



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 58 OF 2004

1.SALIM H. SUMRA
2.ISMAIL MOHAMED
3.MOHAMED OMAR – Suing as Chairman, Secretary & Treasurer of
K.F.F. COAST BRANCH.....PLAINTIFFS

=VERSUS=

1.MAINA KARIUKI
HUSSEIN SWALEH
MOHAMED M. HATIMY – Sued as National Officers of
K.F.F.DEFENDANTS

R U L I N G

The Applicants have come to court by Chamber Summons under Order 39 Rule 2(2), Section 63(c) and Section 3A of the Civil Procedure Act. Orders sought are mainly under prayer 2 of the application namely:-

“That the Defendants/Respondents be committed to
civil jail for a period of 3 months or be fined for willful
disobedience of court order issued on 27/2/2004;

and 3 namely:-

“That the resolutions made on 28 th February, 2004 pertaining
to the amendment of K.F.F. Constitution and fixing of election dates be set aside.”

The grounds are set out on the body of the application and also in the affidavit of Ismail Mohamed in support of the application which shows that on 27/2/04 late afternoon the applicants approached the court with a certificate of urgency seeking to restrain the Respondents (officials of Kenya Federation of

Football Association) from holding a Special General Meeting scheduled on the following date (28/2/04) in Nairobi.

After due consideration of arguments on both sides court decided to grant orders restraining the Respondents from deliberating on Agenda of the meeting itemized No.4 and 5 which state as follows:-

“4.Review of KFF Constitution

“5. KFF election time table.”

These orders were pronounced by this court at 5.30 p.m. on 27th February, 2004. By that time the court building was closed up. The Applicants now complain that the Respondents disobeyed the order made and on 28/2/04 – they allowed the meeting to discuss these items contrary to the order of court. It is shown that the order could not be extracted at such a late hour as the court offices were closed and Deputy Registrar had gone away. And the following day was not working day being a Saturday. However, it is stated that the order was made in presence of Respondents counsel Mr. Gikandi. It is to be noted that on the same date (27/2/04). The firm of Gikandi & Co., Advocates perused the file before service of summons on the Defendants. The Advocates entered appearance on the same day.

Consequently when the Applicants appeared in court under certificate of urgency seeking ex parte orders they were confronted by Advocate Gikandi who insisted on being heard though his clients were not served with the application. The affidavit in support states that the order of court was widely reported in local newspapers on 28/2/04 the day of the meeting, the newspapers cuttings are exhibited. That the Respondents allowed the meeting and discussed the items of agenda prohibited by court is not disputed there is exhibited documents that confirm the amendments (review) of the Constitution was deliberated upon and a draft discussed. Also the elections and rules of conducting the same.

The opposition to this application is that:-

- 1) Application to punish for contempt must be brought under the provisions of Judicature Act of Kenya. Leave of court was not obtained before filing the application.
- 2) None of the Defendants were served with the Court Order.
- 3) Judicature Act being substantive statutory provision overrides Civil Procedure rules which are only subsidiary Legislation.
- 4) Court Order bearing Penal Notice must be served on any of the Defendants before 28/2/2004.
- 5) The court has no jurisdiction to issue any of the orders prayed for.

Regarding the 1st and 3rd grounds I have already pointed out that the application is brought under the provisions of Order 39 Civil Procedure rules and Section 63(c) of Civil Procedure Act, Cap.21. Both provisions empower the court to grant temporary injunctions and to punish for disobedience by imprisonment and or attachment of property. The court is moved to make these orders by summons in Chambers under rule 9 of Order 39. There is a difference in procedure between the powers of court granted under Civil Procedure Order 39 and the jurisdiction of court conferred by the Judicature Act, Cap.8, Section 5. This power is special to High Court and the Court of Appeal only and the special practice and procedure is provided for under Order 52 of Supreme Court Rules of England.

The upshot is that under Civil Procedure rules of Kenya the practice and procedure followed in England is not applicable. Both Civil Procedure Act, Cap.21 and Judicature Act are Statutes of Parliament and none is subsidiary to the other.

With regard to grounds 2 and 4 there is no affidavit that personal service was not effected after order was issued on the late hours of Friday 27th February. However, it is explained the court had closed its

offices for the weekend.

The inference to be made is that the Respondents became aware of the order as soon as it was made in the evening of 27th February. This is because the Respondents had instructed an advocate to enter appearance before the summons were served and to appear and to oppose the application by the Applicants though they were not served. The Respondents must have been very anxious to know the outcome of the court order. They probably hoped to succeed in opposition in which case they were eager to find out from their advocate and the advocate who was very anxious to be heard that late hour must have had instructions to report to his clients the outcome immediately. All the same, there is no affidavit confirming there was no service.

With modern state of communications it cannot be said that the outcome of the application was not communicated to the Respondents immediately.

Again, it is shown that the court order was published in major dailies of the morning of 28th February. The Notice calling the meeting showed that the meeting was to commence at 10.00 a.m. that morning. At this time the papers had already hit the streets. And when the nation was reading that a court had issued the order the Respondents proceeded to defy the order in the eyes of the public.

In the circumstances surrounding the making of the order in presence of Respondents Advocate and at the time when court had closed for weekend it is my considered opinion that it would be obstructing the cause of justice to insist on personal service of the order. I therefore find that it was not possible to serve order personally. I also find that as it was impossible to extract the order it was also not possible to have the Penal Notice endorsed therein. But the Respondents had knowledge of the order on 28/2/04.

As to whether the court had jurisdiction to issue orders prayed for I have already said that the jurisdiction of court is donated by Section 63(c) Civil Procedure Act. Also it is not disputed that the order of court was breached by the Respondents and even now they continue to defy the court order by proceeding to organize elections as stated by the Applicants.

The other point is that the court jurisdiction is given by the Laws of Kenya. It is only in certain matters that Parliament has, as it were, reserved to be dealt with in accordance with the laws and procedure of England. These special jurisdictions are given under our Statutes. In enacting Section 63(c) of the Civil Procedure Act, Cap.21 the intention of Parliament was to empower our courts to enforce breaches of injunctions and the procedure is as specified by the Rules Committee, under Order 39 rule 9. It is a point of complaint that the undertaking given by the Applicants was not given and filed until Monday the first day of March 2004. I do not find any irregularity in this. The intervening days were not working days.

I have perused the authorities relied upon by both sides. I agree with the Judge's comments in the judgment of Isaac Wanjohi, that there is confusion regarding the powers of court in contempt proceedings. The court jurisdiction to make orders under these provisions is granted under Statute (Cap.21). No leave is required under these provisions and the procedure is simply by application by way of Chamber Summons. This was stated in the judgment of Court of Appeal in Civil Appeal No.134 of 1997 – Joseph Schilling Biyo (K) Ltd vs Stardust Investment Ltd at page 8 thus:-

“The procedure where there is disobedience of any terms of an injunction order under Order XXXIX rules 1 & 2 is by Chamber Summons as set out under rule 9. That rule does not require that leave of court be first obtained before taking out such summons.”

In the High Court case of Isaac Wanjohi & Another vs Rosaline Macharia the court in a carefully written judgment demonstrated that procedure set out under Civil Procedure Act and that under Judicature Act, Section 5 is different. My own view is that each statute deals with separate forms of contempt. Under the Civil Procedure Act the purpose seems to me to enforce orders of injunction granted by court in proceedings in any court. Even a Magistrate's Court and the Rules of Supreme Court of England Order 52 is not applicable.

I therefore find that the procedure adopted in this case is correct.

For these reasons I find that the Respondents did disobey the court order willfully and openly in defiance of the authority of court. I find them jointly and severally guilty of contempt and I commit them to imprisonment for a period of 3 months.

However, they shall not be imprisoned if they shall pay jointly and severally a fine of Kshs.500,000/- to the Officer serving the Warrant of Committal.

In addition, it is proper that the resolutions passed in open defiance of court authority be and are hereby set aside.

Costs of this application shall be to the Applicants.

Dated at Mombasa this 15th day of March, 2004.

JOYCE KHAMINWA

J U D G E

15/3/04

Mr. Gikandi

1. I apply for certified copy of proceedings and the Ruling.
2. I request an order for stay of punishment which court has passed for a period of 7 days to enable me to file a formal application. My clients stand to lose their liberty.

Mr. Khatib I have no objection to first prayer.

I object to the second prayer. It concerns the proper administration of justice and have not shown any remorse or apologized to the Applicants for distress they have caused. Mr. Gikandi – authority of court has been asserted. They intend to file appeal.

RULING

The Respondents counsel asks for stay for a period of 7days to file formal application for stay pending appeal.

The orders will be executed upon the issue of Warrants of Arrest and before arrest the Respondents shall be given option of paying the fine.

In the circumstances, I do not see any reason to grant an order for 7 days as prayed. It is not correct that they will lose their liberty.

The Respondents have been found guilty of very serious contempt which has been committed before members of public thus bringing the reputation of court to ridicule in the eyes of members of public.

Dated at Mombasa this 15th day of March, 2004.

JOYCE KHAMINWA

J U D G E