REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.454 OF 2015

CHARLES J. KABAIKU.....…….....…...PLAINTIFF

-VERSUS-

FEP HOLDINGS LIMITED.....…….....DEFENDANTS

RULING

[1] This Ruling is in respect of the Notice of Preliminary Objection filed by the Defendant on **20 November 2015**. The Preliminary Objection was filed by the Defendant in opposition to the Plaintiff's Notice of Motion dated **19 October 2015**. It was hinged on the following grounds:

> [a] That the Notice of Motion is incompetent, as it was lodged in violation of **Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya of the Laws of Kenya,** the appropriate application being **APPLICATION NOTICE**.
>
> [b] That the said Notice of Motion is an abuse of the Court process as no Orders were alive to be contemned as at the time alleged.

On the basis of the foregoing, the Defendant urged that the Motion dated **19 October 2015** be dismissed with costs to the Defendant

[2] By his Notice of Motion dated **19 October 2015**, the Plaintiff moved the Court for orders, *inter alia*, that the Managing Director and Chief Executive of the Defendant Company be cited for contempt of court and be punished accordingly as per the provisions of the law; and that the General Meeting held by the Defendant on **23 September 2015** be declared null and void. That application was filed under **Section 5 of the Judicature Act, Sections 135, 157** and **158 of the Companies Act, and Order 51 of the Civil Procedure Rules, 2010**. The Preliminary Objection has been taken on the ground that the Motion was lodged in violation of **Section 5 of the Judicature Act** and is therefore incompetent.

[3] The Preliminary Objection was canvassed by way of written submissions, the highlighting of which was set for **20 September 2016**. The main thrust of the Preliminary Objection is that the application dated **19 October 2015** is incompetent for the reason that it was not brought in accordance with the procedure governing Contempt of Court Proceedings as applicable in England at the time it was filed. Counsel for the Defendant/Respondent relied on the **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** to support his contention that what ought to have been filed was not a Notice of Motion but an Application Notice. He therefore posited that the Notice of Motion herein has failed to

comport to the demands of the **Rule 81.10** of the **Civil Procedure (Amendment No. 2) Rules, 2012** and ought, for that reason, to be struck out with costs.

[4] A second aspect of the Preliminary Objection was to the effect that it was imperative for the Applicant to avail proof of service of the orders alleged to have been contemned, failing which the application would be a non-starter. Counsel cited **Rules 81.6** and **81.8** of the **English Civil Procedure Rules** in support of this argument and submitted that unless the Court dispenses with service, and order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not to do the act in question. He added that service, for this purpose must be personal service. It was the Defendant's contention that there was no personal service of the orders in question; and that no leave was given by the Court to otherwise serve the order by an alternative method or at an alternative place.

[5] Thirdly, it was submitted by Counsel for the Defendant that the Order allegedly contemned was vacated a day later and was therefore not available for execution; and that there having been no valid Order from the Court binding the Defendant, it was at liberty to proceed with the Annual General Meeting as planned, as there was no existing order capable of breach. He thus urged the Court to dismiss the application as it seeks the intervention of the Court, not to punish for contempt of court or to safeguard the rule of law, but for the purpose of settling scores with the Defendant.

[6] The Plaintiff's Counsel, **Mr. Nyakundi**, opposed the Preliminary Objection. He filed his written submissions to that effect on **19 May 2016**. His main argument was that the General Meeting of **23 September 2015** was unlawfully held, since there was an order in place stopping it. He added that the meeting was held in contravention of the Companies Act, since the members were not served beforehand with the Auditors' financial statements for the year **2014**. On the issue of service, it was the posturing of **Mr. Nyakundi** that there is no clear provision under the Kenyan law requiring personal service of Court orders; and that even in England, there is no concurrence in the legal decisions handed down over time as to the procedure to be followed in applications for committal for contempt of court.

[7] Counsel for the Plaintiff further urged the Court to note that there are two disparate prayers in the Notice of Motion dated **19 October 2015,** and to find that even if it were to agree with the Defence with regard to their objection to the request for committal, such a finding should not affect the rest of their prayers in the application. He thus prayed for the dismissal of the Preliminary Objection to pave way for the hearing and determination of the application dated **19 October 2015** on its merits.

[8] It is now trite law, that a Preliminary Objection should be confined to points of law. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**, this point was made thus:

> **"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."**

[9] In the premises, the submissions of the Defendant to the effect that the Order alleged to have been contemned was not served, or that the order had been vacated to pave way for the Annual General Meeting are matters of fact/evidence that can only be verified or contested at the hearing of the application itself. Thus, the only proper preliminary point that presents itself for my determination is whether or not the application was filed in accordance with the provisions of **Section 5 of the Judicature Act,** and by extension the relevant English law that was applicable as at the **19 October 2015**.

[10] Section 5(1) of the Judicature Act provides that:

> **"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 such power shall extend to upholding the authority and dignity of subordinate courts."**

In the case of **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**, the Court of Appeal set the tone with regard to the legal position obtaining in England and its applicability to the Kenyan situation. The Court stated thus:

> **"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 Procedures, 1999. Recently on 1st October, 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 procedures for four different forms of violations:**
>
> **Rule 81.4 relates to committal for "breach of a judgment, 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 judgment, order or undertaking) now referred to as 'application notice' (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. 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..."** (emphasis supplied)

[11] A perusal of the record does confirm that the application dated **19 October 2015** was neither brought by way of a Notice Application, nor does it **"...identify separately and numerically each alleged act of contempt..."** alleged against the Defendant. It is noteworthy that the Court of Appeal expressed the view that an application for contempt be by way of Notice Application and that the application **"must set out fully the grounds on which the committal application is made"** and that it **"must"** identify separately and numerically the alleged acts of contempt. I would therefore agree with Counsel for the Defendant/Respondent that it was imperative for the Applicant to strictly comply with the procedure set out in **the Gachege Case** (supra); and that, while I appreciate that justice must be administered without undue regard to procedural technicalities as required by **Article 159(2)(d)** of **the Constitution**, there is no gainsaying that contempt proceedings are quasi-criminal in nature, hence the need for greater vigilance in ensuring compliance with the set procedures. Accordingly, this is one of those instances in which, in my considered view, it is fair and just to insist on compliance with the Rules of Procedure. I am fortified in this finding by the words of **Kiage, JA** in the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others [203] eKLR** thus:

> **" I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner…were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice…it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."**

[12] In the result, I would uphold the Preliminary Objection and find that the application dated **19 October 2015** is incompetent for failure to comply with the relevant procedural imperatives governing the filing of contempt applications. I would thus, issue an order for the striking out the said application, which I hereby do with an order that the costs thereof be paid by the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2016.

OLGA SEWE

JUDGE