



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 60 OF 2019**

**SARAH WAIRIMU KAMOTHO COHEN.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**GEORGE KINOTI.....2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS....3<sup>RD</sup> RESPONDENT**

**JUMA VICTOR OWITI.....4<sup>TH</sup> RESPONDENT**

**JOHN KAMAU.....5<sup>TH</sup> RESPONDENT**

**RULING**

The applicant is facing a charge of murder in this case. In the course of the criminal proceedings, in this case, and before the plea was taken, learned Prosecution Counsel Ms. Mwaniki made oral submissions on 26<sup>th</sup> September 2019 that the Applicant herein and her defence counsel be cited for contempt of court for disobeying the orders of this court dated 16<sup>th</sup> September 2019 barring the DCI, Investigators, Prosecution, defence and victims from addressing the media on the investigations and evidence alleged to exist in this case. The media was also gagged from publishing details of investigations, evidence or any other information touching on this case. The application was opposed by Mr. Murgor, learned counsel for the applicant. This court directed Ms. Mwaniki to file a formal application to allow the other parties to formally respond to the issues that the application would raise. This court directed that the anticipated application be filed on or before the 8<sup>th</sup> October 2019 and the responses to that application be filed on or before 15<sup>th</sup> October 2019. The case was placed for mention on the same date (15<sup>th</sup> October 2019).

On 15<sup>th</sup> October 2019 this court was informed by the prosecution through Mr. Muteti that they had not managed to file the application due to some unforeseen circumstances. They sought more time to do so. Mr. Murgor informed the court that on the applicant's part, he had filed the application for contempt of court. The prosecution was allowed more time up to 22<sup>nd</sup> October 2019 to file their papers and Mr. Murgor was allowed to file his response on or before 30<sup>th</sup> October 2019. The matter was then placed down for mention on 30<sup>th</sup> October 2019 for the court to give directions as to when these applications would be heard.

When this matter came up for mention on 30<sup>th</sup> October 2019, the prosecution informed the court that they had not filed the application as intended earlier but had instead filed a Replying Affidavit in which they have sought orders against the Applicant and her defence Counsel Mr. Murgor for contempt of court. Ms. Mwaniki told the court that there were new issues arising from the Supplementary Affidavit filed by the Applicant and that some people who were not parties to this case have been adversely mentioned. She sought more time on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to respond to the issues arising from the Supplementary Affidavit. On behalf of Mr. Ochieng for the 5<sup>th</sup> Respondent, Ms. Mwaniki submitted that the 5<sup>th</sup> Respondent had filed a Replying Affidavit before he had been served with the Supplementary Affidavit and therefore he required more time to respond to the issues arising from the Supplementary Affidavit.

On his part, Mr. Donald Kipkorir, appearing for the 2<sup>nd</sup> Respondent, told the court that his client is raising a Preliminary Objection and Grounds of Opposition and that the same had been filed. At the same time, Mr. Murgor sought more time to file a Replying Affidavit in respect of issues arising from the Preliminary Objection and the Grounds of Opposition, specifically on the issue touching on the prayers seeking to have the Applicant and Mr. Murgor held for contempt of court. This application by Mr. Murgor was opposed by both Ms. Mwaniki and Mr. Kipkorir.

Mr. Kipkorir submitted that the 2<sup>nd</sup> Respondent has raised the Preliminary Objection on the jurisdiction of this court to entertain the application by the Applicant and Grounds of Opposition in respect of the failure by the Applicant to follow procedure in making her application for contempt of court against the respondents. He argued that having raised the issue of the jurisdiction of this court to entertain

the Applicant's application, this issue must be addressed by the court first because without jurisdiction this court cannot hear the Applicant's application.

As a result of the arguments advanced by the parties on 30<sup>th</sup> October 2019 this court was not able to give directions in regard to the contempt of court application and the responses. The court directed that the matter be adjourned to 5<sup>th</sup> November 2019 to allow the court time to address the issues raised by Mr. Kipkorir and give directions on that matter first before this court can give any other directions and/or orders in respect of the Applicant's application.

I have considered the issues that were canvassed before me. I agree with Mr. Kipkorir that the issue of jurisdiction of this court raised in the Preliminary Objection must be addressed first before this court can entertain other issues in this case including leave to file further affidavits. I agree with counsel when he says that jurisdiction is everything and without it this court cannot proceed any further. I am reminded of the often cited case of *Owners of the Motor Vessel "Lillian S" v. Caltex Ool (K) Ltd [1989] eKLR* where it is stated that ***where a court takes it upon itself to exercise a jurisdiction that it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.***

In the same case, the late Nyarangi JA stated as follows, that:

***"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of the court may not be heard to raise the issue after the matter is heard and determined."***

For the above reasons, it is my view that the issues raised in the Preliminary Objection must be addressed first before this court can entertain any other issues such as the issues being raised in regard to filing of additional affidavits. I have read the Supplementary Affidavit by the Applicant. It responds to both the issue on the Preliminary Objection as well as the issues touching on contempt of court. To allow the Applicant an opportunity to respond to the issues touching on the Preliminary Objection, I will and do hereby allow the application by Mr. Murgor to deem the Supplementary Affidavit as properly filed. I hasten to caution Mr. Murgor that in respect to the Preliminary Objection, he will be allowed to refer to the Supplementary Affidavit only in as far as it relates to the Preliminary Objection and not to the contempt of court issues. Consequently I hereby allow the application by Mr. Kipkorir and order that this court shall first hear and determine the 2<sup>nd</sup> Respondent's Preliminary Objection. The determination of the Preliminary Objection by this court will dictate the way forward in respect of the other issues touching on the contempt of court proceedings. Orders shall issue accordingly.

**Dated, dated and delivered in open court this 5<sup>th</sup> November 2019.**

**S. N. Mutuku**

**Judge**