REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRIOBI

(MILIMANI LAW COURTS)

MISC. CIVIL APPLICATION NO. 268 OF 2014 (JR)

IN THE MATTER OF AN APPLICATION BY THE APPLICANT BRYAN YONGO OTUMBA FOR AN ORDER OF COMMITTAL FOR CONTEMPT OF COURT DIRECTED AT MR BONIFACE N. CHIEF LICENSING OFFICER CENTRAL FIREARMS BUREAU AND MR MICHAEL LEMAYIAN C I THE OCS SPRING VALLEY STATION.

AND

IN THE MATTER OF AN ORDER MADE BY THE COURT ON THE 10TH AND 15TH DAY OF JULY 2014 AND ISSUED ON THE SAME DAY

RULING

Introduction

1. By an application by way of an Originating Notice of Motion expressed to be brought under section 5(1) of the ***Judicature Act***, dated 15th December, 2014, the ex parte applicant herein, **Bryan Yongo Otumba,** seeks the following orders:

    1. THAT Mr Boniface N. Maingi Chief Licensing Officer, Central Firearms Bureau and Mr Michael Lemayian CI the OCS Spring Valley Police Station be committed to prison for contempt of court.

    2. THAT all necessary and consequential directions be given.

    3. THAT the cost of this application be in the cause.

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

2. The application was supported by an affidavit sworn by the Applicant on 14th December, 2014.

3. According to the Applicant, this Court on 10th July, 2014 made an order maintaining the status quo with respect to the decision of the Chief Licensing Officer Central Firearms Bureau, the Inspector General of Police, he PCIO Nairobi Area, the OCS Spring Valley revoking and confiscating the applicant's firearm and firearm certificate. The said order according to the applicant was extended when the matter came up for hearing on 15th July, 2014 till 23rd September, 2014. Both orders, he deposed were duly served on the respondents.

4. Despite that **Mr Boniface N. Maingi**, the Chief Licensing Officer, Central Firearms Bureau

caused to be written a letter dated 11th August, 2014 revoking the applicant's firearms certificate No. 8903. Further in spite of the foregoing, on 10th November, 2014, the Criminal Investigation Department and the OCS Valley proceeded to charge the applicant at Kibera Criminal Case No. 5023 of 2014 with the offence of being found in possession of a firearm without a firearm certificate in force at t time.

5. It was the applicant's case that the respondents' actions constitute contempt of the aforesaid court orders.

Respondents' Case

6. In response to the application, the Respondents filed a replying affidavit sworn by **Michael Lemayien**, a Police Chief Inspector attached to Spring Valley Police Station and the Investigating Officer in the case.

7. According to him, both the respondents are no in contempt of Court. In his view, the allegations that led to the recall of the firearm and the firearm certificate which provoked these proceedings were different from the allegations that led to the writing of the letter dated 11th August 2014. According to him, these proceedings were provoked by a complaint made by one **Atula Shantilal Vershi Shah** on 30th June, 2014 that the applicant threatened him with a gun. According to the deponent, the applicant has a series of criminal cases which were reported to their police station one of which is Criminal Case No. 5029 of 2014 and 718 of 2014 before Kibera Law Courts relating to creating disturbances in a manner likely to cause a breach of the peace contrary to section 223(1) of the ***Penal Code***.

8. It was deposed that after the investigations were done a charge was preferred against the applicant. According to the deponent, Criminal Case No. 5029 of 2014 was in respect of complaint by one **Muambi Mutune** who alleged that he applicant had threatened to kill them at Kitsuru Estate and shot one round of ammunition which was later recovered from the scene. On being summoned to the Station to record a statement, the applicant declined. According to the deponent, the applicant misused his firearm contrary to the provisions of the ***Firearms Act*** Cap 114, Laws of Kenya.

9. Criminal Case No. 5023 on the other hand was in respect of complaint made by one **Jacob Juma** who alleged that on 8th November, 2014 the complaint received a telephone from the applicant which he did not pick. However, thereafter the applicant sent him a text message threatening to kill him. The same evening the complainant saw the applicant in the company of four men outside his compound and called police officers who arrested the five suspects near the complainant's compound and upon search recovered a loaded pistol and a magazine with eleven rounds of ammunitions. Upon examination it was confirmed that the cartridge which an exhibit in case no. 5029 of 2014 was fired from the pistol which was recovered from the applicant.

10. It was the deponent's case that after investigations it was found that there was sufficient evidence to charge the applicant and via a letter dated 11th August, 2014 the applicant was called upon to surrender the firearm and the firearm certificate for purposes of investigations ut the applicant declined to surrender the same.

11. In the deponent's view the pistol and the magazine will be used as exhibits in criminal cases nos. 5023 and 5029 of 2014.

12. It was the deponent's case that following the delivery of the judgement herein on 14th January, 2014, the interim orders granted herein have been overtaken by events and that the applicant cannot keep hiding behind Court orders while posing threats to the society hence the application ought to be dismissed.

Determinations

13. I have considered the application, the supporting affidavit, the affidavit in reply as well as the submissions filed.

14. In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. 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".

15. 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**.

16. 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 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".

17. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that 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. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

18. Similarly, in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458,** it was held that:

"It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors."

19. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken pursuant to breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**

20. Order 53 rule 1(4) of the ***Civil Procedure Rules*** provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise. [Underlining mine].

21. Therefore pursuant to the aforesaid provision the jurisdiction of the Court thereunder is restricted to staying the questioned proceedings. Whereas the Court may well grant orders of stay in the exercise of its inherent jurisdiction, it is however my view that where the stay is granted pursuant to the foregoing provisions, a party cannot use such an order of stay as applying to other proceedings which are not in question i.e. proceedings which are not under challenge and for which no leave to apply for orders of judicial review have been sought and granted.

22. Therefore in order for this Court to find that the respondents are guilty of contempt, the actions deemed to be contemptuous must be the actions for which leave was granted and which were consequently stayed. As was held by this Court in **Bryan Yongo vs. Chief Licencing Officer & 3 Others [2014] eKLR.**

"…the Court must state that where a Court directs that the leave do operate as a stay of the *proceedings in question*, that stay is limited to particular proceedings being challenged in that matter and is not to be interpreted to mean that the stay refers to future wrong doings as well. So that the stay that was granted by the Court ought not to be interpreted to cover commission of alleged future offences."

23. However before dealing with that issue, the respondents contended that since judgement had been delivered the orders sought herein are nolonger efficacious. As rightly submitted by the ex parte applicant, it matters not if the case has been dismissed if at the time of the action alleged to be in contempt the proceedings were alive. As was held in **Commercial Exchange Limited and Another vs. Barclays Bank of Kenya Ltd. Civil Appeal No. 136 of 1996,** the discontinuance of a suit does not affect consent orders already made in that suit. It is similarly my view that the determination of a matter does not affect the orders made therein whether interim or otherwise in so far as contempt of Court is concerned.

24. As was held by this Court in **Gachoni Enterprises Limited vs. D.N. Nyaga t/a Njeru, Nyaga & Co. Advocates & another [2012] eKLR**:

"…even if the suit had abated, would that affect the orders made therein? In my considered view, Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. The validity or otherwise of the suit may constitute a ground for purging the contempt but cannot, in my view, constitute a passport for disobeying an order made by a Court of competent jurisdiction. If parties and their counsel were given a blank cheque to decide on the validity of court orders, the dignity of the courts would be severely eroded. It must always be remembered that contempt of court proceedings are meant to maintain the dignity of the Courts and therefore the validity or otherwise of the suit in which the orders are granted cannot sanitise contemptuous actions by a party or his legal adviser."

25. In this case, it is however contended that the events which led to the letter dated 11th August, 2014, were not the subject of these proceedings. It is true that these proceedings were provoked by a complaint by one **Hiten Shah**. However it is on record that the letter dated 11th August, 2014 was written pursuant to complaints made by **Muambi Mutune**, **Rolient Simiyu** and **Jacob Juma**. In **Bryan Yongo vs. Chief Licencing Officer & 3 Others [2014] EKLR** (supra) this Court further expressed itself as follows:

"This Court in the above case prohibited the revocation of the applicant's license unless the due process was adhered to. That case was in respect of an earlier attempt to revoke the applicant's license. The present case seems to have been provoked by the decision made on 11th August, 2014…It is therefore clear that section 5(5) of the said Act is only applicable where the conditions are sought to be varied. Whereas the letter dated 11th July 2014, did not expressly state the reason for requiring the applicant to surrender his firearm certificate, it is contended which contention is not controverted that the applicant did not surrender the said certificate hence the discretionary powers under section 5(7)(b) of the Act could be invoked. To grant the order that the leave granted herein operates as a stay would have the effect of rendering part of the pending criminal proceedings superfluous."

26. The standard of proof in contempt proceedings is now well settled. In **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227,** it was held:

"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…It must be higher than proof on the 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 in aid of a civil remedy where there is any other method of doing justice. This 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 must 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 has not been shown that the respondent intended to drive out the applicants, and that their actions were only consistent with an intention that they should vacate the land when they ploughed the area…The language of the order was such that the court cannot say that the respondents' conduct in moving in to plough, though it came close to doing so, amounted to a constructive eviction and therefore to a breach of the order…The Court, however has power to restrain by injunction threatened contempts. 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."

27. Therefore as was recognised in **Peter K. Yego & Others vs. Pauline Nekesa Kode Nakuru HCCC No. 194 of 2004,** as contempt of court is criminal, it must be proved that one has actually disobeyed the court order before one is cited for contempt. In my view the applicant in an application for contempt must prove beyond paradventure that the respondent is guilty of contempt.

28. In the instant application I am not satisfied that the standard of proof has been attained. There is evidence that the action of the Respondents which is the subject of these contempt proceedings was occasioned by a complaint which was not the subject of the "proceedings in question." To grant the orders sought herein would have the effect of scuttling the later proceedings and that is a course which the Court should only take when satisfied that the act complained of was wanton, reckless and deliberate.

29. In the premises, it is my view that the applicant has failed to prove beyond the balance of probabilities but below beyond reasonable doubt that the respondent's action was in contempt of court.

30. Consequently, the Originating Notice of Motion fails and is disallowed but with no order as to costs.

31. It is so ordered.

Dated at Nairobi this day 11th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Yongo the applicant

Cc Patricia