IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL APPEAL NO.474 OF 2002

(From the Original Civil Suit EJ 966 of 1998 of SPMC at Milimani)

SAMBAZA PRODUCTIONS LIMITED …….APPELLANT

V E R S U S

ESTHER MUTHONI MUTHEE ……RESPONDENT

R U L I N G

This is an application dated 30.9.2002 by way of Notice of Motion made under Order 39 Rule 2(3) of the Civil Procedure Rules and Section 5 of the Judicature Act Cap 8 and Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya asking that leave be granted to the Applicant to bring contempt of Court proceedings against J.M. Njongoro Advocate and secondly, that in the alternative, J.M. Njongoro Advocate and or Respondent be ordered to refund (by way of deposit in a joint interest account between counsels on record) the sum of Kshs.300,000/- plus accrued interest unlawfully withdrawn from Akiba Bank Account No. 50023026.

From the affidavit in support by Catherine Muigai, she says the Applicant got judgement for breach of contract but when the judgement was set aside, the Court ordered the Defendant to deposit Kshs.300,000/- in a joint account in the names of the two firms, but when the case was now heard substantially the Court decreed on 16.8.2002 that Kshs.400,000/- be paid to the Appellant and ordered that the Kshs.300,000/- originally deposited be paid to Njongoro & Company Advocates. The Applicant filed appeal and asked for stay of execution which he got on 3.9.2002. That order stayed the Order of 16.8.2002 in which the Respondent was awarded Kshs.400,000/-. Now the complaint is that Njongoro & Company Advocates have paid out Kshs.300,000/- originally deposited in a joint account on 11.6.2001 against the Court order.

But Sophia Njeri Kagiri, secretary to Njongoro and Company Advocates says in her affidavit of 11.10.2002 that she never saw the penal notice and did not tell Mr. Njongoro about it and Esther Muthee in affidavit of same date said that the Court had in fact released the Kshs.300,000/- to the Advocate and as she wanted money the Advocate wrote a cheque to her and John Njongoro in a similar affidavit said that the Court ordered the release of Kshs.300,000/- to Respondent and Applicant not his counsel objected and that he did not know anything about the stay of execution.

However, at the hearing, Mr. Ngatia for the Respondent raised two legal issues. First he said the application for leave should not have been made together with application for committal secondly he said Mr. Njongoro cannot be committed as he was not served and thirdly as he is not a party to the action, leave cannot be granted.

Section 5 of Cap 8 provides that: -

> "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 court."

Order 52/2 of the Rules of the Supreme Court, provides for an exparte application to be made for leave to make application for committal, such application when made must be supported by a statement setting out the names and description of the Applicant, the name description and orders of the person sought to be committed, the grounds for committal and a verifying affidavit.

It is after leave has been granted that an application for the order must be made by Notice of Motion and "unless the Judge hearing the application for leave has directed otherwise the Notice of Motion must be heard after 8 clear days from the date of service. This means that the omnibus application is not contemplated.

The question is whether the practice as adopted vitiates the application.I think it does. It deprives a party of the opportunity of preparing himself and by making the leave stage an interpartes process it completely perverts the procedure. I feel it is a fundamental deviation from procedure for which the Court cannot exercise its discretion and treat as a mere irregularity.

Mr. Mutua for Applicant felt that Order 52 of RSC cannot apply without due incorporation into our laws but it is trite that Section 5 of Cap 8 is sufficient in statutory incorporation of the English Law and Practice into ours.

Mr. Ngatia said there was no service. Again the RSC commentary says that no order will normally be issued for the committal of a person unless he has been personally served with the order disobedience to which is said to constitute the contempt." The Court of Appeal has said so too in Court of Appeal Civil Application No. NAI 264 of 1993, NYAMODI OCHIENG NYAMOGO v. KENYA POSTS & TELECOMMUNICATION and added the mandatory nature of the requirement of endorsement of Notice of Penal consequences.

In the case of MWANGI WANGONDU vs. NAIROBI CITY COUNCIL CIVIL APPEAL NO. 95 OF 1988, the Court of Appeal followed the English procedure and confirmed it in the Nyamogo's case (Supra), it is therefore, trite that English procedure applies.

Mr. Ngatia complained that Mr. Njongoro was not party to the case and as such cannot be guilty of contempt and cannot be committed.

This is, however, not a complete defence. Primafacie Court orders must only bind those parties to the action but it is also the law that anyone not a party to the suit can be committed for contempt notwithstanding if knowing the existence of the order disobeyed he aids or abets the contemnor in disobeying it, or obstructs by action the object of the order from being realized.

SEE LORD WELLESLY vs. EARL OF MORNINGTON (1848) 11 BEAV 181.

The only last point is whether failure to effect service vitiates the application.

RSC commentary on 52/3/(1) says: -

> "Failure to comply with proper procedure such as personal service, is not necessarily fatal to the lawfulness of a contempt order. The Court has complete discretion.
>
> Under Section 13(3) of A.J.A. 1960 to perfect an invalid committal order in a contempt case, but that power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interests of the contemnor, the victim of the contempt and other Court users. Where a contemnor has not suffered any injustice by the failure to follow

the proper procedures (such as service) the committal order could stand subject to variation to take account of any technical procedural defect."

See BUTLER V BUTLER 1992 3 WLR 813

In this case, contemnor would have suffered injustice by not being given time to prepare himself for the case. Besides, I think the contemno r meant is when order is already given which is not so here.

I hold that the application is incompetent and is struck off with costs.

DATED at Nairobi this 6th day of July 2003

A.I. HAYANGA

JUDGE

Read to -

Mr. Maweu for Respondent

Mr. Kituku for Applicant