



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 266 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE MANAGING DIRECTOR, KENYA

RAILWAYS LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE APPLICANT: SAMUEL MUGWE GIOCHE

RULING

1. The application pending for hearing herein is a Chamber Summons application dated 12th February 2020 brought by the *ex parte* Applicant’s Notice of Motion, seeking leave to institute contempt proceedings against the Managing Director, Kenya Railways Corporation (the 1st Respondent herein), for disobeying court orders issued herein.

2. The said application is supported by the *ex parte* Applicant’s verifying affidavit sworn on 12th February 2020, wherein he states that while the 1st Respondent has paid the decretal sum awarded herein of Kshs 1,392,130/=, he has neglected and failed to pay the interest and costs awarded amounting to Kshs 328, 426/=. He annexed a copy of the judgment delivered herein on 29th July 2019, in which the Court granted him orders of mandamus compelling the 1st Respondent to pay him the said sums of money, and copies of letters demanding payment which he sent to the 1st Respondent.

3. I have considered the *ex parte* Applicant’s application, and note that after the entire Contempt of Court Act was declared unconstitutional on 9th November 2018 by Mwita J. in **Kenya Human Rights Commission vs Attorney General & Anor (2018) eKLR**, the applicable law on contempt of Court is now the English Common law. This was the holding by this Court in **Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR** as follows:

“37. The procedure 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 under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertaking. The English law on committal for contempt of court 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.”

38. This section was repealed by section 38 of the Contempt of Act, which Act is now no longer operative, however, the substance of the common law is still applicable under section 3 of the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...”

4. It is notable that under the English law it is not necessary to obtain leave to commence contempt of Court proceedings. This position was

explained by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR thus:

“An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as “*application notice*” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.

It is clear from this summary that leave, now called “*permission*” is not required where committal proceedings relate to a breach of a 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 a false statement of Truth or disclosure statement*” where, in the former it is expressly provided that:-

“The application for permission to make a committal application must be made by a part 8 claim form.....”

And in the case of the latter,

“A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made.....”

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....”

5. To this extent, and given that there is evidence of the orders granted by this Court requiring the 1st Respondent to make payment of interest and costs to the *ex parte* Applicant, and demands made by the Applicant for payment, I will dispense of the *ex parte* Applicant’s application by granting the appropriate orders. Lastly, it is notable in this regard that court operations have been scaled down since the filing of the applications due to the COVID-19 pandemic, and cases are now being heard remotely by way of electronic means.

6. In the premises, I accordingly make the following orders:

I. The *ex parte* Applicant shall file and personally serve the 1st Respondent with an application for contempt of Court, a copy of this ruling and a mention notice within thirty (30) days of today’s date.

II. There shall be no order as to costs of the Chamber Summons dated 12th February 2020.

III. This matter shall be mentioned on 15th July 2020 for further directions.

IV. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, the Court shall hear this suit on the basis of the electronic copies of the pleadings and written submissions filed by the parties.

V. The parties shall file their pleadings, applications and written submissions electronically by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

VI. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

VII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

VIII. The parties shall also be required to send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

IX. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Thursday, 21st May 2020.

X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 15th July 2020 and bring it to the attention of a Judge in the Division on that date for directions.

XI. Parties shall be at liberty to apply.

7. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE