



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO.396 OF 2019

JOSEPH GIKUHI MWATHE.....APPLICANT

VERSUS

DANIEL KARIUKI NJAMWEA.....1ST RESPONDENT

FAMILY BANK LIMITED.....2ND RESPONDENT

RULING

1. This is a Ruling in respect of an application dated the **11th October, 2019** and filed on **14th October, 2019** by **JOSEPH GIKUHI MWATHE**. The application is brought under **Sections 1A, 1B and 3A**, all of the **Civil Procedure Act** and **Section 5** of the **Judicature Act Laws of Kenya** and all the enabling provisions of Law. In the application, the Applicant seeks the following orders:-

1. THAT the manager of the 2nd Respondent, Jomo Kenyatta Avenue Branch in Mombasa County be committed to Civil Jail for the breach of the Honourable Court's Decree issued on the 7th November, 2017.

2. THAT costs of this Application be provided for.

2. The **Notice of Motion** is supported by an **Affidavit** sworn on **11th October, 2019** by **Joseph Gikuhi Mwathe**, the Applicant herein.

3. The **Notice of Motion** Application is premised on the grounds that: -

1. THAT the 2nd Respondent's Manager Jomo Kenyatta Avenue Branch in Mombasa County, has refused to comply with the Honourable Court's Decree despite service.

2. THAT the actions of the manager to refuse to comply with the Honourable Court's Decree has scuttled the Applicant's attempts to execute the Honourable Court's Decree to recover Motor Vehicle Registration Number KBX 819 D in the occupation of the 1st Respondent.

3. THAT the actions of the 2nd Respondent is an affront to the authority of the Honourable Court.

4. THAT despite services and several reminders to comply with the Honourable Court's decree, the 2nd Respondent has refused to hand over to the Applicant the Log Book of Motor Vehicle Registration Number KBX 819 D.

5. THAT it's important that the dignity and constitutional authority of the Honourable Court be respected and maintained.

4. The 2nd Respondent has opposed the said Application vide a **Preliminary Objection** dated the **30th August, 2020** and it states: -

1) THAT the Application herein offends the provisions of Section 10 of the Magistrates' Court Act, 2015 Laws of Kenya. This Application is therefore unsuitable before this Court since it forestalls the parties' right to appeal.

5. The court will first determine the Preliminary Objection as raised by the Respondent. The instant application will abide by the said outcome.

DIRECTIONS OF THE COURT

6. The parties took directions on disposing the application by way of written submissions. The Applicant filed its submissions on the **8th October, 2020** while the 2nd Respondent filed theirs on the **4th November, 2020**. The parties opted to rely on their written submissions in their entirety.

THE APPLICANT'S SUBMISSIONS

7. The Applicant submitted that the 2nd Respondent be cited for Contempt of Court for failure to comply with the Decree of the lower Court in **CMCC No. 1301 of 2016** which ordered that the Log Book of Motor Vehicle Registration Number **KBX 819 D** be released to the Applicant.

8. That the Decree of the lower court was duly served on the Manager of the 2nd Respondent who has failed to comply with the said court order. It has been submitted that it has since been three (3) years since the decree was served upon the 2nd Respondent, and the said order has not been complied with.

9. The Applicant has urged that the court finds the 2nd Respondent in breach of the lower court's order and that its actions are an affront to the trial court's authority and dignity.

10. With regard to the **Preliminary Objection** dated **30th August, 2020**, the Applicant has not denied that **Section 10(3)** of the **Magistrates' Act** provides for Contempt of Court. The Applicant's main contention is that the filing of the instant application does not breach the right of the 2nd Respondent to lodge an Appeal since he is rightfully before the court by virtue of the provisions of **Section 5** of the **Judicature Act** and **Rule 39(2)** of the **High Court (Organization and Administration) General Rules 2016** which give the High Court power to punish for Contempt of Court and specifically **Rule 39(2)(d)** of the **High Court (Organization and Administration) General Rules 2016** that gives the High Court power to exercise supervisory powers on application by any party to the Court to punish for Contempt of Court.

11. It has also been submitted by the Applicant that the **Judicature Act** and **High Court (Organization and Administration) General Rules 2016** clothe the High Court with the requisite jurisdiction to handle the Application for Contempt of Court. The Applicant seeks that the Court makes a finding that the Application for Contempt is properly before court and dismiss the Respondent's Notice of Preliminary Objection. For **Rule 39(2)** of the **High Court (Organization and Administration) General Rules 2016** reliance was placed on the case of **HF Group Limited –vs- Cyprian Nyakundi [2019] eKLR.**

THE 2ND RESPONDENT'S SUBMISSIONS

12. According to the 2nd Respondent, the Application which is for Contempt of Court has been improperly lodged before the High Court in contravention of the provisions of **Section 10(1) of the Magistrates' Court Act** which gives the Magistrate's Court jurisdiction over Contempt matters.

13. The Respondent relied on the case of **Christine Wangare Cachege –vs- Elizabeth Wanjiru Evans & 11 Others [2014]eKLR**, where it was acknowledged that **Section 10** of the **Magistrates' Court Act** gives the Magistrate's Court unlimited jurisdiction to punish for Contempt of Court.

14. The Respondent has acknowledged that the High Court and Court of Appeal have jurisdiction to punish for contempt by virtue of Section 5(1) of the Judicature Act, but submit that the trial court, in this case being the Magistrate's court should be allowed to exercise its original jurisdiction so as not to forestall parties' right to appeal to the High Court. Relied on the cases of . This was as held in **Ramadhan Salim –vs- Evans M. Maabi T/A Murhy Auctioneers & Another [2016] eKLR** and **In Re ZJA & TA (Minors) [2020] eKLR.**

15. It was added that Jurisdiction is the key and the cornerstone of litigation in that, without it, a court of Law should lay down its tools. Reliance has been placed on the finding in the case of **Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989)eKLR.**

16. As for whether the Manager of the 2nd Respondent was in breach of Court Orders, it has been submitted that the Applicant has failed to prove the required ingredients of what constitutes Contempt as laid down in the case of **Cecil Miller –vs- Jackson Njeru and Another [2017]eKLR.**

17. The Manager of the 2nd Respondent has stated that he has at all times complied with the trial court's orders and that the Applicant has not satisfied to the required standard of proof in Contempt of Court proceedings which "*standard of proof must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt*" as was held in the case of **Mutitika –vs- Baharini Farm Limited [1985] KLR 229.**

18. In conclusion, it has been submitted that the Applicant having failed to satisfy to the standard required the threshold to warrant the grant of committal orders, the application emphatically fails and ought to be struck out. Consequently, it is the 2nd Respondent's prayer that the **Notice of Preliminary Objection** dated **30th August, 2020** be upheld.

ANALYSIS AND DETERMINATION

19. I have considered the Preliminary Objection as raised by the 2nd Respondent which is based on the ground that the court lacks jurisdiction to hear and determine this matter pursuant to the provisions of **Section 10 of the Magistrates' Court Act No.26 of 2015**. I find the issue for determination being whether this court has jurisdiction to determine the application by the applicant and whether the same meets the threshold for the grant of committal orders for contempt of court under **Section 10 of the Magistrates' Court Act No.26 of 2015**.

20. The **Magistrates' Courts Act, 2015** came into force on **2nd January, 2016** and it gives the Magistrate's Courts unlimited jurisdiction to punish for contempt. **Section 10** of the said **Act** specifically provides that: -

(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court-

(a) Assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) Interrupts or obstructs the proceedings of the Court; or

(c) Without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court."

21. The prevailing law before the amendment of the Act was that the Magistrates courts had no powers to punish for contempt. **Section 10(3)** is in respect of civil proceedings before the court and any disobedience of a decree or order of the court constitutes contempt and is punishable by the same court.

22. The Court of Appeal in the case of **Ramadhan Salim –vs- Evans M. Maabi T/A Murhy Auctioneers & Another [2016]eKLR** held: -

"...The only jurisdiction the magistrate's court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the Magistrates' Courts Act, 2015 which came into force on 2nd January 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt..."

23. In the case herein a civil proceeding, a Decree was issued on **7th November, 2017** by **Hon. E. Kagoni** (Senior Resident Magistrate) in **CMCC No.1301 of 2016** which ordered that the Log Book of Motor Vehicle Registration Number **KBX 819D** be released to the Applicant. The Applicant claims that the 2nd Respondent has not complied with the said Decree and has thus filed an application for Contempt of Court before this Court.

24. To the Applicant, the High Court has the requisite jurisdiction to

handle the Contempt application despite the provision of **Section 10(3)** of the **Magistrates' Court Act**.

25. It is true that the High Court and Court of Appeal have the requisite unlimited jurisdiction to handle Contempt of Court applications but the reading of **Section 10 of the Magistrates' Court Act** shows that the Magistrate's Court also have concurrent jurisdiction to handle Contempt of Court when it comes to civil proceedings as provided under **Section 10(3)** of the **Magistrates' Court Act**.

26. I further agree with the 2nd Respondent that if this Court makes a finding in the application as filed, it will forestall their right to Appeal. This position was observed by the Court of Appeal in **Ramadhan Salim –vs- Evans M. Maabi T/A Murhy Auctioneers & Another (Supra)** where it was acknowledged that it had concurrent jurisdiction with the High Court to handle an application for Contempt of Court but declined to determine the same so as not to pre-empt the parties right to Appeal.

27. In view of the above, I agree with the 2nd Respondent that the court with original jurisdiction to handle the application for Contempt of Court in this case is the court which issued the impugned orders and not this court. And this is the trial (Magistrate's) court.

28. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See **Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989)eKLR**.

29. Having so found, this court cannot therefore determine the merits on the contempt of Court application, for doing so will usurp the authority of the Magistrate's Court, further, it is likely to prejudice the court determination should a similar application be filed in the same court, and compromise the party's right to appeal.

30. Consequently, I find that the **Preliminary Objection** dated **30th August, 2020** has merit and uphold the same. The application dated

11th October 2020 is therefore struck out with costs to the 2nd Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE

In the Presence of:

No appearance by Mr. Okanga for Applicant

Mr. Kinyua counsel holding brief for Mr. Akello counsel for 2nd Respondent