



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 219 OF 2014
JACINTA WANJIRU RAPHAEL.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion dated 8th July 2014 that was filed under Certificate of Urgency and brought under **Section 177** of the **Criminal Procedure Code**, Articles 161(1) and 165 of the Constitution and Section 121(3) of the Penal Code. The Application is supported by the Affidavit of Jacinta Wanjiru Raphael, the Applicant, sworn on 8th July 2014.
2. The Applicant seeks for orders that the DCIO Makadara be committed to civil jail for contempt of court for failing to honour the order of the Court of 15th August 2013. By that order, the Court had ordered the release of misprint sheets which were in the custody of the said DCIO. The Applicant states that attempts to have the goods released had proved futile.
3. Miss Nyauncho for the Respondent opposed the Application. She submitted that there was a subsisting order of Angawa, J. in an ongoing **High Court Civil Appeal No. 114 of 2012** between the Applicant and another party, Metal Crown Ltd. She added that the Applicant had filed a similar application before Odunga, J., seeking an order of mandamus to compel the Respondent, the DCIO Makadara to release the exhibits. The Court relied on the subsisting orders to dismiss the application.
4. Miss Nyauncho further submitted that the complainant in **Cr. Case No. 32 & 82 of 2012** Makadara intended to appeal against the acquittal of the Applicant. To support this assertion, she cited correspondence from the DPP requesting for the lower court's proceedings to facilitate the lodging of the appeal. She urged the court to dismiss the Application.
5. Mr. Masese for the Applicant in reply, submitted that the order of Angawa, J. referred to was granted pending the arrest and charging of the Applicant. This, he noted, was done and the Applicant acquitted on 15th August 2013. He further submitted that the prosecution had not instituted any appeal against the decision of the Court. He added that the exhibits in question were in respect of the criminal case in which the DCIO was ordered to release to the Applicant. He denied that they were related to the pending civil suit. He added that the Respondent could not use a civil matter to disobey a court order. With respect to the orders of Justice Odunga, Mr. Masese noted that he declined to grant the orders for reason that there

was a remedy available to the Applicant. Thus, the filing of the Applicant to have the DCIO cited for contempt.

6. The main issue for my determination is whether contempt of court orders can issue. To prove contempt against the officer concerned, the Applicant must show that there was **a court order in place and the said order was served personally upon the person who disobeyed it.**

7. The legal basis for this Application, though not properly cited, is **Section 5** of the **Judicature Act** 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.

(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.”

8. The Applicant had been previously charged in CMC Makadara, Cr. Case No. 3282 of 2012 with obtaining goods by false pretences, contrary to Section 213 of the Penal Code. She was eventually acquitted, and the trial Court, after delivering the Judgment on 15th August 2013, ordered that the exhibits be returned to the Applicant through the DCIO, Makadara Division, Nairobi. This order was subsequently served upon the said DCIO on 19th August 2013. On 11th September 2013, the matter went before the lower Court for directions following refusal by the DCIO to release the goods seeking warrant of arrest orders against the said DCIO. The parties were advised to go to the High Court.

9. The Applicant, subsequently instituted proceedings in Misc. Judicial Review Application No. 438 of 2013. In his Judgment dated 6th June 2014, Justice Odunga dismissed the application by the Applicant in which she had sought for orders of mandamus compelling the Metal Crowns Limited, to release the Applicant’s goods of trade in the custody of the 2nd Respondent and the Investigations Officer Makadara. The reasons given for this decision were that: the orders sought could not be granted against a private party; secondly, there was still in place an order staying execution of the order and thirdly, there were more convenient, beneficial and effectual remedies available against the 1st and 3rd Respondents.

10. Meanwhile, it seems, there were ongoing concurrent civil proceedings at the lower court, in CMCC Case No. 345 of 2012 where the Applicant was the plaintiff. The Defendant therein lodged an appeal before the High Court, Civil Appeal No. 114 of 2012. By an order dated 25th April 2012, Angawa J. granted a stay of execution of the trial court’s orders pending the hearing of the main appeal.

11. One of the reasons cited by the Respondent to oppose the Application is that there is an intended appeal from the judgment of the lower Court. The Respondents referred to correspondence by the DPP to illustrate this point. I find this unbelievable for the reason that much time has lapsed and besides the correspondence cited, there is no demonstration of an intention to file an appeal. I have also observed that the correspondence cited by the Applicant between herself and the DPP was with respect to the release of the cash bail that had been deposited by the Applicant in respect of the lower court’s proceedings. There is no information categorically authorizing the release of the goods.

The Applicant also challenged the orders of Odunga, J. as being unrelated to the goods that are the subject matter. The said orders read in part, as follows:

“... Ang’awa, J. held that since the orders issued by the magistrate compelling Metal Crown Ltd, the 2nd Respondent in this matter, is incapable of being enforced since the goods in question were being held by the police, there would be a stay of execution of the said order pending the hearing of the main appeal. There is no indication that the said order has been vacated. Therefore to grant the orders ... would amount to overturning the decision of Ang’awa, J

through the backdoor by this Court and that this Court cannot do. That however does not mean that the Court if properly moved cannot compel the other respondents to release the said goods if the same are in their possession.

13. It is not possible at this stage to determine the status of the orders of stay granted by the learned Judge. It is not in doubt that there are pending orders concerning the subject property. This is in respect of HCCA No. 114 of 2012 involving the Applicant herein and the complainant in the criminal case from which these proceedings emanated. While it is true, as argued by the Applicant that the orders were issue in civil proceedings, I find that the said orders, though issued in the context of the civil proceedings in the High Court, have had the effect of staying the release of the subject property held by the police. None of the parties have clearly addressed me on this issue, and in particular, on the status of the said orders in the pending Civil Appeal, which would have clearly determined this matter.

This Application must therefore fail, and is hereby dismissed.

SIGNED DATED and DELIVERED in open court this **15th** of **October 2014**.

L. A. ACHODE

JUDGE