REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 578 OF 2006

SONALI KIMARI ZACHARIAH……..……..……PLAINTIFF

VERSUS

BINOY ZACHARIAH……..1ST DEFENDANT

SARA PREMA ZACHARIAH…….....…2ND DEFENDANT

ISMAIL MAWJI……..…….3RD DEFENDANT

RICKSHAW TRAVEL (KENYA) LIMITED……..4TH DEFENDANT

FLYING RICKSHAW LIMITED…….……5TH DEFENDANT

R U L I N G

By an application dated 17th November 2006, the plaintiff moved the court for the committal to civil jail of the 1st and 2nd defendants, on the grounds that they had disobeyed and were in breach of the orders which this court made on 27th October 2006.

The application is said to be brought pursuant to the provisions of Order 39 rule 2A(2) of the Civil Procedure Rules, and Section 5 of the Judicature Act.

In the face of the said application the 1st and 2nd defendants, who are the respondents thereto, issued a notice of preliminary objection. The following were the three grounds upon which the preliminary objection was founded;

"**1. THAT the application is incompetent and a nullity as the jurisdiction has not been properly invoked.**

2. THAT this Honourable Court lacks jurisdiction to entertain, determine the suit and the application as drawn and filed.

3 THAT the application has been brought in gross breach of the established practice of the Honourable court under Order 52 rule 4

(2) of the Rules of the Supreme Court which are applicable by dint of Section 5 of the

3.

4.

5. J

6.

7.

8.

9. udicature Act, Chapter 8 of the laws of Kenya."

When the Preliminary Objection was listed for directions before the Hon. Waweru J., on 7th December 2006, the learned judge was notified by both parties that they had agreed to have the objectio9n limited to only the ground numbered 3 above. It is thus my understanding that the grounds numbered 1 and 2 were abandoned.

It was submitted by the respondents that the Penal Notice, endorsed on the formal order, was faulty and thus cannot form the basis of contempt proceedings.

The two faults cited by the respondents were the absence of any addressee, and also the absence of any endorsement by the counsel giving the notice.

In support of the proposition that a penal notice ought to be addressed to a particular person and also that it should be endorsed by the advocate giving the notice, the respondent cited **NYAMODI OCHIENG NYAMOGO & ANOTHER V KENYA POSTS & TELECOMMUNICATIONS CORPORATION, CIVIL APPLICATION NO. NAI 264/93.**

At page 10 of their ruling in that case, the Court of Appeal noted as follows:

"**The relevant procedural obligation is succinctly stated in Order 45 rule 7/5 of the R.S.C. 1982 Ed as follows:**

'It is a necessary condition for the enforcement of a judgement or order under Rule 5 by way of sequestration or committal, that the copy of the judgement or order served under this Rule should have the requisite penal notice indorsed therein.'

And a couple of paragraphs later is given the form that an indorsement is required to take, in the following words in the case of a judgement or order requiring a person to abstain from doing an act:

'If you, within named A.B. disobey this judgement (or order) you will be liable to process of execution for the purpose of compelling you to obey the same'

A similar form with suitable alterations is given in the case of an order against a corporation."

As the law in that regard is well settled, and indeed was not challenged by the applicant, I find that the failure to address the Penal Notice to the respondents herein renders the application unsustainable, if it were to be pursued under the provision of the Judicature Act.

Other grounds upon which the application could not be sustained under the Judicature Act were as follows:

(a) The absence of any evidence that the alleged contemnors were served personally with the order which is in issue.

(b) The failure by the applicant to first obtain leave before commencing the proceedings for committal.

In the case of **NYAMOGO V. K P & T C** (supra), the learned judges said:

"**It is clear that the law in England does not render a mere knowledge of all the terms and directions of the court order and a disobedience thereof by an alleged contemnor as being enough to commit him for contempt. A further essential step is needed to be taken in the shape of indorsement of the penal consequences on the order served on the alleged contemnor."**

That is the law.

However, the applicant submitted that as the issue of service was one of evidence, she would make available affidavits of service, to prove that the respondents were served personally.

The law governing preliminary objections requires that there should either be consensus on the issues of fact which form the foundation for such objections, or alternatively that it be presumed that the facts as stated by the party against whom the objections are raised, are true.

In this case, it appears that there is a dispute as regards the issue of personal service. And, the applicant's counsel has stated from the bar, that there will be affidavits of service, showing that the respondents were served personally.

That being the position, the preliminary objection founded on the alleged failure to effect personal service cannot be sustained.

But, as the applicant did not contest the requirement that the indorsement was to have been addressed to a particular person, and also the requirement that the indorsement be signed by the advocate issuing the notice, I hold that those were defects on the face of the order issued on 27th October 2006.

At that juncture, the applicant made a decision to abandon Section 5 of the Judicature Act, as a basis for the application dated 17th November 2006. She said that she would henceforth only proceed with the application pursuant to the provisions of Order 39 rule 2A of the Civil Procedure Rules.

To my mind as the application had expressly stated, in its title, that it was being brought, inter alia, pursuant to the provisions of Section 5 of the Judicature Act, the decision by the applicant to abandon reliance upon the Judicature Act, must be deemed to be a concession that the preliminary objection, to that extent, is successful.

The applicant has submitted that the provisions of Order 39 Rule 2A of the Civil Procedure Rules provide a comprehensive and exclusive jurisdiction, which was separate and distinct from the jurisdiction pursuant to Section 5 of the Judicature Act.

However, the respondents contend that rules, such as Rule 2A of the Civil Procedure Rules cannot override substantive statute.

I understand the respondents to mean that although the said rule purports to give to the court, power to punish for contempt of court, that could not override the provisions of Section 5 of the Judicature Act, which stipulates that 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.

In JOSEPH MAINGI MUGWIKA V MUROROTO THUITA INVESTMENTS LTD & ANOTHER, MILIMANI HCCC NO. 1403 of 2001, the Hon. Mwera J. entertained an application

which had been brought pursuant to the provisions of Order 39 rule 2A (2) of the Civil Procedure Rules; Section 5 of the Judicature Act; Order 52 of the Supreme Court Practice Rules; and Section 3A of the Civil Procedure Act.

In the course of his ruling, the learned judge noted that:

"…… **the application was argued mainly under Order 39 Civil Procedure Rules, and indeed that is what Mr. Mugambi emphasized, no need is seen requiring making findings on the applicability of S. 5 of Judicature Act in the light of the practice and procedure in England." iHHHHH**

He then went on to find the defendant guilty of contempt.

That was on 27th September 2002.

And in the case of **ROYAL MEDIA V TELKOM KENYA [2001] 1 E.A 210,** the Hon. Visram J. held that there was nothing in the procedure which requires personal service of a penal notice on the alleged contemnor, that would prevent the court, upon information, from taking action against a party who has disobeyed an order of the court.

And whereas there is no doubt that under the provisions of Section 5 of the Judicature Act, the High Court and the Court of Appeal 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, in the case of **NYAMOGO & ANOTHER V KENYA POSTS & TELECOMMUNICATIONS CORPORATION** (supra), the Court of Appeal was not called upon to express any views as to whether or not Order 39 rule 2A of the Civil Procedure Rules were enforceable, independently of the Judicature Act.

In **MUTITIKA V BAHARINI FARM LTD [1985] KLR 227,** the Court of Appeal rejected an application for contempt of court. The said rejection was after a substantive hearing of the application.

But a noteable feature of that case is that the first application for the committal of the respondent, to civil jail, was made to the High Court under Order 39 rule 2 (3) and (5) of the Civil Procedure Rules.

If such a procedure was obviously wrong, I would have expected a comment to that effect, from the Court of Appeal, but no such comment is to be found in their ruling.

In all this, I am not determining, at this point in time, whether or not Order 39 rule 2A of the Civil Procedure Rules provides a comprehensive and exclusive jurisdiction, which was independent of the Judicature Act, on matters of contempt of court. All I am demonstrating is that the issue is arguable.

Therefore, to my mind, it would be improper to summarily strike out or dismiss the application on the ground that Order 39 rule 2A of the Civil Procedure Rules, was inapplicable.

Of course, I am fully alive to the reference which the applicant made on the penal notice, to the effect that the threatened contempt proceedings would be made pursuant to S. 5 of the Judicature Act. As to whether or not the said reference would be a bar to her now pursuing the application only pursuant to Order 39 rule 2A of the Civil Procedure Rules, is an issue which I believe ought only to be resolved after a substantive hearing.

To the extent that the preliminary objection has knocked out one-half of the grounds upon which the application was originally founded, the costs of the preliminary objection are awarded to the respondents. In other words, 50% of the costs are awarded to the respondents.

The other 50% of the costs of the preliminary objection shall abide the outcome of the substantive application.

FRED A. OCHIENG

JUDGE

DATED and DELIVERED at NAIROBI by Azangalala J. this 8th day of February 2007.

F. AZANGALALA

JUDGE