



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Appli 160 of 2005**

**OSERO AND COMPANY ADVOCATES.....PLAINTIFF**

**VERSUS**

**LABHSONS LIMITED.....DEFENDANT**

**R U L I N G**

The applicant is a firm of advocates. They have moved the court for orders that the court do hold the respondent, Labhsons Limited, to be in contempt of court, and to have the court take such action as may be deemed fit, to restore and stamp its authority and dignity.

There is absolutely no doubt in my mind that any party who acts in such manner as constitutes contempt of court will have nobody to blame when the court orders his incarceration. Therefore, although in this case, the court was not specifically asked to order for the incarceration of the respondent, if he was found to be in contempt, in all probability, that would be the position.

Now, before the application could commence, the respondent raised a preliminary objection. The said objection was contained in a Notice dated 13<sup>th</sup> March 2006, which was worded as follows:

**“NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTICE that the respondent/client will prior to the hearing of the applicants application dated 3<sup>rd</sup> February 2006 raise and argue the following grounds of Preliminary Objection in lime (sic!) to the hearing of the same and urge the court to strike it out with costs to the client/respondent;**

**[A] THAT the application is devoid of merit, is fatally defective and an abuse of the process of this honourable court.**

**[B] THAT the application is fatally defective for failure to comply with the very provision of law it purports to be premised on.**

**[C] THAT the application fails to comply with the mandatory provisions of the Supreme Court of England/High Court of Justice in England.”**

When the Preliminary Objection was set to be canvassed, Mr. Amolo advocate was in court, holding

brief for Mr. Musyoki, advocate for the applicant. But, Mr. Amolo did not have instructions to oppose the Preliminary Objection, as his brief only extended so far as to inform the court that Mr. Musyoki would be available at 10.00 a.m. Even then, Mr. Musyoki was not in court by 10.00 a.m, and the preliminary objection was not opposed.

Before delving into the substance of the preliminary objection, I feel obliged to make it abundantly clear that the practice of advocates asking their colleagues to hold brief and to ask the court to accommodate their own particular preference as to timing, is most unwelcome. In my considered view such a practice is an attempt to control the court's diary, to suit ones convenience. For one, I will not entertain such practice.

Advocates need to organize their diaries to suit the convenience of the courts, and not vice versa. Of course, if the diaries of advocates could be synchronized with those of the court, that would be the ideal situation. But where such synchronization cannot be achieved, it would be presumptuous of an advocate to expect that the court will accommodate his wishes.

Parties should do well to remember that court sessions commence at 9.00 a.m. At that time, the presiding judge would go through the list of all the cases listed before him, mentioning each one, with a view to ascertaining if any case was not proceeding. The court would then allocate time to each of the cases that would be proceeding, subject always to the availability of time, on the particular day. It is during the process of allocation of time that any party or advocate may seek to persuade the court to accommodate him. But, to seek to pre-empt the time allocation, by getting someone to hold your brief, with specific indication as to your own preferences, is a practice which takes for granted both the court and other parties who are appearing before it, on that day.

Getting back to the issue at hand, the respondent did seek the striking out of the application, on the grounds that it did not comply with the relevant provisions of the law. First, it was pointed out that the provisions pursuant to which the application was to be moved, were wholly inapplicable. The reason for that is that the applicant purported to move the court pursuant to Sections 8 and 9 of the Judicature Act, as opposed to Section 5.

A reading of Section 8 reveals that it provides for the precedence of puisne judges and judges of appeal; whilst Section 9 provides for the retirement age for judges. Clearly therefore, those two statutory provisions were not relevant to an application for contempt. Therefore, the application would be a non-starter, as it purports to be founded on a wrong foundation.

In **IAN LESLIE CAMPBELL & ANOTHER V CANADIAN HUNGER FOUNDATION, CIVIL APPEAL NO. 56 of 1994**, the Court of Appeal unanimously pronounced itself as follows:

**“Indeed, if there was non-compliance with this elementary but mandatory procedural rule the entire contempt proceedings would be a nullity. In the case of *Nyamodi Ochieng Nyamogo & Another Vs. Kenya Posts & Telecommunications Corporation Civil Application No. NAI 264 of 1993*, this Court said:-**

**“Wangondu’s case had correctly set out the requisite procedural steps to be taken before a party could be called upon to answer a charge of disobedience of a court’s order. The consequences of a finding of a disobedience being penal, the party who calls upon the Court to make such a finding must show that he has himself complied strictly with the procedural requirements.”**

On the face of it, the application herein has not complied strictly with the statutory requirements. Accordingly, I uphold the preliminary objection, and strike out the application dated 3<sup>rd</sup> February 2006. The costs of the said application are awarded to the respondent.

However, for the avoidance of any doubt, I wish to make it abundantly clear that this order is not, in any way, a bar to the applicant bringing another application for contempt, if they are still desirous so to do. The only thing that they would have to bear in mind, should they decide to file a new application, is

the need to strictly comply with all the procedural and statutory requirements.

Dated and Delivered at Nairobi this 11<sup>th</sup> day of May 2006.

FRED A. OCHIENG

JUDGE