> December 2005 also has annexures which are allegedly marked DMKI as per paragraph 2 of the said affidavit but which are not so MARKED or commissioned.
8. The replying affidavit by one Francis M. Mutua sworn on 19<sup>th</sup> July 2007 and filed the same date purports to be annexing documents marked in a bundle as MI which documents bear a stamp, signature, but are not numbered with the exhibit number nor dated.

9. In the said affidavit out of Francis M. Mutua, it is deponed vide paragraph 3 thereof that the application took away the advocates file, relating to the conduct of the matter whose orders are sought to be vindicated namely HCCC 4493/93 in the year 1997 and as such the said deponent cannot recall which precision what transpired in the matter unless he accesses the content of the file.

10. That there is no response from the applicant rebutting that deponent which is correct then it means that the applicant withdrew instructions from the firm of Francis M. Mutua long before he extracted the orders sought to be vindicated in fact 5,6 years later.

11. It is also to be observed that the affidavit of Daniel Kabogo depones that the proceedings in HCCC 4493/93 were compromised and or settled long before the orders sought to be vindicated were extracted and served. Despite this revelation the applicant has not applied and or caused the said proceedings in HCCC 4493/93 to be copied and annexed to a further affidavit in support of the application or invited the court to cause the same to be availed for the courts' perusal in order to ascertain the correct position of the file.

This court has given due consideration to the said observations and considered. There is the light of the rival arguments herein and it makes the following findings on the matter:-

1. As noted above, the supporting affidavit, the substantive application for contempt, the further replying affidavit by one Daniel Kabogo and the replying affidavit by Francis M. Mutua all have exhibits annexed to them which exhibits are not marked and or commissioned. Rule 9 of the oaths and statutory declarations provides:-

“All exhibits to affidavits shall be securely sealed there to under the seal of the commissioner and shall be marked with serial letters of identification. Although there is no penalty provided for in the said rule for non compliance, case law that this court has judicial notice of is to the effect that where there is non compliance with the said rule 9, the exhibits become surplusage, and are proper candidates for striking out or as popularly known for expunging this court does not hesitate in the ordering all the affected exhibits to be expunged.

2. Once the exhibits in support of the substantive application are expunged, they go to affect the paragraph of the affidavits to which they were purportedly annexed. In the case of the substantive application, this would affect paragraph 3, 5 and 6 of the verifying affidavit. These are the core paragraphs in support of the application. Once struck out there will be nothing to show the existence of the order sought to be vindicated, the existence of proof of the personal service of the said order on the alleged contemnors, proof of the existence of the proceedings in which the orders sought to be vindicated were made, without proof of existence of proceedings in which the orders alleged to be vindicated were made. The order sought to be vindicated having existed, extracted, and served as the contemnor there is no basis upon which contempt proceeding can be anchored.

3. The findings in number 1 and 2 above are sufficient to dispose off the entire proceedings herein, because once the substantive application scumbles, the opposing affidavit also tumbles as there will be nothing to oppose.

4. However for purposes of the record and for reasons of an order costs which has to be made in any event, it is necessary to make findings on the opposing deponement as well.

5. The affidavit of Daniel Munene Kabogo sworn on 14/12/2005 and filed on 20/2/2005 mentions, exhibits marked DMKI in a bundle. These too are not commissioned in accordance with rule 9 of the oaths and statutory declarations rules. Non compliance invites the inevitable wielding of the axe upon this paragraph which is expunged along side the entire paragraph 2. Once expunged the said affidavit remains an empty shell. Likewise the affidavit Francis M. Mutua has a bundle of exhibits attached to it. They are found in paragraph 5 of the affidavit. They bear a commission stamp and signature of an identified commissioner for oaths but they are not marked. These too have to suffer the inevitable wielding of the axe. Once expunged they go with paragraph 5. Once paragraph 5 is struck out, there is no

basis upon which the other deponents in paragraph 2, 3 and 4 can be anchored.

For the reasons given above, all the parties herein namely the applicant, as well as both respondents filed invalid papers for the reasons given, above, which are struckout for reasons given.

Each party to bear the it own costs.

Dated Read and delivered at Nairobi this 26<sup>th</sup> day of September 2008.

**NAMBUYE**

**JUDGE**