



IN THE HIGH COURT OF KENYA AT NAIRIOBI

(MILIMANI LAW COURTS)

MISC. CIVIL APPLICATION NO. 93 OF 2013 (JR)

**IN THE MATTER OF AN APPLICATION BY PC MORRIS SAGALA AND 29 OTHERS FOR
LEAVE TO APPLY FOR ORDER OF COMMITTAL FOR CONTEMPT**

**IN THE MATTER OF CONTEMPT OF STATUTORY OBLIGATION AND OF THE HIGH
COURT ORDERS ISSUED ON 15TH MARCH 2014 AND 19TH DECEMBER 2013 BEFORE THE
HONOURABLE JUSTICE G.V. ODUNGA**

**IN THE MATTER OF THE POLICE SERVICE ACT AND THE KENYA CONSTITUTION
2010**

IN THE MATTER OF HIGH COURT JUDICIAL REVIEW NO. 93 OF 2013

MORRIS SAGALA & 29 OTHERS.....APPLICANTS

VERSUS

- 1. THE DEPUTY INSPECTOR GENERAL OF NATIONAL POLICE SERVICE**
- 2. INSPECTOR GENERAL OF NATIONAL POLICE SERVICE**

K.S. KITOORESPONDENTS

EX-PARTE:

- 1. PC. MORRIS SAGALA**
- 2. CPL. SOLOMON RUTO NGEMNI (TRAFFIC)**
- 3. CPL. ALI KUPI**
- 4. CPL MILICENT KAMURI**
- 5. CPL BENARD NJERU**
- 6. PC. MOHAMED ADAN**
- 7. PC. NATHAN MOTARI**
- 8. PC (W). JANE MANYARA**
- 9. PC. WILLIAM CHIRCHIR**
- 10. PC (W) PRISCA ASOKON**
- 11. PC. GIBSON MWATELA**
- 12. PC. FRANCIS SANG**
- 13. PC (W). PAULINE NDERITU**
- 14. PC. CRISPUS MAINGI**
- 15. P.C. RICHARD NJENGA**
- 16. PC. ANNALICE KABURU**
- 17. PC (W). CAREEN MIHESO**

- 18.PC (W). SALOME NZILANI
- 19.PC (R). LUKAS KIARIE
- 20.PC. WILLIAM OMOLLO
- 21.PC (W) RISPA WAMBUI
- 22.PC. PETER NGARUIYA
- 23.54. PC(W) JOYCE WANJA
- 24.PC.JOTHAM NYAROCHE
- 25.PC. MOPEL NKETUYA
- 26.PC. JIMMY KEMBOI
- 27.PC. JONAH SANG
- 28.PC. ALEX CHEMIRMIR
- 29.PC. PHILIP OTIENO

RULING

Introduction

1. By their Chamber Summons dated 6th May, 2014, the *ex parte* applicants herein seek the following orders:
 1. **That this application be certified urgent and heard forthwith**
 2. **That due to the urgency hereof, service of this application be dispensed with and the application be heard ex-parte in the first instance.**
 3. **That this honourable court do and hereby commit the Inspector General of National Police Service, the Deputy Inspector of National Police Service and K.S. Kitoo respectively to prison for maximum of six (6) months for deliberately refusing and/or continuing to disobey, flout or circumvent this Honourable Court's Order issued on the 15th March, 2013.**
 4. **That the costs of the application be awarded to the Applicants.**
 5. **That further another order be made as the court shall deem fit.**

Ex Parte Applicant's Case

2. The application was supported by a supporting affidavit sworn by **Morris Sagala**, the 1st applicant herein on 5th May, 2014.
3. According to him, following the grant of interim orders herein on 15th March, 2013, the said order and penal notice were duly served upon the Respondents through their legal offices at Vigilant House receipt of which was acknowledged. Thereafter the applicant filed a Notice of Motion dated 15th March, 2013 to which judgement was delivered on 19th December, 2013.
4. However upon receiving the interim orders and penal notice aforesaid, the deponent deposed that the Respondents through the OCS Athi River Weighbridge Police Station one **Alex Mumo** issued marching orders to the *ex parte* applicants requiring them to vacate the Police House immediately and report at their new station a demand which the applicants declined to heed.
5. According to him, it is the duty of the Respondents to obey a Court Order duly served upon them and not fragrantly and deliberately continue to disobey, flout or circumvent the same.
6. It was deposed that the Respondents have termed the applicants deserters from police service and stopped their salaries while some of them have been forcefully removed from their houses.
7. The applicants therefore sought an order that summons be issued to the Respondents to personally appear before the Court to show cause why they should not be committed to civil jail for six

months.

8. It was submitted on behalf of the applicants that the Respondents' action in the face of the Court orders served on them is contemptuous and the applicants relied on a number of authorities on the subject of contempt.

Respondents' Case

9. In opposition to the application, the Respondents filed the following grounds of opposition:
 1. **That the application herein is fatally defective and incompetent for non-compliance of the mandatory provisions of the substantive and procedural law.**
 2. **That the application is unmerited based on mere allegation, has no cause of action and is otherwise an abuse of the court process.**
 3. **That in any case the orders alleged to have been disobeyed are long spent and this court is *functus officio* in view of the fact that the main suit has been finalized.**
 4. **That the alleged contemptuous actions are over one year and was within the full knowledge and participation of the Applicants wilfully taken, and otherwise are estopped by their own conduct from bringing this belated and an afterthought application.**
 5. **That in any case there was no valid personal service of the order and penal notice on the Respondents.**
10. On behalf of the Respondents it was submitted that though the applicants obtained interim orders the same seem not to have been served either upon the Attorney General or on the Respondents personally and at no point in the proceedings did the applicants allege that the orders had been disobeyed.
11. It was submitted that it was clear that by the time the interim orders were obtained the transfers had already been effected and the officers had reported to their respective stations and that this issue was not brought to the attention of the Court. It was submitted that the decision of the police once effected are irreversible since the transfer affects more than one officer.
12. It was submitted that the orders of transfer were not lawful but were merely issued by an authority not mandated by the law to do so.
13. It was further submitted that the application was procedurally defective and that the order in question was not personally served on the Respondents.

Determinations

14. The first port of call with respect to the procedure for institution contempt of Court proceedings in this country is 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.***
15. 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**.

16. 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 1st 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.
17. 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”.

18. 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”.

19. 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.
20. 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 in pursuance of actions taken in 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 & Others Civil Appeal No. 59 of 1993.
21. In the instant case, it is clear from the affidavit of service that the interim orders were not served on the Respondents personally. That however does not mean that the orders given by the Court were thereby rendered worthless. As this Court held in Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013:

“In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.”

22. Therefore whereas the Respondents may not be committed to civil jail for disobeying the orders issued in this matter, 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 police

procedures this Court cannot turn a blind eye to the same. The Respondents have not sworn any affidavit that they are unaware of the orders issued by this Court whether in the interim or final.

23. What is contended in the submissions filed herein is nothing but a manifestation of sheer arrogance and display of impunity. To disregard Court orders on the ground that once police officers make decisions the same cannot be reversed is the highest height of invincibility coming from law enforcement agencies. It was contended in the submissions that no law was broken since the only error was that the person who issued the transfer directive had no authority to do so. In other words, it was being contended that the issue was no big deal. This Court having pronounced itself on the matter it borders on contempt of Court for such submissions to even be contemplated. Fundamental rights and freedom which are expressly laid out in our constitution must never be given casual observance or breached with impunity by the Government or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010**:

“The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers.”

24. Therefore in order to maintain the rule of law and in order that the authority and the dignity of our Courts are upheld at all times and to stamp the authority of this Court and ensure the values and principles of governance enshrined in Article 10 of the Constitution are adhered to, I hereby direct the Respondents to appear before this Court personally to explain why appropriate sanctions ought not to be taken against them in light of their abhorrent conduct.

Dated at Nairobi this day 16th of October, 2014

G V ODUNGA

JUDGE

In the presence of:

Mr Sausi for the Applicants

Cc Patricia