REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 389 OF 2004

KARIUKI & 2 OTHERS ..... APPLICANTS

VERSUS

MINISTER FOR GENDER, SPORTS, CULTURE

& SOCIAL SERVICES & 2 OTHERS ..... RESPONDENTS

RULING

The applicants in this matter by their Notice of Motion dated 8th April 2004 as amended orally on 11.5.2004 are seeking orders that one Hon Najib Balala, Minister for Gender, Sports, Culture and Social Services be committed and detained in prison for a period of six (6) months for disobeying court orders issued on 26th March 2004.

Facts

The facts are as follows: -

On 26th March 2004, I issued orders that leave be granted to the applicants to institute judicial review proceedings to challenge the Minister's decision to remove the applicants as officials of the Kenya Football Federation (KFF) and appoint a Stakeholders Transitional Committee in its place. I also issued orders that leave so granted do operate as a stay of the decision. I shall return to the specifics shortly.

The applicants contend that the Minister was served on 29th March 2004 but he blatantly ignored the orders and on the same day, inaugurated the Committee aforesaid. On the same day again, the Minister filed a Notice of Motion dated 29th March 2004 seeking orders that the stay orders be stayed and vacated. In the meantime the Stakeholders Committee continued with its work as if the Court order was either non-existence or irrelevant to its operations and the instant application was filed. Initially, members of that committee were also cited in this application but subsequently their committal was withdrawn.

In a replying affidavit sworn on 20th April 2004, the Minister depones that the applicants had no *locus standi* to bring the proceedings herein as they were declared to have exhausted their term as officials of KFF in HCCC No 58 of 2004 (Mombasa). Any orders issued by this Court are therefore issued to pretenders and in vain. Further, that he had the duty to fill the vacuum on football management in Kenya by appointing a Transitional Committee, as he did, for three (3) months only.

More importantly, the Minister depones that he was not served with a court order by one of the applicants, Hussen Swaleh, and any service effected on M/S V Nyamodi & Co Advocates for the Attorney General is not service neither is it personal to him. In any event, no Penal Notice was indorsed on the face of the Court order as by law required neither was it served on him. He concedes however that he was aware of the Court Order as his counsel; Paul Nyamodi did inform him of the same hence the

application to stay and vacate the orders aforesaid.

The Minister has deponed to other matters which with respect I find irrelevant and should be argued when and if he chooses to prosecute his pending application.

Submissions by Counsel for the Applicants

Learned counsel for the applicant in submissions before me relied on the affidavit of service filed on 31st March 2004 by one Robert Nguitui Mugo where he deponed that he left the Court Order and the Penal Notice at the reception area of the Minister's office as he was ejected therefrom before he could effect personal service. Counsel argued at length, without showing me any authority to support his viewpoint that service on a minister is personal service if it is served on the Attorney General as was also done in this case. Since the Order was also served on his lawyer, Paul Nyamodi and the Minister acted on it and filed the application to stay the Order, he was deemed to have knowledge of it. I was also informed that with such knowledge and having gone on to disregard the Order, the Minister was squarely within the ambit of contempt and should be punished for it. Counsel implored me to see to it that court orders whether properly issued or not, whether agreeable to the respondent or not, should be obeyed. If they are not so obeyed, the only recourse known to law is to punish the contemnor appropriately, in this case by a sentence of six months.

Submissions by Counsel for the Respondent

Mr Nyamodi, learned counsel for the Minister, submitted and I shall limit myself to what I considered relevant submissions, that the Orders issued on 26.3.2004 were in vain. The applicants were no longer officials of KFF and the Minister upon appointment of the Stakeholders Committee became *functus officio* and there was nothing to stay. What the Minister did on 29.3.2004 was to inaugurate the Committee, which I am told is a totally different matter.

Regarding service, the Minister was not personally served and therefore, contempt orders cannot attach to him. In any event, I am informed, the Penal Notice was neither indorsed on the Order nor was it served on the Minister together with and/or as part of the Order. Service of the Order and the Penal Notice was served on M/S V Nyamodi & Co Advocates which I am told is not personal service neither was service on the Attorney General.

The Minister as I said earlier admitted to knowledge of the Order but counsel submitted that there is no substitute in our law and practice to personal service. Even if the Minister had such knowledge and he chose not to take action on the Order as he did, he cannot be held to be in contempt merely because he had knowledge without service.

I am asked to refer to and be guided by the following authorities in reaching a decision that the Minister was not in contempt of the Court Order, as is alleged;

i) *Nyamogo vs KPTC* CA Appl No Nai 264/1993

ii) *Wildlife Lodges Ltd vs County Council of Narok & Another* HCCC No 1248 of 2003 (unreported).

Minister's Actions and Conduct.

Before restating the law as I understand it, I must from the inception indicate that this matter has caused me some anxiety. Anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with courts as to who has more **"***muscle*" in certain matters where their decisions have been questioned, in court! Courts unlike politically minded ministers are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that courts do. Judicial review orders would otherwise have no meaning in our laws!

Having so expressed my anxiety, I shall now restate the matters as I see them that have necessitated this Ruling.

It is not in contention that when the orders of 26.3.2004 were issued, Mr Nyamodi then and now acting for the Minister was present in court and was made aware of the Order. It is also generally agreed that the said Mr Nyamodi was served with the Court Order and Penal Notice and both were served as separate sheets of paper. As regards the Minister, whereas Mr Nyamodi emphatically denies the process server's averments that he was thrown out of the Minister's office, I am inclined to believe the process server. In his affidavit sworn on 31st March 2004, the process server articulately confirms that when he tried to serve the Minister, he was

"whisked away not to effect service as the Minister at the time was heading to the conference room to address a press conference inaugurating the KFF shareholder Transitional Committee".

I believe him because it cannot be coincidence that indeed that was precisely what the Minister was doing at the said hour on the said date.

It is also generally agreed that service was also effected on the Attorney General which as I shall shortly show is of no consequence in the matter before me.

The Minister, it is therefore, agreed had knowledge of the Court Order and that is the reason he quickly inaugurated the Stakeholders Transitional Committee, threw out the process server to avoid service (which he denies but which I find to be an untruth) and filed an application to stay the Orders issued on 26.3.2004.

Personal Service

Mr Mailanyi's argument that personal service need not be effected on a minister is to my mind weak, unsubstantiated and unsupported by any Kenyan authority that I have come across. He himself offered none.

Tied to this argument is the submission that even if the Minister was not served personally, he had knowledge of the Court Order and therefore, having disobeyed it in spite of such knowledge, he is guilty of contempt. Again Mr Mailanyi gave no authority for his contention but I am aware that in *Re Tuck Murch vs Loose more (1906) Ch 692,* Collins MR observed at page 694: -

"Knowledge is higher than service…. Service is unnecessary where there is knowledge".

Similarly in a recent decision of the High Court of Malawi, *viz*; *D T Kampanje Banda vs Hon Gwanda Chakuamba*, Civil Cause No 1841 of 2001 (High Court of Malawi) (unreported), Mkandawire, J said in circumstances very similar to the ones before me, that where an advocate attempted to vacate an injunction order issued against leading lights of the Malawi Congress Party, it only meant that those members had knowledge of the injunction. The learned judge had this to say:

"Having given instructions to counsel to vacate the order, they are estopped from claiming that they had knowledge of the injunction".

The learned judge in that case found that disobedience in spite of knowledge and no clear service still constituted contempt of court and ordered that each of the contemnors should pay K 200,000.00 and in default thereof 12 months imprisonment. This is what counsel for the applicants was asking me to do and I am in the circumstances of this case quite attracted to that argument, but that is not the law in Kenya.

The case of *Mwangi Wangondu vs Nairobi City Commission* CA 95/1988 (unreported) set down the rules as regards service of orders subject to contempt proceedings in this country. In that case, the Court said;

"The procedure for committal for civil contempt in England where an order of sequestration is sought is

set out under the Rules of the Supreme Court (RSC) orders 45 and 46 and in *Halsbury's Laws of England*, Vol 9 (4th edition) under the heading 'contempt of court'. Briefly the effect of these provisions is that as a general rule, no order of court requiring a person to do or restrain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it."

This holding was again upheld in *Jacob Zedekiah Ochino & another vs George Aura Okombo* C Appl 36 of 1989 (unreported) and in *Nyamogo vs Kenya Posts and Telecommunications Corporation* CA Nai 264 of 1993.

In the latter case, the Court specifically ruled as I have in this matter that service on the alleged contemnor's advocates did not constitute personal service and even if the alleged contemnor had knowledge of the Order through the advocate, he would not be liable for contempt.

I agree that in the instant case, the applicants' arguments that Paul Nyamodi, Advocate knew of the Order because he was in court when it was issued and was served with, it must mean that the Minister knew it, is correct but not backed by legal precedence in Kenya. I need not belabor the point but will return to it when closing save to say that in the instant case the Penal Notice existed but was not indorsed on the order itself but was a separate sheet of paper and with that single mistake, the application should fail.

Other Issues

A number of other issues were raised in submission, specifically whether leave is required to institute proceedings for contempt of court in the High Court of Kenya. Whereas that is the practice in Kenya, after careful study of the Rules of the Supreme Court of England I am of the same mind as Bosire, J (as he then was) in *Isaac Wanjohi & another vs Rosalina Macharia* Civil Case No 450 of 1995 where he held quite firmly that such a procedure is unnecessary in our jurisdiction. My brother, Ojwang, Ag J similarly agreed with that finding in his erudite ruling in *Wildlife Lodges Limited vs County Council of Narok & another* HCCC No 1248 of 2003.

A second issue that arose was whether a person to whom an order has been issued should be heard in contempt proceedings before purging the contempt. Although an important point in law, counsel for the applicant did not too strongly urge the point and I find no reason to assist his cause by expanding on the law in the matter.

Lastly, I should restate the oft-quoted principle in *Hadkinson vs Hadkinson* [1952] All ER 567 that court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which courts are set up.

Conclusion

As I said earlier, this matter has caused me some anxiety because had it been left to me in the circumstances of this case, Hon Najib Balala would be guilty of contempt of the Orders made herein. Had our law been as in the case of *Re Tuck* (*Supra*) or as in *Kampanje Banda* (*Supra*) I would have had no hesitation in finding that knowledge is higher than service and dealt with the contemnor appropriately. But in our law, service is higher than knowledge and since the service here was frustrated by the Minister's bodyguards, I shall firmly hold in accord with the existing law that there was no service. Without personal service there cannot be contempt and Hon Najib Balala is accordingly not guilty of such contempt, and I would say, like the Hon Chief Justice Banda in Malawi Supreme Court CA No 2 of 2000, *Dr Peter Chimna vs Hon Gwanda* (unreported),

"had the proper procedure been followed … some people… would have been committed to prison for contempt."

Having so held, I must say one thing more; if those who have knowledge of court orders and also have knowledge that the way to avoid those orders is to avoid personal service are sleeping well in the guise that by hiding behind the shield of muscle they can escape the long arm of the law, let this be a warning that they will not. The law as applied by the courts studiously and unceasingly, will never sleep, and someday will catch up with those who flout the law and walk away unscathed.

And so Hon Najib Balala should heed the words of Madan, JA in *Githunguri vs Republic* and for different reasons and in spite of his actions which I have found to be improper, raise up his eyes to heaven and thank *Allah* that the rule of law exists and thrives in Kenya.

In the meantime, the application dated 8th April 2004 is hereby dismissed.

For reasons that I have given, Hon Najib Balala is not entitled to any costs.

Orders accordingly.

Dated and Delivered at Nairobi this 4th day of June 2004.

I.LENAOLA

AG. JUDGE