REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.137 OF 2014

BETWEEN

KULRAJ SINGH BHANGRA……...…PETITIONER

AND

THE DIRECTOR GENERAL, KENYA CITIZENS AND FOREIGN

NATIONALS MANAGEMENT SERVICE……...……..RESPONDENT

RULING

1. On 5th December 2014, I delivered a judgment in which I made orders as follows:

> ***"(1) A declaration is hereby issued that the Respondent has violated the rights of the Petitioner under Article 47(1) to administrative action that is efficient, lawful reasonable and procedurally fair.***
>
> ***(2) A declaration is hereby issued that the Respondent has violated the rights of the Petitioner under Article 47(2) to be notified in writing of any adverse actions against him.***
>
> ***(3) An order of Mandamus is hereby issued directing the Respondent within 45 days of today's date to consider the Petitioner's Application as a citizen of Kenya and thereafter comply with Article 47(2) of the Constitution.***
>
> ***(4) The Petitioner upon the Respondent's compliance with 3 above is at liberty to take such further legal or other lawful action as he deems fit.***
>
> ***(5) Let each Party bear its own costs as none has wholly succeeded."***

2. The matter should then have come to an end but by a Notice of Motion dated 30th July 2015, the Petitioner has sought contempt of Court orders against the Respondent for disobeying the above orders.

3. In his Supporting Affidavit sworn on 30th July 2015, the Petitioner has deponed that although the Judgment herein and consequent orders were served on the Respondent, the latter has refused to comply with the said orders. That his conduct has therefore undermined the authority and dignity of the Court and only by the present Application can the orders be enforced.

4. In response, the Respondent filed a Replying Affidavit sworn on 30th November 2015 by one Alfred Omangi, Chief Immigration Officer and states that he has been unable to comply with this Court's orders because the Respondent's original file number 395322 is missing. That the said file contains vital information that is necessary in considering the Petitioner's application for registration as a citizen of Kenya. And it would be an abdication of his duty for the Respondent to determine the Petitioner's application without having the benefit of the information contained in the aforesaid file.
5. To show that the Respondent's hands are presently tied, Mr. Omangi deponed that while also regretting the delay in compliance as above, the Respondent granted the Petitioner a Certificate of Identity valid for one year to enable him travel in and out of Kenya as he wished.

6. As to the way of unlocking the present stalemate, the Respondent has suggested that the Petitioner should avail **"his mother's original passport, dependant's pass and any other original immigration document from the family."**

7. It is the Respondent case therefore that the Application is misconceived and should be dismissed.

8. I have taken into accounts the above matters and it is not contested that:

a. The orders reproduced above are well known to the Respondent.

b. It is admitted that the Respondent has not complied with the said orders.

c. Non-compliance is explained as having been caused by inability by the Respondent to access file No.395322 which contains the information necessary to process the Petitioner's application for registration as a citizen of Kenya.

9. In the circumstances, can there be said to be contempt of Court on the part of the Respondent? To answer that question, it is necessary to explain what conduct would amount to contempt of Court.

10. In that regard **Salmon L. J.** in **Morris v Grown Office [1970] 2 Q.B.114** stated thus;

"Contempt of Court" means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the Court. Nowadays when sympathy is accorded to anyone who defies constituted authority, the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens … should be anxious to safeguard."

11. Further, Lord Nicholls in **AG v Punch Ltd [200] UKHL 50** described contempt of Court as the;

"… established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration of justice."

12. **Lord Diplock in AG v Times Newspapers Ltd [1974] A. C. 311 – 2** on the fact that contempt of Court may lead to Criminal sanction gave the following caution;

"The Courts have … been vigilant to see that the procedure for committal is not lightly invoked in cases where although a contempt has been committed there is no serious likelihood that it has caused any harm to the interests of any of the parties to the litigation or to the public interest."

13. In the above context, is the Respondent's explanation for non-compliance sufficient to make a finding that he is not in contempt of Court?

14. In **Mutitika v Baharini Farm Ltd [1985] KLR 227**, it was held that;

"The standard of proof in contempt proceedings must be higher than a balance of probabilities, and almost, but not exactly, beyond reasonable doubt, as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. The guilt of a contemnor has to be proved with such strictness of proof with the gravity of the charge."

15. It is my understanding that in succeeding cases however, it has been held that the standard of proof has in fact been found to be beyond reasonable doubt (see for example **Payless Car Hire v Imperial Bank Ltd H. C. Civil Case No.33 of 2011** and **Basil Criticos v AG and Others [2012] eKLR).** This is in line with the decision in **RE Breamblevale Ltd [1969] 3 all E.R 1062** where Lord Denning stated thus;

"A contempt of Court is an offence of a criminal nature. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt."

16. In the above regard, what was the Respondent commanded to do? His office was to consider the Petitioner's Application as a citizen of Kenya within 45 days. It did not do so and that is disobedience, plain and simple. Its explanation is a mitigating factor in terms of what sanction the Court should mete out to him. In proceedings of a criminal nature, an acceptance of a charge is taken as a plea of guilty and any explanation given is merely so given to mitigate any punishment that may be meted out.

17. In that regard, if it is indeed true that the file aforesaid is missing and for a whole year the Respondent does not look for an alternative way to address its inability to comply with the orders of this Court, can its explanation be termed as reasonable? I do not think so.

18. In my judgment aforesaid, I declared that the Respondent had not afforded the Petitioner administrative action that was efficient, lawful and procedurally fair contrary to **Article 47** of the **Constitution**. Despite that firm declaration, the Respondent has in fact perpetrated the violation of that right. This Court cannot countenance such an action.

19. Having so said, it is my understanding that even where a party is found to be in contempt, sanctions other than committal to civil jail can be given. That is why in **Mutitika (supra)** the Learned Judges quoted with approval the following passage from **Re Maia Annie Davis [1889] 21 QBD 236 at 239** that;

"Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the rolls in the case of Re Clement seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other mode which is not open to the objection or arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him. On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it 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. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."

20. I wholly adopt the reasoning above and in the present matter, I note that the Respondent granted the Petitioner a Certificate of Identity and has also suggested that he is willing to process the Petitioner's Application for registration as a Kenyan citizen if certain documents are presented to him.

21. In the circumstances, it is in the interests of justice that I shall determine Application dated 30th July 2015 in the following terms:

i. The Respondent, having admitted non-compliance with the orders dated 5th December 2014 is hereby cited for contempt of Court.

ii. To purge the contempt, the Respondent is granted a further 30 days to comply thereof and shall in doing so request the Petitioner for any relevant documents in his possession or in his family's possession.

iii. Failure to act as above, this Court will then proceed to mete out such sentence and/or sanction on the Respondent as it deems fit.

iv. The matter to be mentioned on a date to be given for further orders.

v. Costs of the Application shall be determined on the mention date.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

No appearance for Petitioner

Mr. Obura for Respondent

Order

Ruling duly delivered.

Further Oder

Mention on 19/8/2016 to confirm compliance with this Ruling.

ISAAC LENAOLA

JUDGE