



**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**

The issue for determination by the court in this ruling is whether the 1<sup>st</sup> respondent, Judicial Commission of Inquiry into the Goldenberg Affair, should be accorded audience, during the hearing of the *ex parte* Chamber Summons application dated 23.9.2003 (“the application for leave”) filed by the applicants, Messrs Goldenberg International Ltd, Kamlesh Mansukhlal Pattin and Job Kilach seeking leave to commence contempt proceedings against the said 1st respondent with a view to seek several reliefs the substantive one being “that the 1st respondent be barred from appearing or having audience before this court or any other court in relation to the present proceedings or to any other proceedings involving the applicants herein until the 1st respondent’s contempt of this court’s order issued on the 16th April, 2003 is purged”.

When the application for leave came up for hearing on 4.11.2003, Messrs Waweru Gatonye and Horace Okumu appearing for the 1st and 2<sup>nd</sup> Respondents respectively requested the Court to allow them to be heard. Mr Okumu pointed out that the respondents are parties in the main application and that the application for leave is an application within the main application. The latter application, he said, is part heard, and the respondents are properly in court and should be heard on any application made by the applicants. In his view, if the application for leave had not been made in the main application, perhaps the request by the respondent would not hold good. Mr Waweru added his voice in support of this submission and argued that the Court has inherent power to hear an *ex parte* application *inter partes* if no prejudice is caused to the other party. He pointed out that the respondent had filed and served on the applicants a replying affidavit to the application for leave. He invited the Court to peruse it. He also referred the court to the case of *Rosafric Limited v The Minister for Finance* (HC Misc Application No 1392 of 2001) in support of his submission. On his part, Mr Wambua for the applicants opposed the participation by the respondents in the *ex parte* hearing of the application for leave. He pointed out that it is mandatory that the application for leave be heard *ex parte*. In this regard, he invited the attention of the Court to page 107, Footnote “P” of *Atkins Court Forms* and contended that the procedure in contempt of court application is the same as that obtaining in judicial review for orders of *mandamus*, *certiorari* and

prohibition and emphasized that as rule 1(2) of order LIII is mandatory, an application for leave for contempt cannot be *inter-partes*. The attention of the Court was further drawn to the Court of Appeal decision in *Republic v Tony Gachoka and Another* (CA Criminal Application No 2 of 1999) where the application for leave to institute contempt proceedings was made *ex parte*. Mr Wambua referred to the words in the 2nd paragraph of page 8 of the Court of Appeal ruling in *The Judicial Commission of inquiry into the Goldenberg Affair and 3 others v Job Kilach*, CA Civil Application No 77 of 2003 where the Court stated thus:

“..... The High Court had a duty to hear him.

Mr Justice Mbito heard him on his application by way of Chamber summons under order 53 rule 1 of the Civil Procedure Rules. In the summons, which was and had to be *ex parte* as required by the provisions of Order 53 (the underlining is of this court) the respondent asked Mbito J for the following orders...”

These (underlined) words, he said, clearly show that an application for leave has to be *ex parte*. He submitted that the respondents will not suffer any prejudice if they are not heard during the *ex parte* hearing of the application for leave. Moreover, he contended, as there is no application before leave is granted no prejudice can therefore arise at leave stage. He further contended that the proceedings would be unnecessarily protracted if the respondents are given audience at leave stage.

With regard to the *Rosaftric* case, Mr Wambua submitted that the decision was wrong and that this court can therefore depart from it. In his view, the decision misinterpreted the word “shall” in rule 1(2) of order LIII.

In reply, Mr Waweru did not see the relevance of the Court of appeal decision in the *Gachoka* case because the point under consideration here was not considered there. In his view, the words “which was and had to be *ex parte* as required by the provisions of order 53” in the CA Civil

Application No 77 of 2003 (*supra*) referred to the application and not to the hearing of the application for leave. He further submitted that the reasoning at page 4 of the *Rosaftric* case was sound and can be adopted and if the respondents can be heard at the leave stage and leave is denied, they will be the better for it. Have the respondents made out a case to be heard in the application for leave?

Section 60(1) of the Constitution of Kenya confers on the High Court unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and power as may be conferred on it by the constitution or any other law. The mode of exercise of jurisdiction by High Court is spelt out in section 3(1) of the Judicature Act, chapter 8, which enjoins the High Court to exercise such jurisdiction in conformity with the Constitution of Kenya, and all other written laws etc.

Section 5(1) of the Judicature Act confers power on the High Court to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. The proviso to section 77(8) of the Constitution of Kenya stipulates that “nothing in this subsection shall prevent a court from punishing a person for contempt even if the act or commission constituting the contempt is not defined in a written law and the penalty therefore is not so prescribed”. What do all these provisions add up to? First, that the power conferred on this court by S 5(1) of the Judicature Act to punish for contempt, that is to say the power of the time being possessed by the High Court of Justice in England is in addition to the unlimited power conferred by section 60(1) of the Constitution of Kenya.

It is said that the English practice is that an application of leave to file contempt proceedings is modelled on the application for Judicial review for orders of *certiorari*, *mandamus* and prohibition as can be seen from rules 1 and 2 of order 52 of the Supreme Court Practice. This has been the practice followed by legal practitioners in this country by reason of section 5(1) of the Judicature Act. As the power to punish for contempt conferred by section 5(1) of the Judicature Act is additional to the power conferred by Constitution, it must of necessity include this court’s inherent power to make orders relating to participation in an application for leave to file contempt proceedings which may not necessarily be in tandem with the English position under order 52 of the supreme Court Practice. Such power must

encompass the power to determine whether or not a person or party affected by the intended contempt proceedings should be allowed at the leave stage to participate. The requirement that in judicial review proceedings for *mandamus*, *certiorari* and prohibition, the application for leave is normally *ex parte* and the party or parties to whom the orders are intended to be directed are normally not served or allowed participation cannot hold good in all cases. We think Mr Justice Alnashir Virsram was right in *Rosafriic Ltd & Others v the Minister for Finance* (NBI HC Misc Civil Application 1392 of 2001) when, in dealing with a similar application, albeit in judicial review under order LIII, stated:

“So, then should this court allow an interested party who claims to be directly affected to be heard at this so called “*ex parte*” stage? It is not in dispute that the interested party herein is, and will be, directly affected with the outcome of this application.

Indeed, the purpose of the application is to stop the sale of its assets and liabilities to another bank. Clearly the interested party will have the right to challenge any leave granted *ex parte* herein to the applicants. So, if they have a right to challenge the leave after it has been granted, what is wrong in having them challenge the same before it is granted? It is not logical that what can be done after can also be done before in certain circumstances where the Court considers it appropriate to do so? Or will the Court be stifled in its attempt to do justice merely by the use of the mandatory word “shall” in the rule? (ie rule 1(2) of order LIII)”.

When section 5(1) of the Judicature Act invokes the power to punish for contempt “as is for the time being possessed by the High Court in England” thereby literally, importing order 52 of the rules of the English Supreme Court Practice, it merely adds onto the power conferred on this court by the onstitution. To the extent to which the rules in order 52 of the Supreme Court Practice may not vest in the English Courts discretionary power to allow a party to participate in *ex parte* application, such rules would have no application in our jurisdiction as they would offend and be in conflict with the Constitution. The High Court of Justice in England seems to be a threesome or tripartite institution made up of the Chancery, the Queens Bench and the Family Divisions. Order 52 of the Supreme Court Practice is designed to meet the needs of the English people. It is not static. It is amended from time to time to keep pace with the changing circumstances of the English people. There is need for Kenya to promulgate her own rules to govern applications for contempt of court under section 5(1) of the Judicature Act. There is no reason or rhythm why Kenya should continue to rely on rules of Practice and Procedure from England, or India, or any other country for that matter, which are not designed to suit the circumstances of her own people. Development of jurisprudence in Kenya should reflect aspirations and ideals of her own people. In this branch of the law, this is hampered by application of the English Rules. In our view, this court has power to make and will, in appropriate cases, make orders permitting any party who may be affected by an intended application for contempt to participate in the hearing of the *ex parte* application for leave. In deciding whether to permit such party to participate in the *ex parte* application for leave, the Court will be guided by considerations as to whether any prejudice will be caused or occasioned by such participation, and whether ends of justice will be better served by an *inter partes* hearing of the *ex parte* application.

Where the party applying to be allowed to participate in the *ex parte* application intends to place before the Court relevant material or facts without which the Court would not have a full or complete picture of the matter before it, the Court will readily allow such party to participate in the *ex parte* application. This is more so where it becomes plain that the party seeking leave to institute contempt proceedings has omitted material facts or has distorted facts or where, on the basis of the material placed before the Court by the party seeking to participate in the *ex parte* application, it appears to the Court that the intended contempt proceedings are not properly founded in law or are futile.

Where, as here, leave is sought in an ongoing litigation, the Court will more readily allow a party to participate in the *ex parte* application if it is shown that no prejudice is caused and that such party intends to place before the Court material which will assist the court to fairly reach its decision. But where a party has patently and beyond peradventure been in flagrant breach of the Court order, the dictates of justice demand that such party be shut out.

The circumstances of this case indicate that service of the Court order is a contentious issue. Leave is

being sought on the basis that service of the order was effected. The 1st respondent has filed an affidavit denying that there was due or proper service. This is material that is relevant to the issue whether leave should be granted. If it transpires early enough that there was no service or proper service of the order, it will be futile to grant leave. A decision made at the leave stage on the point may save the Court valuable time rather than after a full-fledged hearing of the contempt proceedings following leave.

In the result, we allow the 1st respondent to participate in this *ex parte* application for leave. We deem the replying affidavit filed as having been duly filed.

Dated and delivered at Nairobi this 28<sup>th</sup> day of November, 2003

**J. A. ALUOCH**

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**JUDGE**

**P. K. KARIUKI**

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**JUDGE**