



Editorial Note

Contempt

- Disobeying an Order for alleged ambiguity
- Court orders to be obeyed until reviewed or successfully appealed against
- Leave to apply for Judicial review orders granted where arguable grounds shown and not necessary on merit

- Disobedience punishable by committal

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC CIVIL CASE NO 1445 OF 2003**

IN THE MATTER OF AN APPLICATION BY

MWANGI KIBURA

REPUBLIC APPLICANT

VERSUS

THE HON ATTORNEY GENERAL

THE ADMINISTRATIVE SECRETARY

POLICE DEPARTMENT

OFFICE OF THE PRESIDENT

THE OCPD, KENYA

RAILWAYS POLICE RESPONDENT

RULING

The application dated 9th December 2003 seeks to commit the OCPD Kenya Railways police for a term of 6 months for disobeying a court order dated 24th November, 2003 or in the alternative he purges the contempt by permitting the applicant to immediately start operating the canteen the subject matter of this proceedings. It is supported by the applicant's affidavit sworn on 9th December 2003.

The order was served on the OCPD on 24th November, 2003 and this is not denied and on the following day the penal Notice was served. This is also not disputed. Affidavits of service have been filed in support of the service. By grounds of opposition dated 16th January, 2004 and filed on 20th January 2004 the Attorney General claims inter alia:-

(1) That the order was ambiguous and incapable of being obeyed and that it was also defective and spurious

(2) That the application contravenes S 16 of Government Proceedings Act

(3) That the applicant was evicted on 17th November, 2003 before the Order was served

(4) That application is misconceived and has no legal basis and it also lacks merit.

No affidavit was filed to counter the facts of service as alleged by the applicant. A statement in the grounds that eviction had been done before the order has no evidential value.

The order as extracted is not perfect but is fairly clear that the OCPD's decision to terminate and evict had been stopped pending the hearing of the main application.

All the grounds raised by the Attorney General might as well be meritorious when the main application for the grant of judicial orders is heard but the matter has not reached that stage and those grounds concerning the merit of the application and the order can only be gone into at that stage.

The application for leave is invariably heard *ex parte* and it is usually granted or refused on whether or not the applicant has an arguable case. The order made in judicial review proceedings falls outside S 16 of that Government Proceedings Act such an order must be obeyed until the matter is heard on merit when the main application is heard. The issue of the validity of the order should await the main application.

Both the order and penal notice having been served and disobeyed the OCPD is clearly in contempt. Granted that the application is said to be grounded on O 39 rule 2 and O 50 rule 1 instead of the Judicature Act and the Rules of the Supreme Court, this court shall not deny the applicant relief where other enabling provisions have also been invoked.

In the case of **THUO v NJURU NBI CA 278 of 1998(CA)** unreported the Court of Appeal held that court orders must be obeyed until set aside. The Attorney General has not appealed as against the order as provided under S 8 of the Law reform Act which has donated the powers. It is improper for him to be seen to be condoning violation of valid court orders.

I therefore grant orders as prayed in the application subject to the following conditions:-

(1) In the first instance the OCPD Railways has 14 days within which he can purge the contempt by allowing the applicant to take possession.

(2) If order (1) above is not complied with order as per prayer 1 in the application to immediately take effect.

It is so ordered

DATED at Nairobi this 12th day of March 2003.

J G NYAMU

JUDGE