



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURT**

**Miscellaneous Application 399 of 2012**

**ALBERT MUKHWANA.....APPLICANT**

**VERSUS**

**JULIUS ONJIRO..... RESPONDENT**

**R U L I N G**

By a Motion on Notice dated 19<sup>th</sup> July 2012 expressed to be brought under the provisions of Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya, Order 52 Rules 2(2) of the Rules of the Supreme Court of England, 1965, Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and all other enabling provisions of the law the applicant herein seeks the following orders:

- 1. An order of committal to be made against JULIUS ONJIRO to prison for such period as this Honourable Court may deem fit and just in that the said JULIUS ONJIRO has disobeyed a court order granted by HON M. K. Kiema on the 22<sup>nd</sup> day of June 2012 inter alia:**
  - a. Restraining the Defendant for disposing or dealing with the Plaintiff's household goods catered away from the Plaintiff's house in any way that is detrimental pending hearing of the suit.**
  - b. Compelling the Respondent to release the Plaintiff's household goods in good working condition pending hearing and determination of the suit.**

The application is based on the following grounds:

- a. The said JULIUS ONJIRO, despite being aware of the court order; and in spite of numerous prior and subsequent demands and reminders from the Applicant's advocates on record, S. K. Amani & Associates, has refused to release the Applicant's household goods as ordered.**
- b. The Applicants have no other way of enforcing the said order.**

It is now settled that, by dint of Section 5 of the Judicature Act, the High Court and the Court of Appeal in Kenya exercise the same power to punish for contempt of court as that exercised (for the time being) by the High Court of Justice in England. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The jurisdiction of the High Court of Justice in England in matters of contempt of court is provided for in the Rules of the Supreme Court. Order 52 rule 2 of these Rules provides an elaborate procedure for the institution and

prosecution of contempt of court applications. Under rule 2 subrule (3) of the Order 52 of the Rules of the Supreme Court, it is stated, in mandatory language, that the notice of the application for leave is to be given to the Crown Office not later than the preceding day and must at the same time lodge in that office copies of the statement and affidavit. It is settled that the equivalent of the Crown Office in Kenya is the Office of the Attorney General. Order 52 rule 2(1) of the Rules of the Supreme Court of England provides that no application to a Divisional Court for an order of committal against any person may be made unless permission to make such an application has been granted in accordance with the rule. Subrule (2) provides that an application for such permission must be made *ex parte* to a Divisional Court except in vacation when it may be made to Judge in Chambers 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 by an affidavit to be filed before the application is made verifying the facts relied on.

As the applicant's application has invoked both Section 5(1) of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, he bound himself to the procedure provided for contempt proceedings both under section 5 of the Judicature Act and Order 52 of the Supreme Court of England and that means the applicant was required to give a notice of the application to the Attorney General's Office at least the preceding day before making the application and lodge with the said office copies of the Statement and affidavits. He was then required to seek leave to institute the proceedings and the application itself is required to provide for the name, description and address of the person sought to be committed. Once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. Under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity. The provision stipulates that "unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse". See **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**

When **Mr Kimathi**, learned counsel who was holding brief for **Ms. Amani** for the applicant appeared before me on 19<sup>th</sup> July 2012, I pointed out to counsel the foregoing provision. I then gave counsel time to decide whether the failure to comply with the said provisions more particularly the failure to notify the Attorney General could be cured subsequently. Learned Counsel was of the view that subsequent notification was possible and attempts were made to serve the said notice.

From the said provisions it is clear that the notification to the office of the Attorney General ought to be done prior to the application for leave. I have not been referred to any authority or legal provision that permits the notification to be done subsequently. Accordingly it is my view that this application was incompetent *ab initio* and could not be cured by subsequent attempts at service.

Apart from the foregoing the application as presented does not seek leave to institute these proceedings. From the record no such leave has been sought. Whereas I was prepared to treat the present application as one seeking leave, in light of the foregoing even if I were so minded, this application would still be still born.

In order to give an opportunity to the applicant to move the court properly, the Notice of Motion dated 19<sup>th</sup> July 2012 is hereby struck out with no order as to costs.

**Dated at Nairobi this 9<sup>th</sup> day of October 2012**

**G V ODUNGA**  
**JUDGE**

Delivered in the absence of the parties