REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 149 OF 2002

REPUBLIC .... APPLICANT

VERSUS

COMMISSIONER OF LANDS

& 12 OTHERS .... RESPONDENTS

AND

JAMES KINIYA GACHIRA alias

JAMES KINIYA GACHIRI .... INTERESTED PARTY

RULING

When the application dated 27th September, 2002 came up for hearing before me the parties agreed to have the preliminary objection dated 15th October, 2002 and filed on the same date by the interested party heard first.

In short the preliminary objection states that the application is resjudicata, misconceived bad in law and procedurally defective and therefore seeking the striking out of the application.

The application itself seeks the committal to civil jail of one James Kiniiya Gachira alias James Kiniiya Gachiri for disobeying the courts orders made on 15th February 2002 by my brother Justice Rimita following ... of penal notice on 29th May 2002 and also that the same person be ordered to demolish all construction work carried out after 20th May 2002 before he can be heard by the court and that if he does not do so the City Council of Nairobi be authorized to demolish the said construction work and recover the demolition costs summarily from the Interested Party without going to court.

The first ground is that my brother Judge Ransley did give a ruling in an application dated 18th April 2002 which was pre... on the same acts of alleged contempt and the learned Judge did give a ruling on merit which ruling appears at pages 88-89.

The second ground is that the application is supported by an affidavit which does not bear the name and address of the persons who drew it and therefore the drawn affidavit offends S 35 of the Advocate’s Act and ought to be expunged from the record. If expunged the application would not have any leg to stand on.

The respondent’s counsel has cited a number of authorities in support of his contention on resjudicata and on the validity of the application in view of the defections affidavit.

In reply Mr Kiiru the learned counsel for the applicant had contended:-

> **(1) That the preliminary part is aimed at delaying the hearing of the application and the points lacks substance**
>
> **(2) That the application is not resjudicata since acts of disobedience complained of are of a continuous nature and the ... notice has since been served.**
>
> **(3) He contents that following a similar objection Judge Ransley had only ruled on the effect of the failure to serve a penal notice including the issue of service. He referred the court to the ruling at page 88 where the Judge says that the matter was not heard substantially. For resjudicata to work the earlier matter must have been herd on merit which is not the case.**

Hearing on a preliminary point could not have been a hearing on merit.

There is an affidavit of service where the respondent was served with another copy of the order with a penal notice – see Affidavit of Service dated 23rd September, 2002 at page 26 of the application. Having rectified the position a plea of resjudicata cannot succeed.

The documents he submitted ought not defeat the course of justice. As regards the point on affidavit the learned counsel submitted that S 35 of the Advocates Act has been complied with since the application itself does disclose the name and address of the drawee of the document. He submitted that S 35(2) only applies to commencing documents.

In his reply Mr Kingara the learned counsel for the interested party submitted that the last paragraph of Mr Justice Ransleys ruling clearly directed that the word clearly be construed during the hearing of the main application which application the applicant has never set down for hearing. The matter is therefore res judicata be concluded.

The ruling of my learned brother Mr Justice Ranslay appearing at page 88 clears state the application for contempt was never argued substantially "see para 2 of the ruling. The learned judge at pg 2 final paragraph of this ruling when invited to giving meaning to the order allegedly violated expressed the court's view that the interpretation of the word "dealing" should be dealt with at the substantive hearing of the application.

It is also clear from the ruling that the learned Judge did quite correctly address that in contempt application procedures have to be strictly adhered to and all the necessary steps taken before a committal order can be made.

As a result he appears not to have been satisfied with the service of the penal notice and whether or not contempt had strictly been committed in view of the ambiguity in the term dealing appearing in order 4 of the order and which the Judge preferred dealt with in the main application for review.

From the above this court is of the view that the first application was not heard on merit and the upholding of the preliminary objection could not possibly be a bar to a subsequent application for contempt as far as the service of the order and Peral Notice are concerned. However the court's "suggestion" that the issue on whether the ongoing construction reop.......... certified dealing be heard or argued in the main application for review does bar this court from adjudicating or the same point in this subsequent similar application. There was no appeal or review of this part of the ruling.

This court cannot therefore deal with the committal application due to this part of Judg Ransley's order, the two courts being of coordinate jurisdiction.

By virtue of S 5 of the Judicature Act cap 8 the Supreme Court Practice Rules of England apply to Kenya. Under O 52 of the Supreme Court Rules 1997 the following are the requirements 52.4.2003

> **"Where committal is sought for breach of an injunction, it must be made clear that the defendant is alleged to have done and that it is a breach .... The notice of motion must state ... what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself S 2/4/4 on evidence states ... The appropriate standard of proof to be applied in committal proceedings however is the criminal standard of proof (Dean v Dean [1987] FLR 517 CA)**

It is quite evident from the above analysis of the law (although the court did not refer to it specifications) that the learned Judge feltthat the point raised concerning the interpretation of the order is a matter he felt could only be canvassed in the main application for review.

It is clear that the slightest ambiguity to the order could invalidate an application for committal. Ambiguity could in turn lead to the standard of proof which is the criminal standard not being attached especially on affidavit evidence as in the this matter.

I therefore find and hold that to the extent that this court is being asked to reopen the judgment's order the matter is resjudicata several authorities have been cited to the court by the respondent's counsel and I need not recite them here because this ruling has only turned on the special rules concerning committal proceedings as analysed above.

For the same reason I have found it necessary to go into comments on the validity of the affidavit in support. The upshot is that the application is struck out and judge Ransley's order that the main application for review be set down for hearing and issues canvassed there is hereby re....

This ruling matter have heard on interpretation of a court ruling and the court is for this reason not inclined to make an order or costs.

It is so ordered.

Dated and delivered the 5th day of March, 2004.

J G NYAMU

JUDGE