



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO 25 OF 2013

KATSURI LIMITED.....APPELLANT/DEFENDANT

VERSUS

KAPURCHAND DEPAR SHAH.....RESPONDENT/APPLICANT

RULING

By a notice of motion dated 29.9.2015, the Respondent/Applicant moved this court under the provisions of Sections **1A**, **1B** and **3A** of the Civil Procedure Act[1] and the **Judicature Act**[2] seeking an order that the this court do find that a director of the appellant company a one **Bipin Shah** is in contempt of the orders of the honourable court and jail him for a period not exceeding **six (6) months**.

I find it fit first to examine the procedure for instituting contempt of court proceedings in this country. This calls for examination of Section 5 of the Judicature Act[3] which provides as follows:-

*(1) 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.*

Discussing the procedure for instituting Contempt proceedings in Kenya, **Odunga J** in the case of *John Mugo Gachuki vs New Nyamakima Co. Ltd*[4]observed as follows:-

*"It is unfortunate that nearly 50 years after independence our procedure, with respect to punishment for contempt in our Court is referable to the procedure in High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law as enacted."*

Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act[5] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by **Platt J** and **Porter J** (as they then were) *in the matter of an application by Gurbaresh Singh & Sons Ltd*[6]where they stated:-

*"The second aspect concerns the words of Section 5-"for the time being", which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules."(Emphasis supplied)*

Discussing the procedure in England, the Court of Appeal in *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others*[7] observed as follows:-

*"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act,[8] the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High*

*Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.*

*The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.*

*Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-*

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.*
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.*
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.*
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.*
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.*
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.*
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.*

The learned Judges<sup>[9]</sup> in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples.<sup>[10]</sup> The only consistency in the decided cases is that leave was a requirement.

However, following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996", The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. On 1.10.2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 RSC in its entirety. Part 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

**Rules 81.4** relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

**Rule 81.11-** Committal for "interference with the due administration of justice" (applicable only in criminal proceedings)

**Rule 81.16-** *Committal for contempt "in the face of the court"), and*

**Rule 81.17-** *Committal for "making false statement of truth or disclosure statement."*

An application under Rule **81.4** (breach of judgement, order or undertaking) now referred to as "*application notice*" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. 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.

In the above cited case of *Christine Wangari Gacheche*<sup>[11]</sup> the Court of Appeal correctly pointed out that leave, now called "*permission*" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules **81.12 & 81.17** cited above.

After evaluating the above Rules, the Court of Appeal in the above cited case concluded that "*we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012 White Book, 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...*" On that basis, I find that it was not necessary for the applicant to seek leave before filing this application, hence this application is properly before the court.

The jurisdiction relating contempt of court proceedings, as decided cases suggest is rather problematic<sup>[12]</sup> It appears that Kenyan courts have to continuously and perpetually check upon the current law in force in England and apply it in exercise of this jurisdiction. This is both the substantive and procedural law applicable in England as at the time the contempt is committed.<sup>[13]</sup>

The applicant seeks to have a director of the appellant committed to civil jail for a period not exceeding 6 months for contempt of court for allegedly disobeying orders of this court. It is important to point out that a copy of the alleged order was not annexed nor has it been shown that the alleged contemnor was served with the said order. The grounds relied upon are that the respondent sought and obtained conditional stay to deposit the decretal sum of Ksh. 777,086.38 in a joint interest earning account, that as at today only Ksh. 461,000/= has been paid, thus the Respondent is in contempt, hence the application.

The Respondent in a replying affidavit sworn by one of its directors avers *inter alia* it was not his duty to open the alleged account and that his duty was to provide funds which he did.

According to *Black's Law Dictionary*;<sup>[14]</sup>

*"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

In *Halsbury's Laws of England* it is stated:-

*"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment .....an application to court by him not being entertained until he had purged his contempt"*

In book *The Law of Contempt*<sup>[15]</sup> learned authors **Nigel Lowe & Brenda Sufrin** state a follows:-

*"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not*

*have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."*

In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*<sup>[16]</sup> **Ibrahim J** (as he then was) stated as follows:-

*"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."*

Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of *Gatharia K. Mutikika vs Baharini Farm Ltd*<sup>[17]</sup> where it was held as follows:-

*"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."*

In *Peter K. Yego & Others vs Pauline Nekesa Kode*<sup>[18]</sup> the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a application for contempt must prove beyond peradventure that the respondent is guilty of contempt.<sup>[19]</sup>

The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell*<sup>[20]</sup> held that in order to succeed in civil contempt proceedings, the applicant has to prove **(i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.** Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.<sup>[21]</sup> As pointed out earlier, the alleged order was not annexed, nor was it shown that the corporate veil had been lifted in order for the directors to be held personally liable.

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand*<sup>[22]</sup> have authoritatively stated as follows:-

*"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-*

*(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*

*(b) the defendant had knowledge of or proper notice of the terms of the order;*

*(c) the defendant has acted in breach of the terms of the order; and*

*(d) the defendant's conduct was deliberate.*

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.

The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.

The other important aspect to mention is that the alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities. As matters stand now, the director is not personally liable for debts, actions or omissions of the company, hence the application before me is misdirected.

As pointed out earlier, in an application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances as evidently demonstrated by the authorities cited herein. In the instant application I am not satisfied that that standard of proof has been attained. Having so concluded, I hereby dismiss the application dated 29.9.2015 with costs to the Respondents.

Orders accordingly

Dated at Nyeri this 10<sup>th</sup> day of March 2016

**John M. Mativo**

**Judge**

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[1] Cap 21, Laws of Kenya

[2] Cap 8, Laws of Kenya

[3] Ibid

[4] Civil Case No. 456 of 2011

[5] Supra

[6] Misc Civil Case No. 50 of 1983

[7] Civil Application No. 233 of 2007, {2014}eKLR

[8] Supra

[9] Kihara JA, Maraga JA & Ouko JA

[10] See John Mugo Gachuki vs New Nyamakima Co. Ltd, HCC No. 456 of 2011, Republic vs County Council of Nakuru, ex parte Edward Alera t/a Genesis Reliable Equipment HC JR N. 74 of 2010, National Bank of Kenya Ltd vs County Council of Olekejuado & 2 Others HC Civil Misc (JR) 5 of 2012

[11] Supra note 5

[12] See Peter Gacheru Ng'ang'a, " Contempt of Court by Public Officers in Kenya, Enforcing Orders and the Constitution's Promise", A thesis submitted at the University of Nairobi in partial fulfillment of the Degree of Master of Laws., 2014

[13] See Slim & Another vs Ngala {2012} 2KLR 658; Awadh v Marumbu {2013} 1KLR 454

[14] 9th Edition, page 360

[15] Butterwoths {1996} Pages 555-569

[16] {2005} 1KLR 828

[17] {1985} KLR 227

[18] Nakuru HCCC No No. 194 of 2004

[19] See G. V. Odunga J in Misc App No 268 of 2014 (J.R.)

[20] Eastern Cape Division Case No. 364 of 2005

[21] Ibid, at page 4

[22] Available at [ip36.publications.lawcom.govt.nz](http://ip36.publications.lawcom.govt.nz)