



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 419 OF 2017

KENNEDY ODHIAMBO NYAGUDI.....1ST PLAINTIFF

THE LION'S HEART SELF HELP GROUP.....2ND PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

AMAYA GAMING GROUP (K) LIMITED.....2ND DEFENDANT

RULING

THE PRELIMINARY OBJECTION

The Plaintiffs filed on 22nd February 2018 a Notice of Preliminary Objection dated 20th February 2018 against the Application dated 24th October 2018 on the grounds that: -

1. The Application is invalid and a nullity ab initio as it is founded upon the Contempt of Court Act that was declared unconstitutional in its entirety on 9th November 2018 in **Kenya human rights Commission vs Attorney General & Another [2018] eKLR.**
2. There is no legal basis for an alleged claim for civil contempt as described by **Section 4 (1) (a) of the Contempt of Court Act.**
3. The Applicant lacks locus standi to commence criminal contempt under **Section 4 (1) (b) of the Contempt of Court Act** as the 1st Defendant has not sought consent of the Director of Public Prosecution or leave of this court.
4. The publication was not made when proceedings were active as provided for under **Sections 10 and 11 of the Contempt of Court Act** hence the Application is null and void.

The Plaintiffs thus prayed this court to dismiss the Application dated 24th October 2018 with costs.

THE APPLICATION DATED 24TH OCTOBER 2018

Based on **Section 5** of the **Judicature Act** (Repealed) and **Sections 4 (1), 5 (b), 7 (1), 10 and 27 (f) of the Contempt of Court Act, 2016** amongst other provisions of the law, the 1st Defendant/ Applicant, filed a Notice of Motion dated 24th October 2018 and filed on 25th October 2018 for orders that: -

1. The 1st Plaintiff be ordered to appear before court to show cause as to why he should not be found guilty of contempt and punished in accordance with **Section 29 of the Contempt of Court Act.**
2. The 1st Plaintiff's advocate, Mr. Eddy Nicholas Orinda, be ordered to appear before court to show cause as to why he should not be found guilty of contempt and punished in accordance with **Section 29 of the Contempt of Court Act.**

3. An order for committal to civil jail for a period not exceeding 6 months for contempt of court do issue against the 1st Plaintiff.
4. An order for committal to civil jail for a period not exceeding 6 months for contempt of court do issue against Mr. Eddy Nicholas Orinda, Advocate.
5. The 1st Plaintiff and Eddy Nicholas Orinda bear the costs of this application personally, jointly and severally, on a full indemnity basis.
6. Any other orders the court deems fit in the circumstances.

The Application was based on the following grounds: -

1. Lady Justice Ngetich on 16th August 2018 issued a stay of execution of the orders dated 13th July 2018 which were extended on 17th October 2018 to 17th January 2019.
2. Notwithstanding the orders of 16th August 2018 and the pendency of this suit as well as **Civil Appeal 278 of 2018 NIC Bank Limited v Kennedy Odhiambo & 2 Others**, the 1st Plaintiff and his advocate have gone on to cause the publication in KTN of a piece entitled, “*Betting Bait: Kenya’s Mega Money Laundering Scam*” alleging money laundering and fraud within the 1st Defendant, which issues are pending determination herein.
3. **Section 10 (3) of the Contempt of Court Act** provides that a person is strictly liable for contempt of court where the person does any act which interferes with the course of justice in relation to any judicial proceedings.
4. The Plaintiffs have further caused the publication of “*How NIC Bank got entangled in Amaya Lottery cash battle*” published on 29th November 2017 in Business Daily Newspaper and “*NIC faces private trial in betting cash row*” published on 15th October 2018 in the Daily Nation Newspaper.
5. The Plaintiffs actions in litigating this matter in the media rather than before the court prejudices the pending litigation, subjects the 1st Defendant to public odium and dislike, and risk bringing the dignity and authority of this court into question and disrepute.

The 1st Defendant thus prayed this court to allow the Application which is supported by the Affidavit of Waweru Mathenge.

PLAINTIFFS’ SUBMISSIONS

The Plaintiffs relied on their Written Submissions dated 20th February 2019 during oral submissions.

It is the Plaintiffs submission that the Application is invalid and a nullity ab initio as the provisions under which it is lodged have been declared unconstitutional. The Application though lodged on 25th October 2018 pursuant to the **Contempt of Court Act**, is to be heard on 25th February 2019 way after this court declared the entire Act unconstitutional on 9th November 2018 in **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR**. Therefore, the prosecution of the Application cannot be continued under that law and it is otherwise invalid and a nullity.

The Plaintiffs further submitted that the Application is unknown in law as there is no order upon which to found a claim for civil contempt. It was their submission that the 1st Defendant is vague as to how the Plaintiffs and the alleged contemnors breached the order for stay of execution granted on 16th August 2018 which stayed the execution of an earlier order for discoveries made on 13th July 2018, which stopped the 1st Defendant from making discoveries. Therefore, there is no order made against the Plaintiffs and the alleged contemnors that they could be in breach or contempt of. It was thus the Plaintiffs submission that there is no legal basis to prosecute a claim for civil contempt under **Section 4 (1) (a) of the Contempt of Court Act**.

It was the Plaintiffs submission that the Applicant is pursuing criminal contempt whereas it lacks *locus standi* to do so. A dispute as to whether a publication is in contempt of court falls under criminal contempt. **Section 8 of the Contempt of Court Act** made it compulsory for the consent of the DPP or leave of this court to be sought and granted before such an application can be made, neither of which the Applicant has sought or been granted. Thus, these proceedings are a nullity on the basis of want of *locus standi* to institute or continue them.

Furthermore, the Plaintiffs submitted that under **Section 10 & 11 of the Contempt of Court Act**, a publication must have been made when proceedings are active, and these proceedings could be active from the time when arrangements for hearing were made or from the time the hearing began, as pre-trials are considered proceedings distinct from hearings. It was their submission that there are no active proceedings in this case as the case is at the discoveries stage and pre-trials have not even commenced.

The Plaintiffs further submitted that there is no legal basis for contempt proceedings and standard of proof has not been met. The Contempt of Court Act having been declared unconstitutional, recourse can only be gained from **Section 5 of the Judicature Act** to found an application for civil rather than criminal contempt, and as submitted, there is no basis for civil contempt as there was no order in the first place that the Plaintiffs and alleged contemnors could violate and proof of such violation has neither been presented nor made by the 1st Defendant.

1ST DEFENDANT’S WRITTEN SUBMISSIONS

The 1st Defendant relied on its Submissions dated 4th June 2019.

It was the 1st Defendant's submission that there are 3 issues for determination: -

1. Whether the Application dated 24th October 2018 fails on the basis that the Contempt of Court Act was declared unconstitutional.
2. Whether the 1st Plaintiff and Eddy Nicholas Orinda, Advocate are liable for contempt of court through publication.
3. Whether the 1st Defendant/ Applicant is entitled to the orders sought in the Application dated 24th October 2018.

1. Whether the Application dated 24th October 2018 fails on the basis that the Contempt of Court Act was declared unconstitutional

It was the 1st Defendant's submission that the Application dated 24th October 2018 was filed before the said decision of the High Court. Whereas the Applicant is cognizant to the fact that once a statute is declared unconstitutional, the same is of no more force or validity, the Applicant submitted that this court be guided by the doctrine of objective constitutional invalidity in making a determination on whether the application should fail on the premise that it was anchored on statute that has now been declared unconstitutional.

The doctrine of objective constitutional invalidity was set out in Law Society of Kenya versus Kenya Revenue Authority & Others [2017] eKLR where the court cited the Canadian decision *Ferreira v Levin No and Others*. The court held:

“The doctrine of objective constitutional invalidity was laid out in the Canadian case of Ferreira vs Levin where the court held that finding a law to be in conflict with the Constitution “does not invalidate the law; it merely declares it to be invalid.” A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.”

Suffice, Oliver P. Field, Effect of an Unconstitutional Statute, Vol 1 Maurer School of Law: Indiana University states the effect of an unconstitutional statute as: -

“A repealing act which is unconstitutional can have no effect upon the statute sought to be repealed and the previous statutes remains the law as though the legislature had not made any attempt to change it... A statute which is declared unconstitutional is inoperative only from the time of the decision and not from the time of its purported enactment”

It was the 1st Defendant's submission that prior to the enactment of the Contempt of Court Act, the provision of Section 5 of the Judicature Act gave jurisdiction to courts to punish for contempt of court. The Applicant has even relied on the said provision in the Application dated 24th October 2018. Section 5 of the Judicature Act provides:

“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.”

It was thus the 1st Defendant's submission that the fact that the Contempt of Court Act was declared unconstitutional gives life to the provisions of **Section 5 of the Judicature Act** and thus the application is not invalid and a nullity *ab initio* as alleged by the Plaintiffs. Furthermore, the declaration of the Contempt of Court Act as unconstitutional did not invalidate the **Judicature Act** as unconstitutional and thus the courts can proceed and punish parties for contemptuous acts under the **Judicature Act**.

It was the 1st Defendant's submission that the **Contempt of Court Act** only became inoperative from the time of the decision and not from the time of its purported enactment. It was thus a valid law at the time the application was made and the Applicant can thus not be faulted for the same. The 1st Defendant relied on the Court of Appeal case *Shimmers Plaza Limited v National Bank of Kenya Limited eKLR* where it was held that: -

“...Based on the foregoing provision (Section 5 of the Judicature Act) the applicable law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed.”

DETERMINATION

A Preliminary objection ought to raise pure points of law and/or on agreed facts. I note that the Preliminary Objection is clothed contested facts that would subject hearing and determination of the substantive issue (s) /claim at the hearing. As was stated in;

Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA, Sir Charles Newbold P observed as follows,

a. “The first matter relates to the increasing practice of raising points which should in normal manner, quite improperly by way of preliminary objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. the improper raising of points ”

In line with the above position of law; the only issue for determination at this stage is;

i. Whether the Application dated 24th October 2018 is invalid and a nullity ab initio as it is founded upon the Contempt of Court Act which was declared unconstitutional in its entirety

The High Court judgment by Justice Chacha Mwita in *Kenya Human Rights Commission vs. Attorney General & Another [2018]eKLR* declared the entire Contempt of Court Act unconstitutional. What then this court should determine is the effect of an unconstitutional statute.

In *CARR V. STATE (1890) 127 IND. 204, 26 N. E. 778; 11 L. R. A. 370* the court held:-

"An act which violates the Constitution has no power and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality."

An unconstitutional statute is *void ab initio* and ought to be considered as though it had never been passed. Therefore, a repealing act which is unconstitutional has no effect and the previous statute remains the law.

The existing law 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, the English law on committal for contempt of court was applicable by virtue of **Section 5(1) of the Judicature Act** which provides:-

"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."

The Application herein is dated 24th October 2018 and was anchored on various sections of the **Contempt of Court Act** and **Section 5** of the **Judicature Act**. The **Contempt of Court Act** is however no longer operative as from the date of the judgment declaring it unconstitutional in *Kenya Human Rights Commission vs Attorney General & Another (supra)*. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, **Section 5 of the Judicature Act**.

Therefore, the Application herein was well premised within the law at the time of filing but became void only after the decision in *Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR*.

Following the aforesaid decision, **Section 5** of the **Judicature Act** came to life and thus the application herein is not invalid or a nullity *ab initio* as the Applicant also anchored their Application on Section 5 of the Judicature Act.

DELIVERED DATED & SIGNED IN OPEN COURT ON 22ND OCTOBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

NO APPEARANCE FOR THE PLAINTIFFS

NO APPEARANCE FOR THE DEFENDANTS

MS JASMINE – COURT ASSISTANT