



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 359 OF 2003

REPUBLIC

VERSUS

JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR

& ANOTHER

EX PARTE WILFRED KARUGA KOINANGE & 3 OTHERS

RULING

At the commencement of the hearing of the juridical review proceedings herein Mr Wambua Kilonzo, Counsel for the 4th applicant, drew our attention to the fact that he had just filed (on 18.9.2003) a Notice of Preliminary Objection dated 17.9.2003 and that he intended to argue that the respondents should not be heard by the Court in these proceedings because “they are in contempt of the Court order issued on 12th May, 2003” which “has not been purged”. We allowed this preliminary objection to be argued first after noting that the 1st applicant, Dr. Wilfred Karuga Koinange, did not wish to be associated with the application any further.

In his submissions, Mr Wambua Kilonzo contended that when this Court granted leave for institution of the judicial review proceedings it also ordered that the leave would operate as a stay against receipt of evidence relating to the 1st, 3rd and 4th applicants in the event that the commission’s decision with regard to order No 5 of the orders issued on 12th May, 2003 by this Court was unfavourable to the applicants. Order No 5 required the Commission to accord the applicants the chance or opportunity to ventilate their complaints against the Commission and or some of its members and thereafter consider such complaints and give its ruling.

To buttress his argument that the respondents should not be heard as they are in contempt of the said Court order, Mr Wambua Kilonzo submitted, in a nutshell, that the Commission had stated that the Court order was not capable of compliance and did not obey it. Consequently he said he had to withdraw from further participation in the Commission. In his view, a party who disobeys a Court order loses the right to appear or be heard in that Court until he purges his contempt. He argued that the contempt by the Commission has been continuous in that the Commission has continued to receive evidence against the 1st and 3rd applicants which has been widely publicized in the local media. The disobedience of the Court order has brought ridicule to this Court, he argued. A party served with a Court order cannot choose what order to obey or not to obey, he contended. In his view a party who is aggrieved by a Court order has recourse to appeal and can also apply to vary or set it aside. Mr Rebelo for the 2nd and 3rd applicants supported the objection by Mr Wambua Kilonzo. He drew our attention to this court’s decision in *MSA*

Misc Civil Application No 186 of 1998 and emphasized the point that the Commission is inferior to the High Court and must obey orders issued by this court.

The arguments did not go down well with counsel for the 1st respondent.

While on the one hand admitting that: (i) the High Court has a supervisory role over the Commission and that (ii) if the commissioners are in contempt they can be punished and that (iii) if the commissioners are in contempt, the High Court can prevent them from being heard, Dr. Kuria contended that such contempt must be proved through a formal application filed in the judicial review proceedings after leave is obtained. In his view, counsel for the 4th applicant had assumed the role of a witness as well as that of counsel as he was giving evidence of the alleged contempt from the bar.

Dr. Kuria urged us to reject the preliminary objection because it was disguised as a preliminary objection when in fact it was in substance an application to the Court not to hear the respondents on the ground that they have disobeyed a court order. To do so would, in his view, result in breach of the rules of natural justice. Mr Okumu for the 2nd respondent on his part subscribed to the submissions made by Dr Kuria.

The point we have to consider is whether in the circumstances of this case, we can, on the basis of the preliminary objection, prevent the respondents from being heard in these judicial review proceedings on the grounds preferred by the 4th applicant. A preliminary objection raises, in the words of Sir Charles Newbold (President) in *Mukisa Biscuit Company versus West End Distributors* [1969] EA 696 at page 701, letter B, “a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct”. The preliminary objection by the 4th applicant is premised on the alleged contempt of Court arising from the alleged disobedience of the Court order. It is not common ground that the commissioners were duly served nor is there assumption that they were.

The fact of service of the order as required by law has not been proved and although an affidavit of service has been filed, this does not make that fact common ground between the parties. Although the issue of service for the order attracted considerable publicity in the electronic and print media locally, nevertheless it is incumbent upon the 4th respondent not only to prove that the order was served in accordance with the law, but also that there has been disobedience. Service of a Court order is not a matter in respect of which we can take judicial notice, the publicity of the matter notwithstanding. Service cannot unilaterally be proved because it is a matter that involves and affects the respondents and, if proved, elicits penal consequences.

What we are in fact therefore saying is that a request to bar a party alleged to have disobeyed a Court order from being heard in circumstances such as are in this case requires a formal application and before an order to bar a party alleged to be in contempt is made, such a party must first be heard.

We do not take lightly the issue of disobedience of Court orders if proved.

This Court will not hesitate in appropriate cases to punish for contempt where an application is properly brought and proved. The power to punish for contempt is exercised for the benefit of the institution of the judiciary and the public. The High Court has supervisory jurisdiction to check and control inferior tribunals and public bodies with statutory powers of a judicial or quasi – judicial character whose decisions affect or are likely to affect the rights and freedoms of individuals. The jurisdiction conferred by section 8 and 9 of the Law Reform Act cap 26 on the High Court in this regard is special. The Goldenberg Judicial Commission of Inquiry is subject to the supervisory role of this Court and can be guilty of contempt of Court.

In the result, we overrule the preliminary objection. We order accordingly.

Dated and delivered at Nairobi this 19th day of September, 2003

J.A. ALUOCH

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JUDGE

P.K. KARIUKI

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JUDGE