



NO.121/ 2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS (JR) NO. 5 OF 2012

NATIONAL BANK OF KENYA LTDAPPLICANT

VERSUS

COUNTY COUNCIL OF OLEKEJUADO.....1ST RESPONDENT

CONTINENTAL INTERGRATED

INDUSTRIES LTD.....2ND RESPONDENT

JAMES KAGONIA WARUI3RD RESPONDENT

RULING

1. By an application dated 25th October by way of Notice of Motion pursuant to the provisions of Section 5(1) of the Judicature Act, Order 52 Rule 2(2) of the Rules of the Supreme Court of England and all enabling provisions of the law, the applicant seeks leave to file contempt proceedings against the Town Clerk (or the official serving in equal capacity of Ole kejuado County Council (1st respondent) for disobeying the order of the court dated 18th September, 2012.
2. The *ex parte* application is supported by a verifying affidavit of facts sworn by **Robert Paul Onyango**, advocate in conduct of the matter whereby he depones that the applicant having filed an application by way of Judicial Review, Orders of *certiorari*, *prohibition* and *mandamus* were issued against the 1st Respondent, compelling it to give its consent for transfer of Title No. Ngong Township/Block 11/284 to **James Kagonia Warui** (3rd Respondent) an order it has failed, neglected and/or willfully refused to comply with; an omission that is making the *ex parte* applicant incur huge and significant financial loss as it was in the statutory power of sale before it was settled; and the 3rd Respondent threatens to withdraw from purchasing the property charged; the subject of the proceedings.
3. Section 5 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 that power shall extend to upholding the authority and dignity of the subordinate courts.
4. The fact that the Judicature Act does not provide for either substantive or procedural law that governs contempt of court proceedings has been a point of expression of complaint as expressed in the case of *Nairobi High Court (Civil Division Civil Case No. 456 of 2011–John Mugo*

Gachuki versus New Nyamakima Co. Ltd where it was stated thus:

“It is unfortunate and regrettable that nearly 50 years after independence our procedure, with respect to punishment for contempt in our court is referable to the procedure, in the High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law enacted.”

5. Without such legislation in our laws, we adhere to what is provided for. It is therefore settled that the law that governs contempt proceedings in Kenya is the one applicable in England.
6. Order 52 rule 2 of the Rules of the Supreme Court of England provides;-

“i. No application for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule

ii) An application for such leave must be made ex parte to a judge, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and an affidavit, to be filed before the application is made, verifying the facts relied on.

iii) The applicant must give notice of the application for leave not later than the preceding day to the Registrar and must at the same time lodge with the Registrar copies of the statement and affidavit”.

7. I have perused the *ex parte* application filed herein. It is supported by a verifying affidavit. Attached thereto is a statement relied on which set out the name and description of the applicant; name and description of the contemptnor and grounds upon which committal is sought.
8. It is also a requirement that an applicant gives a notice of the application for leave to the Registrar. Also required to be lodged are copies of the statement and affidavit. This must be done a day preceding the date of the application. It is settled that the Registrar’s Office is equated to the Crown Office and in Kenya the attorney General’s Office. This was held in *Republic versus the Attorney General Ex parte Bindi A. Gadia Kisumu HCMISC No. 124 of 2005 where Mwera, J* (as he then was) stated thus:

“... The application for leave which should precede the substantive motion fell foul of the law when the application was not notified to the Registrar a day before its hearing. All above proceeds on the basis that the Divisional Court in England has its counterpart in the High Court here while the Crown Office should be equated to the Registrar’s office.... Failure to do so what the law requires cannot be described as slight procedural mis-steps. There were/are fundamental in the sense that committal proceedings are about a person’s liberty.”

9. This issue was also considered in *Petra Juliane Muller versus Saidha Kwa Muyo Foundation (NGO) Civil Appeal No. 51 of 2006, (Malindi) were Omondi, J, stated thus:-*

“The equivalent of the Crown Office in the Kenyan set up would be the Attorney General’s Office.”

Odunga, J also concurred that the Crown Office in this country is the Attorney General’s Office (*see John Mugo Gachuki (Supra)*

10. I am also of the view that the Crown Office in this country is indeed the Attorney General’s

Office. This being the case, it was a requirement that the *ex parte* applicant serves a notice to the Attorney General.

11. There is a notice drawn to this effect and annexed to the application. It reads:-

“NOTICE UNDER THE JUDICATURE ACT CHAPTER 8 LAWS OF KENYA AND ORDER 628 OF THE SUPREME COURT OF ENGLAND.

Notice is hereby given that National Bank of Kenya Limited the Exparte applicant herein shall on the day of2013 move the Honourable Court for leave to file an application for contempt against the 1st Respondent.

Dated at Nairobi this 25th October 2013

RACHUONYO AND RACHUONYO ADVOCATE FOR THE APPLICANT

Drawn & Filed by

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NAIROBI.”

12. There is nothing to show that the notice of intention to commence proceedings was served on the Attorney General's Office or was intended to be served on that office. Similarly there is nothing to suggest that the Attorney General was served with any statement and affidavit prior to the application for leave being made.

13. It has been stated that contempt of court proceedings are special proceedings that are quasi – criminal in nature that is why the law must be applied to the letter. The requirement in this case was flouted. Though the application is *ex parte*, I find it difficult to grant the order sought.

14. In the premises, I decline to grant leave to the *ex parte* applicant to institute contempt proceedings as prayed.

15. Orders accordingly.

DATED, SIGNED and DELIVERED at MACHAKOS this 4TH day of NOVEMBER, 2013.

L.N. MUTENDE

JUDGE