Republic v Cabinet Secretary in Charge of Ministry of Interior and Coordination of National Government & 2 others; Wuerfel (Exparte Applicant) (Miscellaneous Application 206 of 2017) [2024] KEHC 926 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 926 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 206 OF 2017

OA SEWE, J

JANUARY 24, 2024

IN THE MATTER OF CONTEMPT AND OR DISOBEDIENCE OF COURT ORDERS DATED 15TH DECEMBER 2017

AND

IN THE MATTER OF A DECLARATION THAT KLAUS WUERFEL IS A MEMBER OF A PROHIBITED IMMIGRANT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 AND THE KENYA CITIZENSHIP AND IMMIGRATION ACT, NO. 12 OF 2011

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY IN CHARGE OF MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

DIRECTOR OF IMMIGRATION ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

KLAUS WUERFEL ..... EXPARTE APPLICANT

RULING

1. Before the Court for determination is the Notice of Motion dated 4th May 2021. The application was filed by the ex parte applicant, Klaus Wuerfel under Articles 25, 48, 49 and 50 of the *Constitution*,

Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya, Section 63(c) and (e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 40 Rule 3 of the *Civil Procedure Rules* 2010, among other provisions of the law. He prayed for orders that:

(a) Spent

(b) Spent

(c) The Court be pleased to order the 2nd respondent herein, namely, the Director of Immigration, be committed to civil jail for a term not exceeding 6 months for contempt and/or disobedience of the orders issued herein on 15th December 2017 by Hon. Lady Justice Chepkwony.

(d) The costs of the application be borne by the respondent.

2. The application was premised on the grounds that, on 15th December 2017, the Court in the presence of counsel for the parties, granted an order prohibiting the respondents herein, whether by themselves, their officers, servants or agents, from proceeding with any arrest, detention and/or deportation of the ex parte applicant; and from interfering with the said ex parte applicant's peaceful stay in Kenya. That thereafter, the applicant duly applied for a visa on 29th April 2021 and the same was approved by the 2nd respondent. The applicant was therefore aggrieved that, on 1st May 2021, the 2nd respondent, through his officers, servants or agents, proceeded to arrest and detain him despite showing them his valid visa. He also complained that an attempt was made to deport him to Germany, in blatant disregard of the express orders of the Court.

3. Consequently, the applicant filed the instant contempt application on 5th May 2021. He annexed several documents to his Supporting Affidavit in proof of his assertions. He explained that on 27th April 2021, he left Kenya for Addis Ababa, Ethiopia, where he stayed for 3 days; and that upon return to Kenya, he was detained by the 2nd respondent's officer with a view of being deported to Germany. He however stood his ground that the was lawfully present in Kenya; and that his arrest and detention was in contravention of a valid court order; hence his application.

4. The applicant accordingly obtained interim orders on 10th May 2021 for his immediate release from custody and the matter was fixed for hearing on 26th May 2021. There being no indication that the respondents filed any response, the application is purely premised on the grounds set out therein as explicated in the applicant's Supporting and the written submissions filed by counsel for the respondents, Ms. Kiti. The respondents accordingly proposed the following two issues for determination:

(a) Whether the applicant has discharged, to the required standards, the evidentiary burden of proving that he was arrested by the respondents; and,

(b) Whether the suit is scandalous, frivolous and vexatious.

5. Counsel relied on Sections 107 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, as well as the cases of *Raila Amolo Odinga & Another v IEBC & Others* [2017] eKLR, Election Petition No. 2 of 2013: *Moses Wanjala Lukoye v Benard Wekesa Sambu* and *David Nyanjom Owak v Attorney General* [2018] eKLR for the principle that whoever alleges must prove. In her view, the applicant fell short of discharging the burden of proof in this case. Moreover, the respondents submitted that the application is scandalous, frivolous and vexatious in so far as nothing has been presented by the applicant to prove that he applied for and was issued with a visa authorizing his stay in the country. In this regard, the respondents relied on Order 2 Rule 15 of the *Civil Procedure Rules* and the case of *County Council of Nandi v Ezekiel Kibet Rutto & 6 Others* [2013] eKLR to support the posturing that the application

is the perfect example of a litigant using the process of the court, not for purposes of agitating a right, but for other extraneous reasons.

6. A perusal of the court record confirms that, upon being granted leave to apply for judicial review, the applicant filed a Notice of Motion dated 25th August 2017; which application was the subject of the ruling dated 15th December 2017. In that ruling, the Court (Hon. Dora Chepkwony, J.) noted, at paragraph 8 thereof, that the respondents filed no response to the application; and that their counsel, Ms. Kiti stated that they had no response and that they would go by the Court's ruling. Accordingly, the application was treated as unchallenged and the following orders were granted to the applicant:

   (a) An order of Certiorari to remove into the Court for the purposes of being quashed the decision, declaration and directive of the 1st respondent made on 18th July 2017 declaring the applicant a prohibited immigrant pursuant to Section 33(1) of the *Kenya Citizens and Immigration Act*, No. 12 of 2011.

   (b) An order of Prohibition directed to the 1st, 2nd and 3rd respondents prohibiting them by themselves, their officers, servants and agents from proceeding with any arrest, detention and or deportation of the applicant out of Kenya and from interfering with the applicant' peaceful stay in Kenya without due process.

   (c) An order of Prohibition directed to the 1st, 2nd and 3rd respondents prohibiting them by themselves, their officers, servants or agents from giving effect to or enforcing or any manner or from issuing any fresh declaration or orders under Section 33 of the *Kenya Citizen and Immigration Act* No. 12 of 2011 for not less than seven (7) days from the date the service is notified in person and in writing to the ex parte applicant to enable his access to the High court for redress, if necessary.

   (d) The respondents to pay costs to the applicant.

7. The *Contempt of Court Act*, 2016, having been declared invalid on 9 November 2018 for lack of public participation in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR, the applicable law in this regard is that which obtained prior to the passing of the *Contempt of Court Act*; as guided by Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya. That provision states:

   (1) 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 such power shall extend to upholding the authority and dignity of the subordinate courts.

   (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary criminal jurisdiction of the High Court."

8. In this posturing, I find succour in the decision of Hon. Nyamweya, J. (as she then was) in case of *Republic v Kajiado County & 2 others Ex parte Kilimanjaro Safari Club Limited* [2019] eKLR, in which it was held:

   26. The applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules,

which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the *Judicature Act* which provided 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 courts."

27. This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended..."

9. Needless to say that court orders must be strictly obeyed and any deliberate disobedience accordingly punished. This position was aptly articulated by Romer LJ in *Hadkinson v Hadkinson* [1952] AllER 567 thus:

> It is the plain and unqualified obligation of every person, against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.
>
> For, a person who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed." (Also see *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another*[2005] KLR 828)

10. Accordingly, it is now settled that in an application of this nature, an applicant must prove the following pre-requisites, namely:

(a) that the terms of the order are clear and unambiguous;

(b) That the contemnor had knowledge or proper notice of the order;

(c) That the respondent has deliberately failed to obey the order;

(see *Katsuri Limited vs. Kapurchand Depar Sha*h [2016] eKLR)

11. The question to pose then, is whether in the circumstances, the 1st, 3rd and 5th Respondents can be cited for contempt of the orders of 13th July 2022. In case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR Hon. Mativo, J (as he then was) held as follows: -

> It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the

Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated: -

> "There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:
>
> (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
>
> (b) the defendant had knowledge of or proper notice of the terms of the order;
>
> (c) the defendant has acted in breach of the terms of the order; and
>
> (d) the defendant's conduct was deliberate...."

12. Hence, the four elements of contempt that the petitioner needed to prove are:

    (a) Was there an order of the court;

    (b) was it clear and unambiguous;

    (c) was it served; and

    (d) was it willfully and intentionally disobeyed?

13. This threshold was further discussed by the Supreme Court of India in *Mahinderjit Singh Bitta v Union of India & Others* IA No.10 of 2010, in which it was held:

> ...In exercise of its contempt jurisdiction, the courts are primarily concerned with whether the contemnor is guilty of intentional and willful violation of the orders of the court, even to constitute a civil contempt. Every party that is lis before the court, and even otherwise, is expected to obey the orders of the court in its true spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution..."

14. As has been shown above there is no contention as to whether there was an order of the court, its clarity or service thereof upon the respondents. The only issue in contention is the alleged disobedience by the 2nd respondent, of the order of 15th March 2018, as extracted and issued 23rd March 2018. In this regard, it is manifest from the Verifying Affidavit filed with the initial judicial review application that the applicant's main complaint was the declaration that he was a prohibited immigrant. He accordingly prayed, not only for an order of Certiorari to quash that decision, but also an order of Prohibition to forestall his intended deposition as well as any such future declarations without due process.

15. In his instant application, the applicant averred that, being aware of the order of the court dated 15th December 2017, the 2nd respondent deliberately ignored, failed and/or refused to strike out his name from the Immigration's Blacklist; and that he was arrested on return from Addis Ababa on 30th April 2021 with a view of being deported to Germany. He however acknowledges at Paragraph 4 of his Supporting Affidavit that he visited the Immigration Regional Headquarters, Mombasa, where he was assured that his name had been taken off the Blacklist. Likewise, the applicant deposed that he was issued with an Entry Visa which was duly approved by the 2nd respondent on 29th April 2021. A copy

thereof was annexed to the Verifying Affidavit as Annexure KW-4, and it shows that the visa was valid for 3 months.

16. In the premises, there appears to be no direct connection between the orders of 15th December 2017 and applicant's subsequent arrest on 29th April 2021. In particular, the applicant did not demonstrate that his arrest on 29th April 2021 was in violation of the orders of 15th December 2017. Indeed, the prohibition against the applicant's arrest was not indefinite, but was conditional on compliance with due process. Hence, he had no valid basis for complaining on the simple ground of his arrest. He needed to further prove that it was in disregard of due process. It is significant therefore that upon demonstrating that he was lawfully in Kenya he was released.

17. More importantly, counsel for the respondent confirmed to the Court on the 24th May 2023 that the applicant's name had, in fact, been removed from the Immigration Blacklist; and that this was the reason he was allowed back in Kenya in the first place. On the 16th May 2023, the applicant expressed surprise and stated that he did not know that his name had been removed from the Blacklist. He further stated that he had been allowed back into Kenya without any issue; and therefore that his application had been overtaken by events. He however sought to be heard on the sole ground that he was arrested for no reason. That complaint, in my considered view, constitutes a fresh cause of action and cannot be vindicated as a contempt of court matter.

18. Needless to say that contempt of court is quasi-criminal in nature, and it is now settled that the burden of proof is slightly higher than the burden applicable to ordinary civil cases. Thus, in *Mutitika v Baharini Farm Ltd* [1985] eKLR the Court of Appeal held:

> In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

19. In the absence of satisfactory proof of disobedience, as is the case, it is my considered finding that the application is utterly lacking in merit. It is accordingly dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JANUARY 2024

OLGA SEWE

JUDGE