REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 235 of 2007

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE HIGH COURT OF KENYA AT NAIROBI HIGH COURT CIVIL CASE NO.2442 OF 1999, DUNCAN MANUEL MURIGI (AS A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND NGOVI MWASA) Versus KENYA RAILWAYS CORPORATION

BETWEEN

DUNCAN MANUEL MURIGI (A minor suing through his father

and next friend NGOVI MWASA……...……..APPLICANT

VERSUS

KENYA RAILWAYS CORPORATION…..…RESPONDENT

RULING

The application before court is the Chamber Summons dated 3rd December 2007. It is brought under the provisions of Order XXXIX rules 1 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Section 5 of the Judicature Act Cap 8 Laws of Kenya. The applicant is seeking the following orders:-

1. THAT the Honourable Court be pleased to grant the Applicant leave to seek orders to commit the Managing Director, Kenya Railways Corporation – the Respondent herein to Civil jail for contempt of court.

2. THAT the said Managing Director Kenya Railways Corporation be ordered to be kept in prison for a term not exceeding six months or for such other term as this Honourable court may deem just and fit to order.

3. THAT the Officer commanding Kenya Railways Police station be at liberty to assist the plaintiff to arrest, detain and imprison the Managing director of the Respondent.

4. THAT the costs of this application be provided for.

The application is supported by both the supporting affidavit sworn by the Applicant on the 3rd December 2007 and also a supplementary affidavit sworn by the Applicant on 25th June 2008. The applicant also relies on the skeletal arguments dated 2nd October 2008 and filed in court on 3rd October 2008. The Applicant was represented by **Mr Naikuni** Advocate.

The Respondent opposed application and filed a Notice of Preliminary Objection dated 7th June 2008 on the following grounds:

1. The application herein is fatally defective as it is expressed to invoke the power of the court under two mutually exclusive provisions of the law.

2. There has been no personal service of the order and penal notice that gives rise to the application dated 3rd December, 2007.

3. That no application seeking to commit the Managing Director of Kenya Railways Corporation has been filed pursuant to the leave granted by the court on 23rd April 2008.

The Respondent also relied on the replying affidavit of NDUVA MULI sworn on the 11 June 2008 and filed in court on the same date. The Respondent was represented by Mr Makori Advocate.

The Applicant submitted that on 5th October, 2007 the court made an express order against the Respondent to pay Kshs.12,684,032 plus interests being special damages awarded to the applicant in High court Civil Case No.2442 of 1999. The order was served on the 16th October 2007 but the contemnor has not obeyed the order. The Respondent filed a replying affidavit eight months after the application was filed.

The Applicant further submits that the Respondent as a State Corporation should lead by example by obeying court orders. The service was made on the corporation secretary.

The Respondent in opposition to the application contended that the application is defective because Order XXXIX Rule 1 of the Civil Procedure Rules and Section 5 of the Judicature Act Cap 8 of the Laws of Kenya are mutually exclusive. The Respondent cited ***NBI HCCC No.450 of 1995 ISSAC J WANJOHI & ANOTHER v ROSALINE MACHARIA where Bosire J*** (as he then was) stated as follows:-

"**In our case the Applicants presented their Act and Order XXXIX of the Civil Procedure Rules. As I have endeavoured to demonstrate different considerations apply depending on whether an application is brought under Section 5 or under Order XXXIX Rule 2 (3)…considering the foregoing, I am of the view and so hold that the manner in which the application was presented renders if fatally defective. To my mind, a breach of a court order under Order XXXIX Rules 1 and 2 may only be dealt with and punished under Order XXXIX Rule 2(3)"**.

The Respondent further contended that in the supplementary affidavit of the Applicant at paragraph 18, he has admitted that the Managing Director of the applicant has never been served. Order 52 Rule 3(1) of the Supreme Court practice Rules makes it mandatory for the contemnor to be served and failure to do so render the application defective. The explanation notes on the said Order 52 Rule 3(1) provides:-

"**No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if, the order is directed to a group of persons or a corporation, some appropriate member has been personally served. Furthermore the prosecutor must give each person sought to be committed the fullest notice that an application is being made for his committal by inserting his name in the Notice of**

Motion and serving personally upon him a copy of the notice and of the affidavit in support showing what is alleged against him…"

The Respondent also cited Halsbury Laws of England volume 9, 4th Edition at page 37 which deals with the necessity of personal service in the contempt of court proceedings and provides as follows:-

"**As a general rule no order of the court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. In case of an order requiring a person to do an act the copy must be so served before the expiration of the time within which he was required to do the act"**.

The Respondent also relied on the decision in ***RE BRAMBLEVALE LTD [1970] CH 128 at p 137 where Lord Denning MR*** stated as follows:-

"**A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. It is not prove by showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."**

The Respondent has also stated that the Respondent has not declined to satisfy the decree. The Managing Director has in his replying affidavit deponed why he has had difficulties in satisfying the decree. The Respondent has a pending application for review where it seeks to set aside the enhanced decree which arose from a consent which was made without instructions.

I have carefully considered the application before court, the submissions and the authorities cited before me. It is clear to the court that there exists an order which I made on the 5th October, 2007 in the following terms:

1. "THAT an order of mandamus be and is hereby issued compelling the Managing Director Kenya railways Corporation to pay to the Applicant Duncan Manuel Murigi an amount of Kshs 12,684,032 plus interest being special damages awarded to the Applicant in the ***High Court Civil Case No. 2442 of 1999, Duncan Manuel Murigi (a minor suing thro' his father and next friend, Ngori Mwasa v Kenya Railways Corporation)***

2. THAT the Respondent to pay for the costs of the application."

The above order is a lawful one and the person it is directed to must obey the same regardless of his opinion on its merits or otherwise. As submitted by the Applicant, the Respondent as a state Corporation must lead by example. If the orders of the court are not obeyed, everyone will result to the law of the jungle and anarchy will blossom whereof the end result shall be the collapse of the rule of law. Contempt undermines the authority and dignity of the court. The contempt proceedings are a vital tool for punishing those who deliberately disobey the court orders and put the court to disrepute. It is rather disturbing for the Respondent to purport not to obey the orders under the pretext that there is an application for review of the judgement in NBI HCCC No. 2442 of 1999 seeking to set aside the judgment. Counsels are expected to give the best advice to their clients on the import of the court orders and the consequences of disobeying the same. A pending application for review or setting aside judgment can not operate as a stay which is a basic principle of civil procedure and counsel are deemed to know. Counsel are also expected to play their rightful role instead of merely making noise. If counsel are casual in discharge of their duties in observing the rule of law, then they may keep blaming the courts. Counsel as well as courts must strictly and faithfully follow the law and there is no other easier route to justice. All must be committed to that course to ensure that the due process is not subverted.

The Respondent is aware of the court order and the fact is exhibited by the replying affidavit and the general instructions to its counsel on record to oppose the application herein. The Respondent's counsel has vehemently opposed the application and even raised the preliminary objection to the effect that the application is fatally defective. Although the Respondent argues that order XXXIX Rule 2(3) and section (5) of the Judicature Act are mutually exclusive and invoking both would make the application fatally

defective in my view, the argument is not convincing because the applicant can opt to go by the provisions in the Judicature Act and abandon the other provided the stated strict procedure of the contempt proceedings is adhered to.

As earlier submitted, the contempt proceedings are criminal in character and the standard of proof is much higher than in civil cases. The contemnor if the application is allowed stands to lose his liberty and go to prison. For the foregoing reason, the court must be certain that the contemnor is personally served with the order which he has disobeyed. Order 52 of the Supreme Court practice Rules make it mandatory for personal service failure to which would make the court to decline to grant the application.

The procedure in committal proceedings is also strict. Order 52 rule 92) makes mandatory for the state law office to be served at leave stage and it provides as follows:-

"**The Applicant must give notice of the application for leave not later than the proceeding day to the crown office and must at the same time lodge in that office copies of the statement and affidavit."**

In our context the Crown office would mean the Honourable Attorney general. There is absolutely no evidence that the Attorney General was given the requisite notice before the application for leave and further that he was served with copies of statement and affidavit at that stage. Failure to serve the Attorney General renders the committal proceedings fatally defective.

In this instant application, it is clear to the court that the contemnor was not personally served. The supporting affidavit sworn by the applicant on 3rd December, 2007 does not contain any averment that the contemnor was personally served. Likewise, the supplementary affidavit of the applicant sworn on the 25th June, 2008 does not also indicate personal service upon the contemnor. It only contains a general allegation at paragraph 4 which states as follows:-

"**That despite the aforesaid order having been properly served upon the Respondent, the said Respondent is in dire contempt and or breach of the same as he has refused, failed and or neglected to comply".**

There is absolutely no evidence of service upon the Managing Director of the Respondent or even any averments that there have been attempts to serve him which have been inhibited. Indeed the counsel for the applicant submitted that service was effected through the corporation secretary. The contemnor has deponed in the replying affidavit sworn on 11th June, 2008 as follows

"**That further I was never served with the subject order nor was there any attempt to serve the same upon my predecessor".**

In the proceedings of this nature the Applicant must prove personal service upon the contemnor in order to succeed. Where personal service is not possible due to deliberate evasion by the contemnor, the Applicant can after several attempts apply to the court for substituted service. The Applicant herein has not in any of the pleadings stated that there were attempts to serve the Managing Director which failed for any reasons.

Although, the contemnor is aware of the orders allegedly disobeyed, going by the evidence on record, he has not been personally served and the applicant cannot succeed in this application. The orders still stand and it is upon the Applicant to start afresh and effect personal service upon the Managing Director of the Respondent before commencing a similar application. The Applicant must adhere to the strict procedure laid down in order to succeed in the proceedings of this nature.

For the reasons I have given above, I find that the Applicant having failed to effect personal service upon the alleged contemnor, the application must fail and it is dismissed with no orders as to costs.

Dated and delivered at Nairobi on this 17th day of November, 2008

J G NYAMU

JUDGE