REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 260 of 2006

REPUBLIC ……..……..…..APPLICANT

V E R S U S

KENYA RAILWAYS CORPORATION ……RESPONDENT

EXPARTE:

JAMES GLENN RUSSEL LIMITED

Judgement

The exparte Applicant ***(wrongly described as "the Interested Party")*** in the Notice of Motion the subject of this Judgement obtained judgement in the sum of Kshs.6,740,032/90 against **RELI COOPERATIVE SAVINGS & CREDIT SOCIETY**, on 30th July, 2004, and a decree was issued to that effect on 18th January, 2005. The **RELI COOPERATIVE AND SAVINGS & CREDIT SOCIETY** *(Reli Sacco)* had no wherewithal to pay that sum of money or any part of it.

GARNISHEE ORDERS

By Chamber Summons dated 3rd February, 2006 the ex parte Applicant (as decree holder), sought and was granted Garnishee Orders on 6th April, 2006), under which all the subscriptions of the members of ***Reli Sacco***, collected but unremitted to the ***Sacco*** were attached to answer the Ex Parte Applicant's decree together with costs in the sum of Kshs.7,548,389.90 and kshs.207,220/= respectively.

The Garnishee Order was served upon the Respondent on 12th April, 2006, according to Exhibit No. LMO IV(a) attached to the Affidavit of Livingstone Maina Ombete sworn on 19th day of May, 2006. The Respondent failed to pay or to respond to the Garnishee Orders.

THE NOTICE TO REGISTRAR AND THE CHAMBER SUMMONS OF 19-05-2006 & NOTICE OF MOTION OF…

The Notice to the Registrar of the High Court is dated 18th May, 2006 and was served on him on that date. The Chamber Summons for leave was filed a day later on 19th May, 2006. That Chamber Summons came for hearing before Hon. Mr. Justice Nyamu on 26th May, 2006, and the ex parte Applicant was granted leave to bring judicial review proceedings for an order of mandamus. Pursuant to that purported leave, the ex Applicant filed a Notice of Motion on 29th May, 2006. My sister Lady Justice Wendoh directed that the Notice of Motion be served upon the Respondent. The Order was made

on 30th May, 2006.

On 26th June, 2006, I granted the orders of mandamus. That order was served upon both the Respondent the Respondent's Managing Director and its Corporation Secretary on 29th June, 2006. The order also contains a Penal Notice on the consequences of disobedience or refusal to honour in full the terms of the order or obstruction of its enforcement – that they will be liable to committal to jail for contempt of court.

In the event, the Respondent failed to honour the terms of the order of mandamus, and only the Corporation Secretary Mr. Maina appeared in Court at the hearing of the application for committal for contempt of the Court order to pay to the ex parte Applicant.

APPLICANT'S COUNSEL'S SUBMISSIONS

I have in essence set out the Applicant's Counsel's submissions in narrating the background to the Application for committal dated and filed on 20-07-2006.

It is that Mr. Vitalis Ong'ongoo, the Managing Director of Kenya Railways Corporation, and Mr. D.K. Maina, the Corporation's Secretary, who have defied this Court's order of mandamus given on 23rd June, 2006 and have shown no intention whatsoever of respecting, honouring and obeying the court order be committed to jail for contempt of court.

There is no dispute that the Respondent's officers have disobeyed the court's order to pay the decretal sum and costs as stated under the Garnishee Order made by my Senior brother Hon. Mr. Justice Osiemo on 28th March, 2006, and issued on 6th April, 2006. There is no dispute that the order of Mandamus made on 23rd June, 2006 was served upon the contemnors, Chief Officers, Vitalis Ongong'o the Managing Director, and to A.K. Maina, the Corporation Secretary of the Respondent. There is a regular and formal Affidavit of one Joseph M. Akuno to that effect sworn and filed in Court on 4th July, 2006. Despite this, apparent regularity, the Application for committal to jail was opposed by the Respondents, who through their Counsel Oraro & Company Advocates filed arguments to the contrary. It is these arguments upon which Mr. Omolo, instructed by Oraro & co. Advocates, relied upon during the hearing of the application for committal. As the arguments by the Applicant's Counse. L.M. Ombete and by the Respondent's counsel (Mr. Omolo) are not in sharp disagreement, I shall consider them together.

THE LEGAL ARGUMENTS

Both parties' Counsel are agreed that the law relating to contempt of court is as set out in Section 5 (1) of the Judicature Act Chapter 8, Laws of Kenya which says-

S. 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 applicable as if it were a conviction and sentence in the exercise of original jurisdiction of the High Court."

For completeness, the other provision which empowers the court to deal with cases of contempt is Order XXXIX rule 2 (3) of the Civil Procedure Rules which provides-

"***Rule 2 (3) – In cases of disobedience, or breach of any such terms, the Court granting an injunction may order the property of the person guilty of disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."***

This provision is not an issue here as it applies specifically to disobedience of orders of injunction and is cited merely for completeness of the consideration of the principles applicable to contempt of court orders.

Under Section 5(1) of the Judicature Act, the law and practice for contempt of court orders applicable in England is applicable in Kenya. English decisions on the subject are therefore of great persuasive authority. This position was restated in the case of ***MWANGI WANGONDU –VS- THE NAIROBI CITY COMMISSION*** (*Civil Appeal No. 95 of 1988).*

The procedure for committal for civil contempt of an order for enforcement is dealt with by order 45, rule 5 of the Rules of the Supreme Court. Rule 5 provides:-

"Where-

(a) a person required by a judgment or order to do an act within a time specified in the judgement or order refuses or neglects to do it within that time, or

(b) a person disobeys a judgment or order …. then, subject to the provisions of these rules, the judgement or order may be enforced by one or more of the following means -

(i) - (ii) (not in issue here),

(iii) – an order of committal against that person.

Order 45 rule 7 deals with service of copies of judgements or orders prerequisite to enforcement under rule 5. Rule 7 & (b) requires that-

"***an order shall not be enforced under rule 5 unless***

(a)……..(*not in issue****)***

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act."

In the case of ***BEESTON SHIPPING LTD. –VS. BABANAFTSA*** **[1985] I ALLER 923, at 926, Dunn L.J. said-**

"The expression '***so served***" means "***served personally."***

In the ***WANGONDU*** case (supra), the Court of Appeal observed the effect of the above captioned rules to be in general that -

"***no order of court requiring a person to do or refrain 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. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to do it."***

The Court of Appeal explained the importance of the requirement of personal service in that the Court will only punish as contempt a breach of an injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant (or respondent) has proper notice of the terms of the injunction and that breach of the injunction has been proved beyond reasonable doubt. The court of Appeal referred to the case of In re ***Bramblevalle Ltd.*** [1970] Ch. 128 where at page 137, allowing the appeal against the order or Megarry J. Lord Denning said-

"***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. To use the time – honoured phrase, it *must be proved beyond reasonable doubt.* ***It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him."***

In the present case, it is the Applicant's case that the officers of the Kenya Railways Corporation, a statutory corporation established under the Kenya Railways Corporation Act ***(Chapter 397, Laws of Kenya***) disobeyed a Court Order. Section 88 of the said Act prohibits the attachment of the Corporation's property and assets in the following terms-

"***88. Notwithstanding anything to the contrary in any law-***

(a) ***where any judgement or order has been obtained against the Corporation, no execution or attachment, or process in the nature thereof, shall be issued against the Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its operating equipment, machinery, fixtures or fittings****; but the managing director shall without delay, cause to be paid out of the revenue of the Corporation such amounts as may by the judgement or order, be awarded against* ***the Corporation to the person entitled thereto*** (*underlining mine*)

(b) no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distain property without the previous written permission of the Managing Director."

It is therefore the Applicant's case that the Chief Officer of the Corporation, namely, the Managing Director of the Corporation has failed and/ or neglected to obey a lawful order of court, without delay, cause to be paid out of the Corporation's revenue the amount by the garnishee order, required to be paid to the Applicant. The said order was duly served upon the said Managing Director, and the Corporation's Secretary, together with an endorsed penal notice as to the consequences of disobedience to that order. There is an Affidavit of service by one Joseph M. Anuko already referred to at the beginning of this Judgement sworn and filed on 4th July, 2006 confirming service upon the Managing Director and the Corporation Secretary of the Respondent. Reference in submissions of the Respondent's Counsel to the case of ***Rtd. General J.K. Mulinge –Vs- Lakestar Insurance Co. Ltd.*** (H.C.C. No. 1275 of 2001) and ***Kentainers Ltd. –Vs- V.M. Assani (H.C.C.C. No. 1625 of 2001)*** that the Affidavit of Service was contrary to Order XVIII rule 3 as it was not sworn by a person who had carried out the service of the order of mandamus, is not borne out by the facts. That authority is therefore of no avail to the Respondent's case.

Whereas contempt proceedings, being of a criminal character, each particular head of contempt must be specified with particularity, in this case, the charge of contempt is in respect of only one matter namely, neglect and refusal to pay the decretal sum in terms of the garnishee order, and the subsequent order of mandamus made on 23-06-2006 and issued on 27th June, 2006. The latter order were duly served upon the Respondent's officers and contained the penal notice. The Applicant therefore fulfilled the prerequisites for an order of committal under Section 5 (1) of the Judicature Act, and the authorities cited above.

The only issue left is whether or not a committal order should issue. If it were merely on the basis of the cited provisions of the law and the authorities, the orders of mandamus was duly issued with a penal notice, warning of the consequences of failure to comply with the terms thereof. It was served upon the Corporation's proper officers and they failed to obey, an order of committal should issue.

An order of committal shall however not issue because the proceedings herein have, to use a hackneyed expression, been "***flawed"*** from the inception. An order based upon a flawed procedure would be incompetent, and unenforceable. These are my reasons.

In the course of writing this Judgement, I looked over, and perused the entire proceedings, what I discovered horrified me. There has never been an application by the (decree holder) (***James Glenn***

Russel Limited) to bring or file judicial review proceedings herein. The purported leave granted by my brother was on the apparent understanding and assumption that the application was made by the decree holder. It was not. The Application for leave to bring judicial review proceedings for the order of mandamus was from the face of the record, made in the name of the Republic against the Respondent. This is contrary to the provisions of Order LIII, rule 1 (2) of the Civil Procedure rules made pursuant to the provisions of Section 9 (1) (a) of the Law Reform Act prescribing the procedure and fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is prayed for or sought.

Unfortunately unlike ordinary applications under the civil procedure rules where there are prescribed forms for bringing in various actions or applications, there are no equivalent forms in matters of judicial review. This has to do with the nature or character of the origin of the reliefs of certiorari, mandamus and prohibition. They were originally called ***prerogative Orders,*** and could only be granted by the Crown, that is the King or the Queen. I touched upon this history at page 15 of my Ruling in ***Republic -Vs- The Non-governmental Organizations Coordination Board, Ex Parte Norwegian People Aid (Applicant) and Integrated Programme for Health and Development*** (Interested Party (H.C. Misc. Application No. 173 of 2004) where I said-

"***It is accepted that upto the 18th December, 1956 when prerogative orders were abolished, by the coming into force of the Law Reform Act*** *(Cap. 26)****, all applications for those orders came in the name of the "Crown." They still do so in England as there is a Queen (meaning the Crown) though even there the orders are not since 1938 called '****prerogative orders****" when the Administration of Justice Act, was enacted and abolished the prerogative orders and referred to them as*** *"judicial review orders"* ***because they are granted by the High Court, and not the Crown. In Kenya the applications for judicial review are brought in the name of the Republic because it is the*** *Republic* ***which is challenging and righting the decisions of its officers or agencies, in the interest of the aggrieved applicants who came to the High Court, Ex parte (alone at first) and ensuring that the affected parties (****Interested parties****) are enjoined."***

Although I did excuse the Applicant in that case, and decided the application therein substantively, the situation here is different. It is different because the foundation of the contempt proceedings was improper, and no proceeding founded upon an improper foundation is itself proper. Such proceedings are void ***ab initio***.

In the circumstances therefore, contempt proceedings being ***criminal in character*** must have a firm and valid foundation. That foundation being lacking, the Applicant's application for contempt against the Chief Officers of the Kenya Railways Corporation cannot stand.

The Application dated and filed on 20th July, 2006 is therefore dismissed with costs.

Dated and delivered at Nairobi this 1st day of March, 2007.

M.J. ANYARA EMUKULE

JUDGE