



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**Civil Case 1276 of 2001**

**FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF**

**VERSUS**

**SHAMSERALI KARIM KURJI .....1<sup>ST</sup> DEFENDANT**

**ZAHERALI KARIM KURJI .....2<sup>ND</sup> DEFENDANT**

**RULING**

On the hearing of a Notice of Motion brought under Section 5 of the Judicature Act and Order 39 of the Civil Procedure Rules to commit the Defendants herein to civil jail, the Respondent took a Preliminary Objection that as no prior notice of these proceedings was given to the Attorney General, the same should be struck out in limine.

Learned counsel for the Objector relied on a ruling of Nyamu J in the case of ***Mwangi Kiunjuri v Wangethi Mwangi & others CC. No.1333 of 2003***. In that case an Originating Notice of Motion had been filed to commit the Respondents therein to civil jail for alleged contempt of court under the provisions of Section 5 of the Judicature Act Cap 8 of the Laws of Kenya and Order 52 of the Rules of the Supreme Court of England and Order 50 Rule 1 of the Civil Procedure Rules.

The provision of Section 5(1) referred to above is on the following terms:-

*“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.”*

In his ruling Mr. Justice Nyamu referred to Order 52 Rule 2 of the Rules of the Supreme Court of England and in particular sub rule 3 which requires that no later than the preceding day the Applicant must give notice of the application for leave to the Crown office of such application.

In those proceedings he held the order granting leave was defective as no notice had been given to the Attorney General before the application for leave was filed. He however, held that in that case matters of considerable public interest were involved.

The Supreme Court Rules refer in Order 52 rule 2 to applications to a Divisional Court but and in Order 52 rule 4 to applications to a court other than a Divisional court. In the latter case no notice is required to be given to the Crown office.

In this matter for the reasons I will give it is not necessary for me to decide whether notice of the application for leave was required to be served on the Attorney General. I would only say that in my view the High Court of Kenya is an equivalent court to the Queen Bench Division in England and that in Kenya no Divisional Court exists.

However, learned counsel for the Applicant relied on the case of Leonard Njoroge Kariuki v Muoroto Thuita Investment HCCC.No.1872 of 2001 in which Mr. Justice Mwera held that where an application for contempt was made pursuant to Order 39 of the Civil Procedure Rules, the Supreme Court Rules of England did not apply as the remedy under the Order was complete in itself. In making his decision he followed the decision of Bosire J (as he then was) in the case of Isaac Wanjohi & another v Macharia NRI HCCC 458/95 in which Bosire J stated:-

*“It would appear to me that applications for committal for contempt of court made in this country fall in the category of those applications in England made to courts other than the Divisional Courts. Consequently no leave would ordinarily be necessary; although it is common practice in Kenya, improperly so in my view, to commence committal proceedings in every case by an application. The authority for that cannot be possibly the Rules of the Supreme Court of England”.*

The proper procedure where an Order is sought pursuant to Order 39 Rule 2A (2) is for an application to be made by Chamber Summons supported by an affidavit seeking such orders as is required under the said rule. It is not necessary in such a case for an application for leave to file such an application to be made.

As Mr. Hira for the Applicant brings his application under Order 39 rule 2A (2), I disallow the preliminary objection with costs. I would add that as the application by Mr. Hira has in fact been made by Notice of Motion, I allow the same to be treated as a Chamber Summons. The matter will proceed.

Dated and Delivered at Nairobi this 30<sup>th</sup> Day of January, 2006.

**P. J. RANSLEY**

JUDGE