



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Case 45 of 2005**

GODFREY KILATYA KITUKU & 6 OTHERS PLAINTIFFS

VS

MALINDI MUNICIPAL COUNCIL DEFENDANTS

RULING

On 9th May 2005, this court issued an order of temporary injunction restraining the defendants by itself, servants or agents from interfering with the plaintiffs plots enumerated in the application.

Ten days later, on 19th May 2005 the plaintiff's filed a Notice of Motion seeking to have

“.... The Defendants/Respondent herein Malindi Municipal Council (Through: Town Clerk Patrick L. Ouya), Resident Engineer, Malindi Municipal Council (D. Ngugi) and Engineer, Victoria Construction Company (Asif Mohammed)”

... committed to civil jail for six (6) months...” for contempt of court”.

The Court granted the plaintiffs leave to cite the contemnors' for contempt of court.

Before the application for contempt could be heard, a Notice of Preliminary Objection was filed. The same was subsequently argued on two separate days namely on 24th June and 22nd July 2005.

Seven grounds of objection were listed but not argued in any order. The first point raised was with regard to the verifying affidavit to the plaint. It was argued that the affidavit failed to disclose that it was sworn on behalf of the rest of the plaintiffs. This was clearly not so, as was pointed out in the course of these arguments, the first paragraph of the affidavit is explicit that it was sworn by the first plaintiff on his own behalf and on behalf of all the other plaintiffs. That ground must therefore fail.

The rest of the grounds were argued together at length. It was contended that the plaintiffs in bringing the application for contempt failed to comply with the correct procedure. That the application combined separate and distinct special High Court jurisdiction. It was also argued that the alleged contemnors were not personally served with the Court's Order forming the subject of the application for contempt.

Finally there were two grounds namely 6 and 7 dealing with the relationship between Order 39 rules 2A(2) of the Civil Procedure Rules and Sections 70(a) 72(1) and 77(1) of the Constitution. It was alleged that Order 39 rules 2A(2) of the Civil Procedure Rules is inconsistent with Sections 70(a), 72(1) and 77(1) of the Constitution. In considering the notice of preliminary objection, the court is guided by the principles laid down in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd** (1969) EA 696, to which the court was referred.

At page 700 Law, JA laid down the law as follows:

“ so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

These principles were developed further in the same case by Sir Charles Newbold,P in the following words at page 701;

“A preliminary objection is in the nature of what used to be a de murer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

Before applying these principles to the present application, I would like to dispose of the points raised in grounds 6 and 7 of the Notice of Preliminary objection. It was argued that Order 39 rule 2A(2) of the Civil Procedure Rules is in contravention of Section 70(a) 72(1) and 77(1) of the Constitution as the former does not provide a fair procedural safeguard to a contemnor. The result of this lacuna is that the contemnor is denied reasonable time and opportunity to defend himself, while at the same time the burden is placed on the contemnor to prove his innocence. For these inconsistency, Order 39 rule 2A(2) of the Civil Procedure Rules, it was submitted, is null and void to that extent.

This point was, however, not raised during arguments probably because the learned counsel found no merit raising it as a point of preliminary objection. Actions relating to the enforcement of fundamental rights guaranteed under Section 70 to 83. (Inclusive) of the Constitution can only be brought as a separate action. Legal Notice No. 133 of 2001 – the Constitution of Kenya(Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedures Rules requires that such proceedings be brought by way of Originating Summons. It is, therefore, improper to attempt to get the court to decide on matters touching on fundamental rights as provided under sections 70 and 83 of the Constitution through notice of Preliminary Objection. Furthermore, this point has not been raised in the defence as required in the **Mukisa** Case. Grounds 6 and 7, must, consequently fail. The remaining grounds are to do with whether or not the plaintiffs complied with the procedures for instituting contempt proceedings. The application by way of Notice of Motion was expressed to be brought under Order 39 Rules 1 and 2A of the Civil procedure Rules, section 3A of the Civil Procedure Act and Section 5 of the Judicature Act.

First it was submitted that the application has muddled up various provisions dealing with contempt of court. That the plaintiffs had an option of either bringing the application under Order 39 Rule 2A(2) of the Civil procedure Rules or under Section 5 of the Judicature Act. That even after combining the two High Court jurisdictions in this application, the plaintiffs failed to take the steps to fulfil conditions precedent before or on filing the motion. It was argued, for instance, that leave was not obtained before commencing contempt proceedings, the application was not supported by the statement, the office of the Attorney General was not served and eight clear day did not elapse between the service of the notice of motion and the day named for the hearing.

In response to these arguments it was observed that although an aggrieved party can proceed to institute contempt of court proceedings for breach of an injunctive order under Order 39 Rule 2A(2) of the Civil Procedure Rules, there are no provisions for procedure to be followed. It followed, it was submitted, that the procedure to be followed is governed by section 5 of the Judicature Act, hence the reason for citing both Order 39 the Civil Procedure Code and sections 5 of the Judicature Act. Section 5 of the Judicature Act further enjoins the High Court and the Court of Appeal to exercise the power to punish for contempt by court as is exercised for the time being by the High Court of Justice in England.

To begin with, does the point raised in this ground meet the requirements of the **Mukisa Biscuits** Case: the point raised concern the jurisdiction of the court to try an application which does not comply with the

rules of procedure. It is therefore, in my view a point of law. It has been raised in the defendants statement of defence at paragraph 4. I am equally persuaded that the point, if argued as a preliminary point of objection is capable of disposing of the application for contempt.

Now, what are the procedures that the plaintiffs were required to comply with? Counsel, in this matter cited numerous authorities, which I have carefully studied. This branch of the law has not been fully developed in this country. The result is a confused and disjointed application of the law of contempt. The need to address this problem has been raised in numerous cases. For instance in the case of **Gitobu Imanyara V Republic** (1990) LWR 11, this court comprising A.M. Cocker, J(as he then was) and E. Torgbor, J stated as follows;

“ We also feel that time is now appropriate for legislation laying down a procedure to be followed by courts in Kenya in contempt of court proceedings”

These sentiments were echoed in 1996 by Bosire, J (as he then was in the often cited case of **Isaac J. Wanjohi and Another V Rosaline Macharia**, in the following words;

“the applicants’ legal advisers seem to be unsure as too many other legal counsel in this country as to the procedure to be followed in moving the court for orders in the event of breach of an injunction order made pursuant to the provisions of Order 39 Civil Procedure Rules”

and more recently, Ojwang, J made a candid order in **Abdullahi Dadacha Dima V Arid Lands Resource Exploitation & Development**, HCCC NBI 1322 of 2003. The order read;

“through the Deputy Registrar, and with the approval of His Lordship the Chief Justice, this ruling shall be availed to the office of the Honorable the Attorney-General and that of the Chairman of the Kenya Law Reform Commission, to appraise them of the unsatisfactory state of the law relating to the exercise of the contempt jurisdiction of the courts’ in Kenya”

I know nothing has been done to simply or streamline the procedure in contempt of court cases.

My own position in this matter is that the substantive law of contempt of court is found first in the Judicature Act – Section 5 – and section 63 of the Civil Procedure Rules. The latter deals with contempt in respect of orders of injunction. It reads;

“63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed:-

- a)
- b)
- c) **grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”**

Pursuant to this provision, the Rules Committee made Order 39 Rule 2A(2) of the Civil Procedure Rules, providing

“ 2A.(2) In case 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”

Both section 63 of the Civil Procedure Act and Order 39 rule 2A(2) Civil Procedure Rules are silent on the procedure for commencement and prosecution of contempt of court cases.

On the other hand section 5 of the Judicature Act provides that

“5. 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”.

It was unanimously agreed that Order 39 and by extension section 63 of the Civil procedure Act will only apply where the breach relates to orders of injunction. All other types of contempt can only be brought under Section 5 of the Judicature Act.

However, the general power to punish for contempt of court in Kenya is vested only in the High Court and the Court of Appeal by virtue of section 5 of the Judicature Act. It follows, therefore, that whether a breach complained relates to an order of injunction or breach or violation of any other order of the court, it is only the High Court or the Court of Appeal that has jurisdiction to punish for the breach or violation.

In punishing in such cases, the High Court and the Court of Appeal are to exercise those powers similar to those exercised by the High Court of Justice in England. In so exercising those powers both the High Court and the Court of Appeal are enjoined, a part from upholding their own authority and dignity to extend this to the subordinate court, which from these provisions. Clearly lack jurisdiction in matters of contempt.

How then does the High Court of Justice in England approach cases of contempt?

The High Court of Justice in England is that court comprising three divisions of the High Court, namely, the Chancery, the Queens Bench and Family Division. Accordingly, the jurisdiction of the High Court of Justice in England is found in the Rules of the Supreme Court. Order 52 in particular provides that where contempt of court is committed in connection with any proceedings before a Divisional court of the Queens Bench Division, or in Criminal proceedings, except where the contempt is committed in the face of the court, or in any proceedings in an inferior court, an order of committal may be made only by a Divisional Court of the Queen’s Bench Division. An order of committal in respect of contempt in connection with any proceedings in the High Court may be made by a single judge of the Queens Bench Division.

Order 52 rule 2 provides for a detailed procedure to be followed before committal for contempt. It is reproduced herebelow;

“ 2. – (1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made *ex parte* to a Divisional court, except in vacation when it may be made to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office and must at the same time lodge in that office copies of the statement and affidavit.

(4) Where an application for leave under this rule is refused by a judge in chambers, the applicant may make a fresh application for such leave to a Divisional court

(5) An application made to a Divisional Court by virtue of paragraph (4) must be made within 8 days after the Judge’s refusal to give leave or, if a Divisional court does not sit within that period, on the first day on which it sits thereafter”.

Rule 3 of Order 52 further provides;

3 – (1) when leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to a Divisional Court and, unless the court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the court or judge under Order 65 rule 4, the court or judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so".

I have deliberately set out the foregoing provisions as they provide the answers to all the issues raised in this application regarding the procedure to be adopted by this court in dealing with cases of contempt of its orders or orders issued by subordinate court.

It was submitted that the plaintiffs failed to comply with all the requirements set out above with the result that their application is incompetent. The plaintiffs obtained leave 16th May 2005 having made an *ex parte* application. The application ought to have been accompanied by

- i. a statement setting out the name and description of the applicant and details of the person to be committed and the grounds
- ii. An affidavit verifying the facts.

These documents ought to have been lodged before the substantive application was made. The notice of Motion filed on 19th May 2005 is supported by affidavit sworn by the first plaintiff. The motion is, however, not supported by a statement setting out matters alluded to in Order 52 rule 2 of the Rules of the Supreme Court.

Secondly, it is a requirement that the Crown Office be notified of the application for leave not later than the preceding day of the application for leave. The Notice to the crown office must be lodged together with the verifying affidavit and the statement. It is now generally accepted that the equivalent of Crown Office in Kenya is the Office of the Attorney General. See **Isaac J. Wanjohi** Case (supra), **Abdullahi Dadacha** case(supra) and the case of **Hon. J. Mwangi Kiunjuri V Wangethi Mwangi and 2 others** – HCC No. Nbi 1333 of 2003. There is no evidence that the office of the Attorney General was served with the notice before the application seeking leave.

Thirdly the plaintiffs were required, after obtaining leave, to list the application for hearing within eight (8) days of serving the notice. Leave was obtained on 16th May 2005 and seven days later on 23rd May 2005, when the application came up for hearing, the same was adjourned by orders of the court to the following day, when some of the persons sought to be cited for contempt appeared before the court and counsel representing them at the time asked for more time to respond to the application. This was granted and hearing fixed for 10th June 2005. On that day, the hearing was further adjourned to allow counsel for those sought to be committed to put in papers in response.

When the application came up for hearing on 24th June 2005 after nearly one month from the time leave was granted, this notice was argued. The limit imposed by Rule 3 is that there must be 8 clear days between the service of the notice of motion and the day named for hearing. There was no service of notice of motion as I have already pointed out. It is therefore futile to try and ascertain when the eight (8)

days lapsed. But leave granted on 16th May 2005 were expected to lapse after 14 days if the motion was not listed for hearing. The motion was listed for hearing well within 14 days but was adjourned as a result of applications to accommodate the other side.

The fourth point raised was that the notice of motion accompanied by a copy of the statement and affidavit in support of the application for leave was not served personally on the person sought to be committed.

For the plaintiffs it was conceded that a part from one contemnor, the rest were personally served. It was alleged that this particular contemnor could not be served because he was hostile and aversive. Such a contemnor, according to learned counsel for the plaintiffs, is stopped from raising an objection on service.

It is trite that the breach of an injunction will not be punished unless the party alleged to be in contempt knew that the order had been made. In other words, in all cases of contempt, with the exception of contempt on the face of the court, the party in breach can only be punished upon an application made to the court for that purpose, after due notice thereof. Rule 3(3) of Order 52 of the Rules of the Supreme Court makes specific provision in mandatory terms that the notice of motion together with a copy of the statement and affidavit in support **must** be served **personally** on the person sought to be committed. It is only with leave of the court that this requirement can be waived. Not even the evasive or hostile character of the contemnor can excuse the failure to effect personal service.

By their very nature, contempt proceedings are criminal and entails loss of personal liberty, if proved. The rules built in the process are intended to provide safeguards to ensure compliance with due process of the law. These rules must be construed strictly. The plaintiffs took only one step which conformed to these requirements, namely they obtained leave. They failed to comply with the rest of the rules, rendering the application incompetent. I so find. The objection raised is sustained. The plaintiffs' application dated 19th May 2005 is dismissed with costs to all the contemnors. Orders accordingly.

[Dated and delivered at Malindi this 22nd day of August 2005]

W. Ouko

Judge.