



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 380 OF 1992

HADAD M. KARUKWA.....1ST APPELLANT

WAWERU KARUKWA.....2ND APPELLANT

-VERSUS-

JOHN MWAGO KARIUKI.....RESPONDENT

RULING

1. For determination is the motion dated 15th June, 2015, seeking *inter alia* that leave be granted to **Hadad M. Karukwa** and **Waweru Karukwa** (hereafter the 1st and 2nd Applicant, respectively) to apply for the committal to civil jail, of **John Mwago Kariuki** (hereafter the Respondent) for contempt of court. The motion is premised on the provisions of Section 5 of the Judicature Act and Order 52(2) of the Supreme Court Rules, (presumably this reference is to Order 52 of the Civil Procedure Rules of England prior to amendment in 2012). On grounds *inter alia* that on 18th November 2008 an order was issued by this court against the Respondent requiring him to serve and release to the Appellants specific documents listed in the order, and that despite the said order being served upon the Respondent, he has refused/failed to comply.

2. The motion is supported by statement of facts and a verifying affidavit of the 2nd Applicant. It is deposed therein that on 18th November 2008 this court had ordered the Respondent to serve and release to the Appellant the documents specified in the said order. That despite being served with the order and subsequent correspondence between the parties' counsel regarding compliance therewith, the Respondent has refused and/or neglected to comply.

3. The motion was opposed by the Respondent through his replying. Therein, the Respondent took issue with the validity of the motion pointing out that the 1st Applicant died in 1997, hence could not have instructed counsel on record for the Applicants to file an application in 2015. Secondly, the Respondent denied knowledge or service of order issued on 18th November 2008; thirdly, that copies of the documents which were the subject of the order in question were already in the parties' possession having been filed for purposes of the trial, and that therefore the Respondent he was intrigued by the issuance of the subject orders especially as he was not heard prior to the orders being given. Finally, the Respondent deposed that his house was broken into sometime in 2002 and various items, including the documents in question, save for some that were in his daughter's possession, were stolen and have not been recovered,

4. On 23rd February 2021, the court directed that the motion be canvassed through written submissions and subsequent oral highlighting. The parties duly complied with filing of submissions but elected not to highlight them.

5. The Applicants' submissions generally reiterated the contents of the verifying affidavit in support of the motion and added that delay in prosecuting the present motion occurred due to the disappearance of the original file herein necessitating reconstruction. It was further submitted there were no concrete grounds on the part of the Respondent opposing the present motion and the contempt by the Applicant could be purged by availing all the documents as earlier ordered by the court. Finally, counsel submitted the motion is merited and ought to be allowed and that by dint of the Contempt of Court Act, 2016 leave to apply is no longer necessary.

6. For his part, the submitted that there was no evidence to prove personal service of the subject order or even the present motion and asserted that willful disobedience of a court order cannot be imputed against a party who has no knowledge of the order. Regarding the applicable principles he relied on the case of **Mutitika v Baharini Farm Limited (1985) KLR 229**. Further, counsel pointed out that the Respondent could not be cited for contempt as the parties in the matter were already in possession of the documents having relied on and/or used them during the hearing of the suit. He emphasized the fact that this matter had been outstanding for long and the explanation given in the replying affidavit to assert that compliance with the 2008 order was difficult.

7. The Court has considered the material canvassed in respect of the motion as well as the copies of the original record filed on 23rd October

2018, and which comprises the reconstructed file. Several preliminary matters arise and need to be addressed at the outset.

8. First, the Applicants did not respond to the allegation that the 1st Respondent is deceased and yet the motion is also brought in his name. If this is true, then counsel seized of this matter on behalf of the Applicants ought to take appropriate steps. That said, the motion before the Court relates to an order issued on 18th November 2008 by **Okwengu J** (as she then was) and extracted on 5th September 2011. The motion itself and related material is in the said bundle which counsel for the Respondent **Mr Eshuchi** confirmed to have in his possession when the matter first came up before me on 23rd February 2021.

9. Thus, claims in the replying affidavit that the motion herein was not served on the Respondent have no basis. Ditto for denials by the Respondent of receipt of the copy of the order dated 18th November 2008. Attached to the Applicants' affidavit in support of this motion are copies of the extracted order (annexure 'WK1') and affidavit of service sworn by **David Ndungo Maina**, the process server, on 14th September 2014 (annexure 'WK2') evidencing personal service of the extracted order upon the Respondent on 14.09.2011 at **Mung'etho Village, Maragwa, Murang'a**.

10. Having set the record straight, the court will now proceed to deal with the prayer in the motion dated 15th June 2015. Although the parties by their affidavits and submissions appeared to have partly addressed the application as one brought to punish contempt, the motion is one for leave to apply for the committal of the Respondent to civil jail for contempt of court. Having considered the matters canvassed before it, the Court is of the considered view that the motion turns on the sole question whether leave is indeed required to cite a party alleged to be in disobedience of a court order for contempt of Court.

11. The Applicants have in their submissions correctly admitted that leave is no longer required but the reason given is no longer valid as the Contempt of Court Act which they relied on was in principle declared unconstitutional by the judgment of **Mwita J** in **Kenya Human Rights Commission v Attorney General & Another Constitutional Petition No. 87 OF 2017; (2019) eKLR**. Therefore, the position reverted to where it was prior to the enactment of the Contempt of Court Act. Regarding the erstwhile requirement for such leave, the issue was settled by the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans and 11 Others (2014) e KLR**.

12. In that case, the Court of Appeal held that the Civil Procedure (Amendment No.2) Rules 2012 of England apply to contempt proceedings in this country by dint of the provisions Section 5 of the Judicature Act. The Court of Appeal stated *inter alia* that:

“It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12 – Committal “for interference with the due administration of justice” and 81.17 – Committal for Making false Statement of Truth or disclosure statement” where leave or permission is required.

13. The Court proceeded to state that:

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order.”

14. Similarly in this case, no leave was required prior to bringing an application seeking committal of the Respondent for contempt arising from his alleged disobedience of the Court order issued on 18th November 2008. In the circumstances the motion dated 15th June 2015 is hereby dismissed but the Court orders that each party will bear its own costs. The Applicants or surviving Applicant are at liberty to file a substantive application for committal of the Respondent as they may deem fit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JULY,2021.

C.MEOLI

JUDGE

In the Presence of:

For the Applicants: Mr Kimani

For the Respondent: Ms Ouma h/b for Mr Eshuchi

C/A: Carol