REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1322 OF 2003

ABDULLAHI DADACHA DIMA
……..……..DEFENDANT/APPLICANT

VERSUS

ARID LANDS RESOURCE EXPLOITATION

& DEVELOPMENT
……..PLAINITIFF/RESPONDENT

RULING

A. BACKGROUND

The defendant's Notice of Motion dated and filed on 17th June, 2004 was brought under section 5 of the Judicature Act (Cap. 8), Order XXXIX rule 2(3) of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). This application, for which leave had been granted by the Honourable Mr. Justice Kihara Kariuki on 7th June, 2004 carried one main prayer:

> **THAT, this Honourable Court be pleased to order that Halakhe D. Waqho and Waqho Gufu be committed to civil jail for a period not exceeding six months for being in disobedience and/or breach of the Court's orders issued on 15th March,2004 by the Honourable Mr. Justice Lenaola.**

The grounds in support of the application are, firstly, that the respondent's chairman of the board, *Halakhe D. Waq* ho and one *Waqho Gufu* have in violation of the order issued on 15th March, 2004 commenced operation on the suit premises. Secondly, it is stated that the cash in bank (Kshs. 650,000/=) as at the time the order was issued on 15th March, 2004 had been withdrawn. Thirdly, it is stated that the said Halakhe D. Wakho and Wakho Gufu and/or their agents have interfered with the respondent's bank accounts, assets, documents, and personal/partner group funds worth Kshs.218,000/=. It is stated further that the said Halakhe D. Waqho and Waqho Gufu are aware of the Court orders but have wilfully and deliberately disobeyed the same, to meet their selfish ends.

The application is further supported by the affidavit of the defendant/applicant.

The essential elements in the depositions are as follows. On 15th March, 2994 the Honourable *Mr. Justice Lenaola* had issued orders for stay of execution, restraining the plaintiff/respondent's board

chairman, *Halakhe D. Waqho* and one Waqho Gufu from executing the orders issued on 19th March, 2004 by the Honourable Mr. Justice Nyamu pending the hearing and determination of the defendant/applicant's Notice of Motion application dated 10th March, 2004. Although the plaintiff/respondent's advocate was in Court when the said orders were made by the Honourable Mr.Justice Lenaola , service of the orders was still made upon *Mr.Halakhe D.* Waqho and Mr. Waqho Gufu , with the applicant personally accompanying the process server during service. The suit premises, contrary to the Court orders, have been operational through one Galgalo Waqho who is acting on the instructions of *Halakhe D. Waqho* . In the said process of operation, there has been interference with the respondent's cash in the bank, in the sum of Kshs. 650,000; with the respondent's assets – in the form of water boreholes and vehicle spare parts all worth Kshs. 2 million; with the respondent's documents such as certificates; and with partner-group cash amounting to Kshs. 218,000/=. Halakhe D. Waqho and Waqho Gufu have defied the Court orders of 15th March, 2004 which had been extended until 17th June, 2004 and have withdrawn cash from the bank and initiated action on certain contracts without authority.

On 24th June, 2004 grounds of objection were filed for the plaintiff/respondent, and two replying affidavits were also filed, one sworn by Waqho Gufu Guyo and the other by *Halakhe Waqho.*

Halakhe Waqho depones that he is aware that on 15th December, 2004 the Court ordered that the defendant be restrained from interfering with the plaintiff's operations, and that he do hand over certain assets to the plaintiff. One of the items to be handed over was office keys which had been in the custody of the defendant's counsel. The deponent averred that the defendant's advocate had not handed in the said keys, and so he wrote to the plaintiff's programme – co-ordinator requesting the provision of another key.The deponent avers that his advocates on record had advised him that replacement of the keys and opening of the doors to the plaintiff's premises was not in contempt of the Court orders. The deponent further avers that he has not withdrawn any money from the plaintiff's account. He deposes that he has not personally been served with any Court order or penal notice, though his advocates advise that they were, on 19th May, 2004 served with the order issued on 15th March, 2004 and a penal notice dated 12th May, 2004.

Waqho Gufu Guyo in his replying affidavit avers that both the office and the plaintiff's bank account had been fully operational prior to the issue of orders of the Court in respect of which contempt is claimed. He states that the Court has never issued any orders to restrain the operation of the plaintiff's bank account and its programmes.

He avers that the orders in question have been served upon him. Some of the depositions touch on matters that can be confirmed from the file. I have seen the affidavit of service sworn by a Court process server, *Joseph I. Mwanzi* , and dated 20th May 2004. This affidavit, the truthfulness of which has not been contested, indicates that personal service was effected upon Halakhe on 14th May, 2004; upon Waqho Gufu on 15th May, 2004; upon Galgalo Wakho on 15th May 2004; and upon their advocates, M/s Naikuni Ngaah & Co. on 19th May, 2004.

The relevant order issued on 15th March, 2004 which had been made by the

Honourable *Mr. Justice Lenaola* reads as follows:

> **"THAT there be a stay of the execution of the orders herein and all consequential orders and/or proceedings until the hearing of the matter inter partes on 30th March, 2004".**

Which orders were being stayed? The answer is that the orders being stayed were those made by the Honourable Mr. Justice Nyamu on 26th January, 2004 and issued by the Deputy Registrar on 19th March, 2004. The two relevant orders may be set out here:

> **"1. THAT the defendant … be and is hereby restrained by way of a temporary injunction from interfering in any way whatsoever with the management and functioning of the plaintiff's office and project at Sololo in Moyale District in the**

Republic of Kenya pending the hearing and determination of this suit.

"2. THAT the defendant ….., his agents, servants or any other person be and [are] hereby compelled to release to the plaintiff, the plaintiff's assets including the office keys, office files, two motor bikes, cash books, bank plates and cheque books to the plaintiff's bank account numbers 103 – 221 – 502 – 298; 103 – 221 – 502 – 295; and 103 – 221 – 502 – 352 at Kenya Commercial Bank, Moyale Branch".

Clearly, the earlier orders had required the defendant who is the applicant herein, to render certain things to the plaintiff and to desist from doing certain things. But now, in the later order (which is the basis of these contempt proceedings), those requirements of the earlier order were stayed. What did that mean? It could only have meant that the defendant, firstly, did not have, for the time being, to desist from doing that which had earlier been prohibited; and the defendant did not now, and for the time being, have to render anything to the plaintiff. So, if the plaintiff were then to demand what the defendant still desist from doing the acts in question, or that the defendant must render to the plaintiff the things which had been in dispute, then the plaintiff would be in contempt of the latest orders of the Court. It is necessary for the Court to establish whether the plaintiff was in breach of those orders.

After reading the replying affidavits sworn on **24th June, 2004** by *Halakhe D. Waqho and Waqho Gufu* , the defendant/applicant filed a further affidavit dated 5th July, 2004 by which he confirms that the Court orders dated 11th May, 2004, 21st April, 2004 and 15th March, 2004 and a penal notice dated 12th May, 2004 had been duly served upon Halakhe Didha , Waqho Gufu , and their advocates, M/s Nakuni Ngaah & Co. Advocates.

On the same 5th July, 2004 one Galma Sala Wario who describes himself as an accounts clerk with the plaintiff during the period November, 2003 – February, 2004 swore and filed an affidavit in support of the defendant's application. He avers that there had been a dispute between the defendant/applicant and the respondent, which had taken the form of HCCC No. 1322 of2003 and which led to orders by the Court, that the coordinator, Abdullahi Dadacha Dima (the applicant), do hand over his keys to his advocates. On 13th May, 2004 while the deponent was in Moyale, Mr. Galgalo Waqho who was the acting co-ordinator, paid the deponent's pending dues and handed over to him certain assets which had been lying in the Moyale office, apart from confirming to the deponent that the plaintiff's Sololo office was already in operation. The deponent avers that he left with the acting co-ordinator the sum of Kshs.218,000/= which belonged to some key stakeholders and partner-groups. This money was left for temporary custody. It was deponed that the said sum of Kshs.218,000/= had not been accounted for and was now being demanded by its owners from the defendant/applicant.

B. SUBMISSIONS BY COUNSEL

On the first day of hearing, on 8th July, 2004 Mr. Ngaah for the plaintiff called for the striking out of the two last affidavits filed to support the applicant's case – because they were belated and so did not comply with the time limits prescribed by the Duty Judge who had allowed their filing. Ms Githinji for the applicant raised several excuses: the last day of filing was a Friday, 2nd July, 2004; but filing was done soon thereafter, on Monday, 5th July, 2004; the deponents had to travel a long distance from Moyale to Nairobi – and this caused some delay.

Ms Githinji prayed for the application of the Court's discretion, to allow the two affidavits to stand. This was not an unprecedented situation, she urged, and cited **Isaac J. Wanjohi & Another v. Rosaline Macharia** , HCCC No. 450 of 1995. She relied on the following passage from the ruling of the Honourable Mr. Justice Bosire (as he then was) (p.12):

> **"The guiding principle appears to me to be that the Court in deciding whether or not proceedings are incompetent must consider whether the rules of Court flouted are mandatory or directory. If mandatory it would have no jurisdiction to consider a matter. If directory it must proceed to consider whether any prejudice has been occasioned to either party and to strike out or dismiss the proceedings**

for noncompliance with rules of Court if prejudice has been caused".

To the same effect counsel relied on the case**, Wanadege Co -operative Savings & Credit Society v**. **Tom Musili &** Five Others , HCCC No. 1633 of 2000, in which the learned judge, Kasanga Mulwa, J says p.5):

"……. Learned counsel Mr. Okundi also submitted that the present application should have been made by Notice of Motion and not by Chamber Summons as required under Order XXXIX rules 4 and 9 and is therefore defective. The [less I say] about this, the better as I consider such a submission succinctly answered in Boyce v. Gathure [1969] E.A 385. The fact that it should have been in one way and not another should not be used as a device, a mask to shield…. the eyes of the Courts [from] the grievances [of], or remedies sought by litigants."

After considering these submissions, I made an order in the following terms:

"Strictly speaking, Mr. Ngaah is right and the two affidavits could have been struck out.

"However, I will exercise the powers of this Court for ensuring proper trial, set out under section 3A of the Civil Procedure Act (Cap.21), to allow the two affidavits to be relied upon."

Learned counsel, Ms. Githinji proceeded to submit that the two directors of the plaintiff be committed to jail for disobeying Court orders. She contended that the respondents had acted in violation of the Court's orders by commencing operations when an order for stay was in place. She contended that the respondents had advanced their contempt by misusing funds, and by interfering with the operations of the plaintiff nongovernmental organization.

Mr. Ngaah for the plaintiff/respondent doubted whe*ther it was in order for the applicant to bring this application under Order XXXIX* . He considered that Order XXXIX rule 2(3) applied only where some property had been attached, and it had already been established that there is contempt of Court; but in the instant case nobody had been found to be in contempt; and no properly had been attached.

Both counsel, with due respect, had not properly identified the specific provisions of the law in force. Order XXXIX rule 2(3) was deleted by L.N. 36 of 2000. That provision when it was in force had thus provided:

"In cases of disobedience, or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such 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".

Although that provision still appears in the Civil Procedure Rules, its correct

numbering now is Order XXXIX, rule 2A(2).

Subject to the foregoing qualification, the purpose of the provision in question should, I think, be related to merits rather than to mere form. In this regard, I would take it t*hat a respondent found to be in violation of an injunctive order issued by the Court, would be liable to the consequences so clearly set out in Order XXXIX, rule 2A(2).* But in this regard, learned counsel, Mr. Ngaah has, I think, correctly submitted that the application of the sanctions under that rule would apply only if the applicant would have previously secured orders of injunction issued by the Court . That would mean, in the instant case, that it will be a relevant question whether the defendant/applicant had indeed secured such orders of

injunction. If he has not, then he cannot seek to rely on Order XXXIX, rule 2A(2). Mr. Ngaah submitted that the applicant's complaint appears to be against claimed disobedience to an order of stay of execution which had been made under Order *XLI, rule 4; but such an order is different from an order of injunction* . In an injunction, counsel submitted, the order is quite specific as to what a party is to do or not do.

Counsel submitted, and I think, quite meritoriously, that where the contravention alleged is against a stay order , then the applicable law is section 5(2) of the Judicature Act (Cap.8). That section has a cross-reference to the practices of the Supreme Court of England; and so under the existing regime of law ***(which no doubt, highly merits reform so as to establish for Kenya an unambiguous and independent procedure for upholding the constitutional authority of Court orders)***, a matter such as the instant one must be considered in the context of rule 52(2) of the Supreme Court Practice Rules in England.Under these rules, the applicant must begin by giving notice to the High Court Registrar, accompanying the same with a statutory sta tement and a verifying affidavit , before seeking the Court's leave to file a motion as the main part of the contempt of Court proceedings.

Mr. Ngaah submitted that, insofar as the applicant had filed no statutory notice, his application has not complied with the law and, consequently, was fatally defective.

Counsel submitted that it was essential to ensure compliance with the detailed procedures aforementioned, for the reason that the liberty of the individual would be called in question. In support of this principle the case, Chiltern District Council v. Keane [1985] 1WLR 619 was cited. In that case (p.621) Sir John Donaldson, M.R. thus stated:

> **"…… where the liberty of the subject is involved, this court has time and again asserted that the procedural rules applicable must be strictly complied with."**

Such procedure entailed placing the subject in such a position as to be able to meet the complaint against him. In the words of the learned Master of the Rolls (p.622):

> **"The notice of motion was personally served on Mr. Keane, but it only stated the grounds of the application to commit in general terms. It recited the undertaking and the injunction, and then alleged that there had been a breach. This, on the authorities, is not sufficient. It has been said in many cases that what is required is that the person alleged to be in contempt shall know, with sufficient *particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of Court*".**

By rule 52(2) of the Supreme Court Rules, as counsel noted, personal service is required. In his view such service was not effected, though as I have already noted, the records show that personal service had been effected in the present matter. I think the only way counsel for the respondent could dispute this matter would have been by seeking leave to cross-examine the process server.

Mr. Ngaah raised other points some of which clearly subtract from the force of the defendant's application : (i) when exactly was the Court order served? (ii) what, specifically, does the order say? (iii) when was the order issued? (iv) what is the alleged breach? (v) when was the alleged breach?

Counsel noted that the application indicates the 12th of March, 2004 as the date of issue of the order in question; yet it is clear that issuance was by the Deputy Registrar, and it was on 15th March, 2004.

Counsel then cites the contents of order number 2 -

> **"THAT there be [a] stay of the execution of the orders herein and all consequential orders, and/or proceedings until the hearing and determination of this application."**

The status quo thereby ordered is to remain until 30th March, 2004 at 2.30 p.m. when the application would be heard inter partes . Counsel remarks, and quite rightly, with respect, that the defendant's application tends to mislead the Court as it does not give an account of what happened in Court on 30th March, 2004 at 2.30 p.m. That date and time *would mark the end of the life of the orde*rs in question, unless further orders were made then to extend them.

From the record, there was a mention of the matter before the Deputy Registrar on 30th March, 2004 . The only order made on that occasion was as follows:

> **"Case fixed for mention on 2nd April, 2004 before the Honourable Duty Judge at 9.00 a.m. Notice to issue."**

Counsel further noted that the other orders also referred to in the application were taken **ex parte** on *15th April, 2004* when the learned judge, the Honourable Mr. Justice Lenaola recorded that interim orders be extended; but he had not reinstated the orders which had lapsed on 30 th March, 2004. Mr. Ngaah submitted, I think correctly, that the applicant should have sought the reinstatement of the orders which had not been extended. He submitted further, and quite correctly, with respect, that in an application for stay of execution of Court orders, it must be specified with clarity which particular orders are being stayed . Counsel further submitted, and quite rightly, with respect, that an order of stay where it is granted, must state what must be done and what must not be done.

Authority for these submissions is to be found in the Court of Appeal decision in **Gatharia K. Mutitika & 2 others v. Baharini Farm Ltd (now called Nakuru House Development Co. Ltd)** (1982 – 1988) 1 KAR 863, the head-note of which reads in part as follows (pp.863-864):

> **"The order of stay did not state in precise terms, as it ought to have done, the rights and obligations of the parties during the period of the stay.**
>
> **"In cases of alleged contempt, the breach of which the alleged contemnor is cited must not only be precisely defined but also proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt.**
>
> **"Having regard to the imprecise terms of the order and the high standard of proof required, it was not possible for the Court to conclude that the actions of the four shareholders amounted to a constructive eviction of the applicants, and therefore to a breach of the order.**"

On the basis of the *Mutitika* case counsel submitted that there were no clear orders in the instant proceedings, which the respondents could be held to have been in breach of. It must be shown, he further submitted, that the respondents did ignore precisely – *defined rights and obligations stated in a particular Court order;* and so breach would not arise where there was no precise statement of obligations; and consequently there would, in those circumstances, be no demonstration of contempt.

Mr. Ngaah challenged the defendant's application on yet another ground. From the affidavit of service sworn by Joseph I. Mwanzi on 20th May, 2004 it was clear that only one penal notice had been served, yet the application was seeking to commit two different persons. It was not even clear who, between the two alleged contemnors, had been served with the penal notice. Counsel submitted, quite rightly, with respect, that it was essential to serve every alleged contemnor with a penal notice. U nder Order 45, rule 7(2) of the Supreme Court Rules in England, the Court Order is required to carry a prominent indication that disobedience shall be an act of contempt.

Mr. Ngaah also noted that the orders said to have been disobeyed were served long after the impugned operations had begun. Besides, some of the actions of the respondents being condemned have not been set out in any detail. The claim that the alleged contemnors had interfered in the affairs of the respondent has no supporting detail, just as there is no evidence that the respondents had indeed

withdrawn moneys that belong to the non-governmental organization. Counsel again relied on the Mutitika case to support the argument that facts alleged in contempt cases must be proved. Also relied on in this regard is **Re Bramblevale Ltd** [1969] 3 ALL E.R. 1062. Two passages from this case have been relied on. **Lord Denning M.R** . remarked (p.106):

> **"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. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence**".

I should note that the statements of the learned Master of the Rolls are not to be taken at face value. The clear nuance running through those words, I believe, is consistent with the generally accepted position in this country (as expressed, for example, in the Mutitika case), namely that proof in contempt proceedings is above the balance of probabilities but below the proof in criminal cases w hich require the "beyond reasonable doubt" standard.

In **Re Bramblevale , Winn, L.J.** stated the following principle which will be relevant in the determination of the instant matter (p.106):

> **"……. I think [the appellant] deserved the imprisonment that he has suffered if only on the technical ground that he was late in producing some of the documents. I suspect that his deserved imprisonment can be based more broadly than on that ground alone. However, the reality of the matter is that the learned judge sent him to prison on the strength of a presumption, known technically as a presumption of fact – praesumptio facti – that a state of things proved to exist at a certain date must be taken, in the absence of contrary evidence, to have continued to exist, for at any rate, a period beyond that date reasonable in all the circumstances. That is a presumption which is occasionally useful as a pragmatic weapon in the absence of evidence**.***However, here it came directly in conflict with another presumption, to which the law of this country attaches quite considerable importance, which is the presumption that a man is innocent until he is proved to be guilty….. I agree that this appeal should be allowed".***

On the basis of the principles in Re Bramblevale , counsel submitted that committal could in any case be only a last resort, and before getting there, other remedies ought to be pursued. In support of this point Mr. Ngaah cited the Ugandan High Court case, **Kasturilal Laroya v. Mityana Staple Cotton Co. Ltd & Anothe r** [1958] E.A. 194 where ***Sir Audley McKisack, C.J.*** adopted the principle (p.196) set out in **Re Maria Annie Davies** (1) (1888), 21 Q.B.D. 236 (at p.239):

> **"Recourse ought not to be had to [the] process of contempt in aid of a civil remedy where there is any ot her method of doing justice . The observations of the Master of the Rolls in the case of Re Clement seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be mostly jealously and carefully watched , and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness …… I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted'….."**

Mr. Ngaah submitted that whereas in the Laroya case there had i ndeed been a contempt but with an alternative remedy available , in the instant case there had been no proof of contempt, and in any case, an alternative remedy is available . The question of merits is that the plaintiff claims that the defendant was not its employee; the defendant claims to have been the victim of an unlawful dismissal.

Counsel contends that the defendant will suffer no prejudice if the plaintiff continues to operate. He submits that should it be the case that the defendant was unlawfully dismissed by the plaintiff, then the defendant should be satisfied with pursuing a claim for damages.

Counsel submitted that the application is devoid of merits, and is simply an abuse of the process of the Court. In his submission, the defendant has a mind to cause prolonged delay in the resolution of the main dispute, while he in the meantime enjoys what is seen as Court orders.

Ms Githinji who should have made her reply to conclude the hearing, now applied for an adjournment. She urged that it was in the interests of justice than an additional one hour be found for her on another day, to make her response – which application was opposed by Mr. Ngaah for the reason that there had been lateness on the part of the applicant even when the hearing date had been taken by consent. Acting on the basis, as I perceived it, that this application carried the specific significance that it would "lead to the clarification of important points of law regarding applications under the High Court's contempt jurisdiction", I allowed adjournment to a further day of hearing, which hearing took place on 6th October, 2004.

Ms Githinji expressed doubts as to the validity of the respondents' objection to the manner in which they had received service. On the mode of invoking the High Court's contempt jurisdiction, learned counsel considered the most relevant local authority to be Isaac J. Wanjohi and Isaiah Karindi Wambugu Mutonyi v. Rosaline Macharia HCCC No. 450 of 1995 which was decided by the Honourable Mr. Justice Bosire (as he then was). The relevant part of the ruling, I believe, is on pages 3 – 4 where the learned judge remarks:

> **"The applicants' legal advisers seem to be unsure as too are many other legal counsel in this country, as to the procedure to be followed in moving the Court in the event of a breach of an injunction order made pursuant to the provisions of O. XXXIX [of the] Civil Procedure Rules. The power donated to the Court by O. XXXIX rule 2(3) …. is independent of the provisions of s.5 of the Judicature Act. A party aggrieved by the disobedience of an injunction order made under O. XXXIX rule 1 or 2 [of the] Civil Procedure Rules appears to be excluded from invoking the jurisdiction under s.5 above. The power donated by s.5 is only exercisable by either the High Court or[the] Court of appeal. Subordinate Courts have no power to punish for contempt under that section."The power donated by O.XXXIX rule 2(3) … is basically available to the Court which granted the order respecting which breach is complained of. A subordinate Court would therefore exercise powers under that rule to deal with breach of its orders made under it. So in exercising powers under that rule there is no requirement for leave to bring an application for contempt ".**

The learned judge then asked the question whether a breach of an order of injunction made under O.XXXIX [of the] Civil Procedure Rules is punishable under section 5 of the Judicature act. His answer was that "the obligations of an applicant in an application expressed to be brought under s. 5 of the Judicature Act are set out in Orders 45 and 52 of the Rules of the Supreme Court of England" (p.4). Order 52 rule 2 sets out the procedure before a Divisional Court – a term defined under section 66 of the Supreme Court Act, 1981 of England as a Court constituted, by special statutory arrangements applicable in that country, of not less than two judges. Before such specially constituted benches, an application for leave is to precede the filing of an application for committa l for contempt of Court . But in the case of benches not being Divisional Courts, the applicable procedure is set out in Order 52 rule 4. In such a case, what is required is that an application be made by motion on notice , and no prior leave is required.

Ms Githinji in urging that the applicant did not need to give prior notice before filing the instant application, made efforts to draw analogies between the Kenyan judicial practice and the arrangement of Courts in England. This is a very confusing matter as the special mode of arrangement of the superior Courts in England is an aspect of the history of judicial institutions in that country which is in no way replicated in Kenya, notwithstanding that section 5 of the Judicature act (Cap. 8) stipulates:

> **"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…….".**

Mr. Justice Bosire in the **Isaac Wanjohi** case did note that the said "High Court of Justice in England" itself is only one of three Divisions (the other two being the Court of Appeal and the Crown Court), quite apart from the fact that it is also divided into three Divisions - the Chancery, the Queen's Bench Division, and the Family Division.

In the view of the learned judge, those High Court benches in Kenya which involve two or more judges may be regarded as equivalent to a Divisional Court in England, for purposes of application of the law of contempt. While this is, with respect, a plausible interpretation, the situation, I think, remains so uncertain as to be an unreliable basis for the exercise of the critically important contempt jurisdiction by the Courts of Kenya. Only by a simply and clearly – stated provision of the law can Kenya's Courts uphold the constitutional authority of the orders they make on a daily basis.

The Honourable Mr. Justice Bosire considered that "applications for committal for contempt made in this country fall in the category of those applications [which] in England are made to Courts other than the Divisional Courts"; and so he went further to opine that **: "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 for leave to bring the application. The authority for that cannot possibly be the Rules of the Supreme Court of England."**

The special merit in those observations, as I see it, is that they are a call for much greate r simplicity in Kenya's law of contempt ; and in my final orders I will direct that this matter be brought to the attention of the State Law Office and the Kenya Law Reform Commission, for consideration and necessary action.

For the limited purposes of the present application, I cannot say I have been persuaded by the submission of learned counsel, Ms. Githinji , that since the Court hearing this application did not comprise at least two Judges, this by itself rendered it not a "Divisional Court" and that ac cordingly, the practice – if mere practice it is – of prior notice before the filing of the application was unnecessary . In my view, however, this is going to be no more than an academic point, in view of the special facts of the instant matter.

Learned Counsel, Ms. Githinji submitted that the application has been brought in accordance with the applicable law, served personally, with penal notice, and with an affidavit of service filed in Court. She stated that it would not have been possible for the applicant to proceed on the basis of an injunction application ; instead, account should be taken of Court orders which had been extended from time to time by consent. Counsel invoked in support of her contention a passage in a case also relied upon by the respondent, **Gatharia Mutitika & 2 Others v. Baharini Farm Ltd** . (1982 – 88) 1 KAR 863 (at p. 867 – **Hancox, J.A.):**

> **"It is perfectly clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or to interfere with the stay, is liable to be committed for contempt ….. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the Court at naught".**

To the submission by counsel for the respondents that the orders which are the basis of the instant application lacked particularity in the form indicated in the case, **Chiltern District Council v. Keane** [1985] 1 W.L.R. Ms Githinji maintained that the orders were specific enough, and their items of reference were offices, and interference with accounts . Learned counsel submitted that the respondents had disobeyed Court orders and while in the course of disobedience, have grossly interfered with the work of the applicant.

C. FINAL ANALYSIS, ORDERS AND DIRECTIONS

As already noted, Order XXXIX rule 2A(2), which is about "injunctions to restrain repetition or continuance of breach", provides as follows:

> **"In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such 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."**

So, for injunctions, the law has clear provisions regarding conduct in contempt of Court. What is the position regarding other orders of the Court? Quite clearly, all orders of the Court must be obeyed, so as to uphold the constitutional authority of the Court .Yet the law as it stands mentions injunctions , but is silent on other orders. This can only be regarded as an omission in the operative body of law, and something to be urgently addressed by the authorities responsible for law reform .

For injunctions, the requisite remedy is directly available under Order XXXIX, rule 2A(2). It should be quite clear, I think that the enforcement of that provision has no reference to the rules of th e Supreme Court of England , since Order XXXIX is selfsufficient.

Insofar as other matters which may be the subject of contempt proceedings are not provided for in a similar manner, what legal procedure is to be followed so as to invoke the Court's contem pt jurisdiction in respect of them? As the law stands today, I would agree with counsel for the respondent that, in such matters one would have to resort to section 5 of the Judicature Act (Cap. 8), as a basis for invoking the Court's contempt jurisdiction.

It was not clearly argued before me that stay-of-execution orders, where they are validly in place, may be equated with injunction orders and made the subject of redress under Order XXXIX rule 2A(2). I found it necessary to resort to **Black's Law Dictionary,** 7th ed (1999) for a definition of injunction , which is as follows (p.788):

> **"A Court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted."**

From this definition I get the impression that a plea for orders of injunction must be made as such, as there are conditions to be satisfied before they are granted . And in that case, I would draw the conclusion that other than in very exceptional circumstances specified by the Court, ordinary stay orders cannot be placed on the same footing as orders of injunction .

I must, therefore, hold that if the stay orders which are the subject of the present proceedings were validly in place and had been disobeyed, then the applicant should have proceeded under section 5 of the Judicature Act (Cap. 8). Since it is acknowledged that the applicant had not secured any orders of injunction , I must hold that it was inappropriate for him to proceed by virtue of Order XXXIX, in his application for contempt measures to be taken by the Court.

Of relevance in this respect are the principles governing the exercise of the contempt jurisdiction, which principles are clearly stated in cases such as Chiltern **District Council v Keane** [1985] 1 WLR 619: strict compliance with the procedural rules is required since the liberty o f the individual is at stake .

It is clear that quite a number of orders were made by the Court, some of them appearing to extend existing ones. Yet it is no less clear that the original order itself is problematic , both in terms of its identity , and in terms of its continued validity . Whereas the application refers to orders issued by the Honourable Mr. Justice Lenaola on 15th March, 2004 it is clear that he made the orders **on 12th March,**

2004 and they were issued by the Deputy Registrar on 15th March, 2004. And then they were to last only upto 30 th March, 2004 ; but they were not thereafter ren ewed, even though there was subsequently an overlay of orders expressed as extending the original order. I think those subsequent orders were clearly made in error, as no original order then existed which could be extended; and most of the responsibility for this state of affairs must be ascribed to learned counsel. This would, I think, be the end of this matter; the application has been brought to secure obedience to orders which had ceased to exist. But it may be added that the very process of professed extension to the original orders was not conducted in clear terms. No specific order being extended had been named; and it had not been specified what obligations were thereby created, or who was the bearer thereof ; this was a true scenario of vagueness, haziness and uncertainty. In the circumstances, the applicant was not able to prove the facts that would constitute the contempt, with specificity and focus.

What is before me is a typical case in which resort to the Court's contempt jurisdiction should be avoided; and I will agree with the distinguished judges who held, in **Kasturilal Laroya v. Mityana Staple Cotton Co. Ltd & Another [1958] E.A. 194 and in Re Maria Annie Davies** (1) (1988), 21 Q.B.D. 236 that "recourse ought not to be had to [the] proces s of contempt in aid of a civil remedy where there is any other method of doing justice ". It has emerged from the submissions of counsel that the gravamen in the present matter is an employment dispute . I would agree with learned counsel for the respondent that the applicant can seek any possible damages , following a quite simple and ordinary procedure of the judicial process.

I have a clear mind in making my finding against the applicant and in favour of the respondent; and I will on that basis make the following orders and give directions as set out hereunder:

1. The applicant's prayer that the Court be pleased to order that Halakhe D. Waqho and Waqho Gufu be committed to civil jail for a period not exceeding six months for being in disobedience and/or breach of the Court's orders issued on 15th March, 2004 is refused.

2. The applicant shall bear the costs of this application, in any event.

3. Through the Deputy Registrar, and with the approval of His Lordship the Chief Justice, this ruling shall be availed to t he Office of the Honourable the Attorney -General and that of the Chairman of the Kenya Law Reform Commission , to apprise them of the unsatisfactory state of the law relating to the exercise of the contempt jurisdiction of the Courts in Kenya.

DATED and DELIVERED this 28th day of January, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the defendant/applicant : Ms Githinji, instructed by M/s Masakhwe Wachira & Co. Advocates

For the plaintiff/respondent : Mr. Ngaah, instructed by M/s Naikuni, Ngaah & Co. Advocates.