



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civ Appli 1574 of 2003**

**COMMITAL TO CIVIL JAIL FOR CONTEMPT OF COURT**

**AND**

**IN THE MATTER OF NAIROBI HCCC NO.4493**

**OF 1993**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**G.K MEENYE t/a MEENYE & KIRIMA, ADVOCATES (Formerly MEENYE & CO.  
ADVOCATES.....1<sup>ST</sup> RESPONDENT**

**MUTUA MBOYA t/a**

**MUTUA MBOYA & NZISSI ADVOCATES.....2<sup>ND</sup> RESPONDENT**

**EXPARTE: NEWTON KOGI KIBURI**

**RULING**

(1) On the 30<sup>th</sup> August, 2005, the Applicant filed a Notice of Motion dated the 25<sup>th</sup> February, 2005 under Section 5 of the Judicature Act [Cap. 8] and Order 52 rules 3 and 4 of the Supreme Court Rules of England seeking orders including—

“1. **THAT** this Honourable Court do hereby commit G.K Meenye and Mutua Mboya the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein to prison for a maximum period of six (6) months for refusing to obey and/or continuing to disobey this Honourable Court’s Order of 19<sup>th</sup> October 1994.”

(2) The Application came before me on the 29<sup>th</sup> March, 2006

but before I could hear it, I had to deal with a preliminary objection raised by the Second Respondent, notice of which he had given on the 29<sup>th</sup> March, 2006. The objection is that “the Applicant’s application dated 25<sup>th</sup> December (*sic*) 2005 ..... is defective and bad in law.”

(3) In his submissions Mr. Mutua Mboya, the Second Respondent who appeared in person, contended that the Applicant had failed to comply with the mandatory provisions of Order 53 rule 1(3) of the Civil Procedure Rules requiring the Applicant to give notice to the Registrar of the High Court of the application for leave (to commence contempt of court proceedings against the First and Second Respondents) not later than the day preceding the filing of the application for such leave. He says that failure to serve the notice renders the Motion incompetent and it should consequently be struck out with costs.

(4) In associating himself with the submissions made by Mr. Mutua, Mr. Wachira Nderitu, learned counsel for the First Respondent, urged that the application be struck out as in any event, the Applicant had not shown any good cause as to why the requirements of the law had been flagrantly breached.

(5) Mr. Ngugi, learned counsel for the Applicant, argued that the objection is misplaced and devoid of merit. He says the issue had been fully canvassed before Ojwang, Ag. J. (as he then was) who decided against the Respondents in a Ruling dated the 17<sup>th</sup> September, 2004. Counsel argued that in any event, and in the absence of any evidence that the notice to the Registrar was not served on the day preceding the filing of the application, the purported Preliminary Objection was improper as it also raises issues of fact and should accordingly be struck out.

(6) With respect, I accept the position taken by Mr. Ngugi that the objection is misconceived. Section 5(1) of the Judicature Act provides as follows:

“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.” (*Emphasis added.*)

At the time the application was filed on the 30<sup>th</sup> August, 2005, the practice and procedure for instituting committal proceedings were and are as set forth in Order 52 of the Supreme Court Rules of England. While the provisions of this Order are not dissimilar to the provisions of Order 53 of the Civil Procedure Rules, the latter, enacted pursuant to Section 9(1) of the Law Reform Act [Cap. 26] to deal specifically with applications for orders of mandamus, prohibition and certiorari, has no relevance whatsoever to applications for orders of committal for contempt of court.

(7) In his Ruling dated the 17<sup>th</sup> September, 2004, Ojwang, J.

granted leave to commence contempt of court proceedings (Order 52 rule 2 of the Supreme Court Rules of England) and the Applicant, and correctly in my view, proceeded to file this Application pursuant to such leave in accordance with Order 52 rule 3 of the English Rules. If, as they do, the Respondents contend that the Applicant failed to give notice to the Registrar (Order 52 rule 2(3)), then their proper course of action is not to seek to strike out the Notice of Motion dated the 25<sup>th</sup> February, 2005 but rather to move the court to set aside the leave granted by Ojwang, J. or to appeal against the Judge’s decision. The Respondents have taken neither of these courses of action.

(8) The result is that the Preliminary Objection dated the

28<sup>th</sup> March, 2006 and filed on the 29<sup>th</sup> March, 2006 fails and it is ordered that the same be and is hereby dismissed with costs to the Applicant assessed at K.Shs. 5,000/= to be shared equally by the Respondents and paid within the next twenty-one (21) days of the date of this Ruling and in default execution to issue.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of June, 2006.

**P. Kihara Kariuki**

**Judge**