



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION NO. 423 OF 2015**

REPUBLIC.....  
.....APPLICANT

AND

THE ATTORNEY  
GENERAL.....1<sup>ST</sup>  
RESPONDENT

THE INSPECTOR GENERAL, NATIONAL POLICE  
SERVICE.....2<sup>ND</sup>RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF  
NATIONAL GOVERNMENT..3<sup>RD</sup>RESPONDENT

EX PARTE: MOUNTAIN SLOPES COMMERCIAL SERVICES LIMITED

AND

EMBU COUNTY  
GOVERNMENT.....  
.....INTERESTED PARTY

**RULING**

**Introduction**

1. By an Amended Application Notice dated 20<sup>th</sup> April, 2016, expressed to be brought under section 5(1) of the *Judicature Act* Cap 8 Laws of Kenya, Part 81, Rule 81.4 of the *England Civil Procedure (Amendment No.2) Rules 2012* Order 40 rule 3 of the *Civil Procedure Rules 2010* and the inherent jurisdiction of the Court, and all other enabling provisions of the law the *ex parte* applicant herein seeks the following orders:
  1. That this Application be certified as urgent to warrant it being heard forthwith.
  2. That the following officers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents namely:
    - a. Deputy County Commissioner Embu East-Ali Noor Duba;

- b. **the OCS Siakago Police Station-Francis Mati;**
  - c. **the Deputy OCS Siakago Police Station-Samuel Nziu; and**
  - d. **The OCPD Embu East, -Njoroge Mbugua be summoned to appear before this honourable court to show cause why they should not be committed to civil jail for blantly failing to comply with orders issued by this Honourable Court on 7<sup>th</sup> December 2015.**
3. **That on failing to show necessary cause, the said officers be committed for a maximum period not exceeding six (6) months or such period as this Honourable Court may deem fit and just in that the said officer's, have disobeyed the Orders made herein by Justice Odunga sitting in the High Court at Nairobi in Misc Civil Case No. 423 of 2015 Court on the 7<sup>th</sup> December, 2015.**
  4. **That this Honourable Court be pleased to impose a penalty of a fine against the cited officers and in default of payment thereof their movable and immovable assets including but not limited to land and buildings be attached and sold to satisfy the penalty for contempt of court.**
  5. **That pending the inter-parties hearing of this Application, the officers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent be restrained from interfering with the Applicant's operations.**
  6. **That the costs of and incidental to this application be provided for.**

### **Ex Parte Applicant's Case**

2. According to the Applicant, on 7<sup>th</sup> December 2015 this Honourable Court granted an order restraining the Respondents or their agents among others from unlawfully interfering with the Applicant's licensed premises and operations. It was averred that the Advocate on record for the Respondents to the application was present in Court on 7<sup>th</sup> December 2015 when the said Court Order was issued and therefore the Respondents were and are fully aware of the Court Order. It was nevertheless contended that the Applicant's Advocates caused service of the order to be effected upon all the parties and attached penal notices cautioning all the parties against breaching the terms of the orders of the Court and the receipt of the same was acknowledged.
3. However, on the 2<sup>nd</sup> March, 2016, the OCPD Embu East, **Njoroge Mbugua** accompanied by several police officers again marched into the Applicant's factory located at Gaciari, Runyenjes and ordered the immediate closure of the Applicant's factory and operations. Again on 11<sup>th</sup> March, 2016, the OCS Siakago Police Station, **Mr Francis Mati** and the deputy OCS Siakago Police Station- **Samuel Nziu**, marched a contingent of police officers into the Applicant's Depot at Siakago and ordered the Applicant to immediately cease its operations and to close his depot. The Applicant contended that it was only able to resume operations after Court summons and an application for contempt was served on them. It was further averred that on 7<sup>th</sup> April, 2016, the Deputy County Commissioner Embu East-**Ali Noor Duba** led a contingent of police officers into the Applicant's factory located at Gaciari, Runyenjes and ordered the Applicant to immediately cease its operations and to close his factory.
4. According to the Applicant, its protests and attempts to bring to the Deputy County Commissioner's attention the Orders of this Court, were met with aggression and hostility from the police officers in the company of the Deputy County Commissioner as they insisted that the Applicant's factory's production and distribution operations be shut down forthwith. It was its view that the cited officers' interference is unjustified as it lawfully operates its business having legitimately obtained all the required manufacturing licenses and clearances from the relevant government authorities and institutions. According to the Applicant, it has fully complied with the licensing requirements.
5. The Applicant, however disclosed on 6<sup>th</sup> February 2016, it made an application for renewal of the liquor licence to the Embu County Government which application was responded to vide a letter dated 10<sup>th</sup> February 2016 in which the latter stated that the County Government of Embu was not in a position to issue the Applicant with the liquor licence owing to the fact that there was an ongoing case in court challenging the implementation of **Embu County Alcoholic Control Act**. However, in that letter, the director of Trade and Industrialization noted that the company had been licensed to manufacture and sell liquor by NACADA in the year 2013. He further noted that

- the Applicant was legally mandated to continue operating its business per section 16(4) of the ***Embu County Alcoholic Drinks Control Act 2014*** until such a time that its application for renewal of the licence would be granted.
6. Based on the foregoing, it was the Applicant's belief that it had fully complied with all operational and licensing requirements, and the cited officers have no justification to interfere with the company's operations. Despite unequivocal Orders by the Court, and the Respondents' full knowledge of the same, the Respondents have engaged in conduct that can only be termed as disrespectful, illegal and unlawful. It was therefore contended that in view of the refusal by the Officers of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to show respect for the Honourable Court through compliance with the orders in its order dated 7<sup>th</sup> December, 2015, the applicant has no other way of enforcing the said orders than to bring this application since the Respondent's order to close down the Applicant's premises and essentially production and distribution in the area under their security jurisdiction is deleterious to its operations and has caused the Applicant grave financial loss.
  7. It was therefore the Applicant's assertion that committal proceedings are the most efficacious mode of compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' officers to obey the Court and to uphold the dignity of this honourable Court as well as the rule of law.

### **Respondents' Case**

8. The Application was opposed by the Respondents. According to them, they were not in contempt of the Court orders issued herein. They contended that the Applicant was operating on expired licenses and that this discovery was made by them when they were undertaking their statutory duty of ensuring that the law is complied with.
9. It was upon that discovery that they ordered the immediate closure of the applicant's premises. They however denied any of the Applicant's properties were destroyed. To them the Court order relied upon by the Applicant was premised upon the condition that the Applicant was licensed which was not the case on 2<sup>nd</sup> March 2016.
10. It was further contended that the ***Interagency Taskforce of Control of Potable Spirit and Combat of Illicit Brews*** published on October 2015 had recommended the closure of the Applicant's premises since it lacked certain legal requirements pertaining to manufacture and distribution of alcohol.
11. The Respondents averred that as law enforcers as well as law abiding citizens who respect the law as well as court orders they could not in any way disobey, disrespect and disregard any court order issued by the Court.

### **Determinations**

12. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.
13. The procedure for instituting contempt of court proceedings is provided for in section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya. That section provides:  
  

***(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.***

***(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.***
14. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

15. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf’s “Access to Justice Report, 1996”**, the **Rules of the Supreme Court** of England are being replaced with the **Civil Procedure Rules, 1999** and pursuant thereto the Court of Appeal in the above decision recognised that on 1<sup>st</sup> October, 2012 the **Civil Procedure (Amendment No. 2) Rules, 2012**, came into force and Part 81 thereof effectively replaced Order 52 of the **Rules of the Supreme Court** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as “application notice”, the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.
16. Court orders, it is now the law, are not made in vain and are meant to be complied with. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

**“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 a 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”.**

17. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

**“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 until that order 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 and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people**

in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

18. In this case, it is not contended by the Respondents that they were unaware of the orders of this Court given on 7<sup>th</sup> December, 2015. Accordingly the issue of service does not fall for determination in these proceedings.
19. However, the Respondent's case is that the report of the ***Interagency Taskforce of Control of Potable Spirit and Combat of Illicit Brews*** published on October 2015 had recommended the closure of the Applicant's premises since it lacked certain legal requirements pertaining to manufacture and distribution of alcohol. It is clear that the alleged report was published, according to the Respondents before this Court issued its order the subject of these proceedings. It follows that the said report which was first in time to the Court order could not override the latter. I however wish to make it clear to the Respondents that such a report cannot override a Court order and where there is a conflict between such a report and a Court order the Court order must prevail. Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. Deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order or has difficulty in complying therewith one ought to come back to Court for interpretation or clarification or to explain the difficulties faced by the need to comply with the same.
20. Where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of a Task Force Report, this Court cannot turn a blind eye to the same. This Court having made a decision which decision has not been stayed, to contend that the said Taskforce had earlier on made an order withdrawing the Applicant's license is in my view to display arrogance and lack of respect for the rule of law. I must send a strong message to those who are intent in disobeying Court orders that such conduct will not be tolerated no matter the status of the contemnors in the society. When persons in authority themselves set out to disobey Court orders with impunity they must remember that they are sending wrong signals to ordinary Kenyans that it is proper to disobey Court orders with impunity which is a recipe for chaos. Such conduct must therefore be nipped in the bud as soon as it is detected. In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs.**

- Ratal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.
21. Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.
  22. It was further contended by the Respondents that the said order was conditional on the Applicant operating its business lawfully which condition the Applicant did not comply with.
  23. It is not in doubt that in its order of 7<sup>th</sup> December, 2015 the Court issued orders *inter alia* restraining the Respondents from ***unlawfully*** interfering with Applicant's licensed premises and operations. The Court however gave liberty to the Respondents to carry out their statutory mandate to ensure that the law is complied with and in a lawful manner. That the police are constitutionally and statutorily mandated to enforce law and order cannot be contested. Accordingly, where security agencies find that particular alcoholic premises are being operated without valid licenses, in my view, there is nothing barring them from taking lawful actions to remedy the situation. Therefore the Applicant was only protected and could only enjoy the protection of the order issued by this Court if it was operating lawfully in the sense that it had secured all the necessary licenses to enable it operate.
  24. When the Applicant applied for the orders the subject of these proceedings, the Applicant exhibited a copy of the Alcoholic Drink Licence issued by the Embu East District Alcohol Licensing Committee on 29<sup>th</sup> April, 2013 whose expiry date was 28<sup>th</sup> February, 2014. The Applicant however relies on a letter dated 9<sup>th</sup> February, 2016 from the Chairman Runyenjes Sub-county Alcoholic Drinks Regulation Committee which confirmed that the Applicant had applied for a licence on 10<sup>th</sup> October, 2014 but its application had not been processed due to an existing order hence by virtue of the County By-Laws, the existing licence continued being valid. This position was confirmed by a letter dated 19<sup>th</sup> February, 2014.
  25. Whereas the benefit of doubt can be given to the Applicant with respect to the licenses from the County Government the licence from the Kenya Revenue Authority to manufacture excisable goods was dated 24<sup>th</sup> December, 2013 and was valid from 1<sup>st</sup> December, to 31<sup>st</sup> December, 2014. There was no evidence that any other such licence was issued after the expiry of that licence. The Applicant did not furnish this Court with any satisfactory explanation as to why it did not exhibit a valid licence from the Kenya Revenue Authority to manufacture excisable goods for the year 2015 or even for the year 2016 when the contempt was alleged to have been committed.
  26. Where a Court grants a conditional order, it is my view that an application for contempt can only succeed where the Applicant proves that the attached conditions were complied with.
  27. As was held in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others** (supra) in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. This threshold cannot be said to have been achieved where the Applicant fails to satisfy the Court that it complied with the conditions which were attached to the order
  28. Having considered the instant application, it is my view that the Applicant has failed to prove to the standards required that the persons cited herein are guilty of contempt of Court.

### **Order**

29. It follows that the Amended Application Notice dated 20<sup>th</sup> April, 2016 fails and is dismissed with costs.

**Dated at Nairobi this 6<sup>th</sup> day of June, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Otieno for the Applicant**

**Mr Munene for the Respondents**

**Cc Mutisya**