



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC. APPL NO. 8 OF 2018

JOHN KYALO.....1ST APPLICANT

MOSES KABURU.....2ND APPLICANT

-VERSUS-

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS....2ND RESPONDENT

JAMES KIMAR.....3RD RESPONDENT

RULING

INTRODUCTION

1. This ruling is with respect to two Applications and a Preliminary Objection (PO). The genesis of the matter is an order of this honorable Court issued on 26/01/2018 stating as follows;

a) **THAT** the Applicants are to deposit cash bail Kshs 20,000/= each pending appearance and/or charge by the DCIO Makindu.

b) **THAT** mention of the matter on 08/03/2018 for further orders.

2. The 1st Application is dated 15/02/2018 and was filed by the Applicants under certificate of urgency. It seeks the following orders;

a) **THAT** the honourable Court be pleased to order the committal to civil jail for a period not exceeding six(6) months James Kimaro (DCIO) herein who is in contempt of an order of this honorable Court issued on 26/01/2018.

b) **THAT** the OCS Makindu police station does enforce the orders of this honorable Court sought in the above prayer.

3. The 2nd Application dated 27/06/2018 was filed by Mr. Jimmy Kimaro, the 3rd Respondent herein. The Republic is named as the Applicant. It seeks *inter alia* the following orders;

a) **THAT** this Honorable Court be pleased to vary the orders issued on 26/01/2018 to enable Mr. Jimmy H. Kimaro (ASP), an investigator with Directorate of Criminal Investigations attached to Directorate of Criminal Investigation Makindu, to process the suspect by charging and arraigning them on matters of stealing stock contrary to section 278 and handling stolen goods contrary to section 322(1) (2) of the Penal Code.

b) **THAT** this Court to direct that the three defendants 1. John Kyalo Mutisya, 2. Moses Wachira Kaburu, 3. Mark Ndongye Matheka who are out on bond to appear before the DCIO Makindu for purpose of charging and arraigning them to Court to face charges of stealing of stock contrary to section 278 and handling of stolen goods contrary to section 322 (1)(2) of the Penal Code.

c) **THAT** the honorable Court issue any order that will assist the investigating officer in charging and arraigning the three Respondents 1. John Kyalo Mutisya, 2. Moses Wachira Kaburu, 3. Mark Ndongye Matheka without necessarily contravening the order issued by the High Court on 26/01/2018 since there is sufficient evidence to warrant the charging and arraigning of the three Respondents before the Court of Law.

4. It is the 2nd Application that attracted the PO dated 16/07/2018 from the Applicants. The gist of the PO is that the DCIO, Mr. Jimmy

Kimaro has no capacity to bring and prosecute the application in person. They contend that such mandate is the preserve of the Director of Public Prosecutions.

5. I have keenly looked at the two applications and the PO and it is my considered view that dealing with the main application for contempt (*herein after 'the application'*) will effectively deal with the rest.

6. There are grounds on the face of the application as well as a supporting affidavit and supplementary affidavit sworn by the 2nd Applicant.

7. The Application was opposed by the 3rd Respondent (*herein after 'ASP Kimaro'*) through his undated replying affidavit filed on 07/05/2018 and a further affidavit dated 30/05/2018 and filed on the same day.

8. The Application was canvassed by way of written submissions.

9. The Applicants submit that in paragraph 7 of ASP Kimaro's replying affidavit, there is an admission that he became aware of the Court order on 01/02/2018 and that despite such awareness; he arrested the 2nd Applicant on 02/02/2018 and detained him until 04/02/2018.

10. According to the Applicants, the actions of ASP Kimaro were deliberate, high handed and clearly meant to circumvent the Court order.

11. Further, they submit that section 4(1) of the Contempt of Court Act, 2016 sets out disobedience of a Court order as an act which constitutes contempt of Court whether the disobedience is in relation to civil or criminal proceedings before a Court.

12. They also submit that a party will not be allowed to interpret a Court order to evade its implementation and that if a party is in doubt as to the meaning of a Court order, they should go back to the Court that issued it for directions.

13. Further, it is their submission that ASP Kimaro has not given any reasonable explanation as to why he arrested the 2nd Applicant. That the order bears the official stamp of the DCIO's office and a signature of a police officer at the station. That in any event, the law is that knowledge of a Court order is enough.

14. They rely on **Malindi Court of Appeal Civil Appeal No. 18 of 2015; Woburn Estate Ltd –Vs- Margaret Bashforth and Nairobi High Court Misc. Criminal Application No. 57 of 2018; Miguna Miguna –Vs- The Director of Criminal Prosecutions & 2 others.**

15. In opposing the application, ASP Kimaro submits that he is the investigating officer in a case of stealing stock and handling stolen goods which prompted the Applicants to file this matter.

16. According to him, the evidence in his possession is sufficient to sustain the charges. He submits that upon realizing their culpability, the Applicants rushed to Court for the anticipatory bond.

17. Further, he submits that the only reason for holding the 2nd Applicant was due to the fact that he refused to cooperate in the charging process by refusing to have his fingerprints taken.

18. According to him, taking of fingerprints is mandatory in the charging process. He submits that the 2nd Applicant's Advocate was immediately informed of the arrest so that he could advise his client to submit the fingerprints. That the 2nd Applicant was released on 04/02/2018 in the presence of his Advocate after agreeing to have his fingerprints taken.

19. He further submits that to the best of his knowledge and understanding, the orders did not in any way or manner bar any police officer from arresting and charging the Applicants. That in the Applicants own application, it meant that they were actually anticipating to be charged and as the police officer in charge of the investigations, he effectively discharged his duties by charging the Applicants and another before a Makindu Law Court.

20. He further submits that for reasons best known to the ODPP Makindu, the prosecution Counsel declined to sign the charge sheets twice and remained with the file for a whole month after which he declared the case as civil. That the action by the ODPP interfered with his investigations and denied the real victim his fundamental right.

21. According to him, granting the prayers sought by the Applicant will propel constant abuse of the process of justice by those who believe that they can always get away from criminal liability by arresting the due process through their constant stagnating applications.

22. Having looked at the application, the reply, all the annexures and authorities, the only issue for determination is whether the act of arresting the Applicants constituted contempt of the orders issued by this Court on 26/01/2018.

ANALYSIS

23. I will not dwell on the issue of service because from the material before Court, it is clear that at the time of the arrest, ASP Kimaro was aware of the Court order.

24. According to the Contempt of Court Act No. 46 of 2016, contempt includes civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.

25. An application for anticipatory bail by the Applicants is what culminated in the order issued on 26/01/2018. It is clear in my mind that resolution of this matter depends wholly on the import of the said order.
26. An anticipatory bail or bail pending arrest should ideally safeguard against loss of freedom by the holder thereof pending the presentment of relevant charges in Court or any other legal action. Where charges have been presented, a holder of anticipatory bail should be summoned, informed of the same and required to appear in Court on a specified date.
27. On the flipside, the holder thereof does not have a right not to appear before the police or any other authority who would wish to question him/her in connection with the commission of an offence.
28. According to ASP Kimaro, the 2nd Applicant was arrested because he evaded the summons and refused to cooperate by refusing to have his fingerprints taken. There was however no evidence that the alleged summons were ever issued. ASP Kimaro also tried to explain his understanding of the order and contends that his actions were as per his understanding.
29. It has been held time without number that a party should never take it upon himself to interpret a Court order and as rightly submitted by the Applicants, if a party is in doubt as to the meaning of a Court order, the only option is to go back to the Court that issued it for directions. Consequently, arrest of the 2nd Applicant was contrary to the aim and intention of the anticipatory bail.
30. At this juncture, the question which begs is whether the contravention was willful. In the **Supreme Court of Kenya Criminal Application No. 2 of 2018**, the learned Judges while commenting on the standard of proof in contempt proceedings stated as follows;
- “The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”***
31. As much as ASP Kimaro did not exhibit anything to show that he summoned the 2nd Applicant, it is not in dispute that the 1st Applicant was never arrested and detained yet both Applicants were needed for similar offences.
32. It is my considered view that this fact buttresses ASP Kimaro’s explanation that indeed he summoned the 2nd Applicant who refused to cooperate. It is also not in dispute that the relevant charges were presented to the ODP, Makindu but there was a delay in accepting them.
33. Further, the application filed by ASP Kimaro on 27/6/2018 seeking variation of the order is in my view an indication that his actions were inadvertent.
34. I am alive to the fact that the aforesaid application was filed after the application for contempt but from the totality of the material before Court, I am convinced that arresting and detaining the 2nd Applicant was done in the honest belief that ASP Kimaro was doing what he needed to do to complete the process of charging. It is also evident that he took the orders quite literally and did not fully appreciate the import of anticipatory bail.
35. The upshot of the foregoing is that ASP Kimaro’s conduct was not willful and as such, contempt of Court has not been proved to the required standard.
36. In light of the foregoing, the application dated 27/06/2018 is unnecessary and should be struck out. The same fate applies to the PO because it is directly connected to the said application.

CONCLUSION

37. The application for contempt dated 15th February 2018 and the motion dated 27th June 2018 lack merit and are therefore dismissed. The Applicant to strictly follow the law in pursuing to enforce the law as regards the alleged offences herein. The orders of 26/01/2018 lapsed as Respondents were charged.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF SEPTEMBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE