



REPUBLIC OF KENYA

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

MISC CIVIL APPLICATION NO 63 OF 2005

THE REPUBLIC
APPLICANT

VERSUS

THE DIVISIONAL CRIMINAL INVESTIGATIONS OFFICER, KIAMBU
RESPONDENT

EX-PARTE

- 1. DAVID NJOGU GACHANJA**
- 2. FAST LANE DEVELOPERS LIMITED**

RULING

The application dated 15th April 2001 seeks to commit Daniel Mutie the Divisional Criminal Investigation Officer (DCIO) Kiambu to prison for a maximum period of six (6) months for blatant disregard and disobedience of the order issued herein by the Honourable Mr Justice Makhandia on 19th January 2005. The order itself has been extracted and is exhibited as DHI. It is admitted by the alleged contemnor Mr Mutie that the order was duly served on him – see para 12 of his affidavit. The same order was the subject matter of earlier contempt proceedings filed on 25th January 2005 in which the respondent was on 15th March 2005 found guilty of contempt and fined Kshs5,000 or a sentence of 5 days in prison.

The order inter-alia required the DCIO not to impound the 2nd applicant motor vehicle registration number KAM 260Q as an alleged exhibit in Kiambu Senior Principal Magistrate's Court Criminal Case No 74/2005 *R v Daniel Njogu Gachanja*. The order also prohibited the said officer and/or other officials under his command from arbitrarily impounding and/or attaching any of the applicant's assets and property as alleged exhibits in Kiambu Senior Principal Magistrate's Court Criminal Case No 74 of 2005 *Republic v David Njogu Gachanja* and/or in respect of any matters relating to Mbo-I-Kamiti Farmers Company Ltd and or Olmorogi Ltd.

A mandamus order was sought to issue to compel the Divisional Criminal Investigations Officer, Kiambu to unconditionally release to the applicants the said motor vehicle registration number KAM 260Q together with the keys to the same.

In his affidavit in reply Mr Mutua deponed that at the time he was served with the court order on 21st January 2005 the motor vehicle was not in his possession the same having been stolen by the applicant and Kenneth Kariuki Gathungu hence his inability to obey the court order. He says that it was impossible

to obey the order because the vehicle was in the possession of the applicants and their advocate, and that it was only surrendered to the police on 28th January 2005. The applicant on the other hand have referred the court to the contents of the charges prepared by Mr Mutie as the heart of his case.

I have considered Mr Mutie's affidavits and the submissions of Oriri Onyango the learned State Counsel. I have also considered what Mr Kariuki advocate had to say, including his written submissions and oral submissions.

The courts evaluation of the evidence is that Mr Mutie did admit the contempt and was convicted and fined as stated above. He appears to have had the opportunity then of offering the version of the story he has now given to this court. I do not believe his version at all. Firstly he is a very senior police officer who ought to be in the forefront in obeying all court orders, no matter how he regards them and also to have them enforced. Secondly if as he says it was impossible to obey the orders nothing would have been easier than arranging for the mention of the case before the Judge who made the order to explain the impossibility of obeying the order. He did not do so but awaited the filing of this application.

This matter presents two notable problems to the court namely the part of the order concerning the release of the vehicle by way of a order of a mandamus order could not have been part of the stay order given in respect of the leave to file judicial review proceedings because such leave can never operate as stay in respect of the relief of mandamus. It can only apply to the reliefs of certiorari and prohibition only. See order 53 rule 1(4). The order as drafted appears to include the mandamus aspect. No such order of mandamus could have been given at leave stage as a matter of law. In addition there is no penal notice or any reference to it. All the same it is clear from the order that pending the final outcome of the Judicial review proceedings the officer was not to deal with issue of the vehicle KAM 260Q but notwithstanding the fact that he admits having been served with the order, he proceeded to frame charges against Kenneth Kariuki Gathungu in Senior Principal Magistrates Court Case No 1235 of 2005 see DN2 and DN3 – by alleging that he had stolen exhibit vide CR 211/250/04. This is a blatant abuse of an order of the court whose full contents he was aware of – the absence of any penal notice notwithstanding the fact that court orders take effect when it is shown their contents have been communicated to those immediately present during the proceedings and take effect as against the others when they are shown to have had knowledge of them. I find it unacceptable that a police officer can be allowed to subvert the cause of justice by deliberately ignoring the contents of a court order (regardless of what he thinks about its validity) – he can move to have it set aside but must obey it first). The officer here clearly obstructed the court by charging Kenneth Kariuki Gathungu in Senior Principal Magistrate's Court Case No 1235 of 2005.

As has been stated often in this field of law the object of contempt jurisdiction is not to punish or compensate the Judge's injured feelings but it is aimed at protecting the due administration of justice and maintenance of law and order. Oswald on contempt 2nd Ed p 12 has cited the celebrated case of Ex-parte Fernandez 30 LJ CP where Eric CJ observed that "the power to punish for contempt is vested in the judges not for their personal protection only, but for that of the public who have an interest in the due administration of Justice." Borrie and Lowe on contempt p319 has observed that Wilmot J in *R v ALMN*(1765) ... 243 AT PG 254, – had this to say.

"The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution, it is a necessary incident to every court of justice."

It is the view of this court that the rules of the law of contempt generally are aimed at upholding the effective administration of justice and the power to punish for contempt is akin to the inherent power of court to do justice in every situation before it. Without this realization and acknowledgement by the court, courts would be the poorer in their daily task of administering justice.

In the case before me I have taken into account the important holding by Cross J in the case of *Re B (FA)* an infant 1965 Ch 1112 at 1178-8 where he held:

"Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison and rules have been laid down to ensure that the alleged contemnor

knows clearly what is being alleged against him and has every opportunity to meet the allegations.”

I find that the disobedience in this case is a direct and intentional affront to the court itself and not necessarily the applicants herein – the court has to deal with one more case instead of the two the subject matter of the other criminal cases which give rise to judicial review. In the opinion of the court the objective outlined above shall have been defeated if the court were to allow an individual or any other person to obstruct its proceedings by a direct disobedience of its order.

In order to demonstrate the court’s commitment to the rule of law, to the administration of justice, and to the maintenance of law and order, this court thinks that all the above objectives would be better served by declining to give a committal order but instead to direct its power to the offending proceedings in order to vindicate the demands of justice. The committal order is accordingly declined and instead the court forthwith calls up the proceedings in Senior Principal Magistrate Court Case No 1235/2005 and brings them to this court and further forthwith quashes the proceedings including the charge sheet prepared contrary to the Court order and in so far as it makes reference to Kenneth Kariuki Gathungu. It is further ordered that the contemnor makes a written apology to this court to be filed in these proceedings within the next 30 minutes fairly which this matter is to be mentioned after the 30 minutes for further orders.

It is so ordered.

DATED and delivered at Nairobi this 10th day of March 2006.

J G NYAMU

JUDGE