



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Winding Up Cause 21 of 2011**

**IN THE MATTER OF THE COMPANIES ACT**

**AND**

**IN THE MATTER OF WINDING UP OF FROSTY MELON CATERERS LIMITED**

**RULING**

1. The petitioner filed a Notice of Motion dated **15<sup>th</sup> June 2012** seeking leave to commence contempt of court proceedings against Mr. Fred Rabong'o a contributory. It was taken out under **Section 5 (1) of the Judicature Act, Order 45(5) of the Rules of the Supreme Court of England, Order 40 Rule 3(1) of the Civil Procedure Act Sections 1A, 1B and 63 (c) of the Civil Procedure Act.**
2. The brief background to the application is that the Honourable Mr. Justice Muga Apondi made an order on **15<sup>th</sup> July 2011** in respect of the Company's restaurants located at L.R No. 209/566 Moi Avenue and L.R No. 209/11880 Parkside Towers, Mombasa Road. The order required the maintenance of status quo of the operations of the two restaurants pre **5<sup>th</sup> July 2011**. It is the petitioner/applicant's claim that the order continues to be in force pursuant to a consent order recorded in court in the presence of the advocates for all parties and was adopted as an order of the court. On or about **1<sup>st</sup> February 2012**, and during the pendency of the said order, Mr. Fred Rabongo ("herein the respondent") disposed of the restaurant located at Moi Avenue to Migoko African Dishes Restaurant. As a result, the petitioner/applicant filed the contempt proceedings herein, seeking among other orders, that the Court be pleased to punish the respondent by committing and detaining him in prison for a term not exceeding six (6) months.
3. The application was coming up for hearing on **25<sup>th</sup> July 2012** when the respondent filed a Notice of Preliminary Objection dated **23<sup>rd</sup> July 2012** to the Petitioner/applicant's application. The grounds of the Preliminary Objection are as follows:-
  - i) **The application is bad in law for failure to comply with the mandatory requirements for committal proceedings.**
  - ii) **The application has not been personally served on the alleged contemnor.**
  - iii) **The application is bad in law as the purported sale on which the application is based is void pursuant to the provisions of section 224 of the Companies Act.**
4. The Preliminary Objection was canvassed before me on **25<sup>th</sup> July 2012**. Mr. Muriithi appeared for the Petitioner/Applicant while Ms. Wanjiru appeared for Mr. Fred Rabongo, the Respondent herein.
5. Ms. Wanjiru for the respondent submitted that the applicant did not comply with the mandatory

requirements for committal proceedings. Ms. Wanjiru submitted that **section 5(1)** of the **Judicature Act** set out the procedure for contempt proceedings. The contempt proceedings were not served on the Attorney General. She further relied on the Respondent's list and bundle of authorities filed in court on 25<sup>th</sup> July 2012 and submitted that where the liberty of a person was involved, it was a must that formal service be effected. She referred the court to the case of **Nyamodi Ochieng Nyamogo & Anor. V Kenya Posts and Telecommunications Corporation, Civil App. No. NAI 264 of 1993**. She stated that there was a strict duty on the applicant to show strict compliance.

6. It was also her submission that courts had held that orders which a party was expected to comply with must be served personally on the party. It was her contention that there was no evidence of personal service upon the respondent. She further submitted that an alleged contemnor must know the penalty. It was her case that there was no penal notice appended to the order sought to be enforced and that the contempt notice was not served on the respondent. She also stated that **section 224** of the Companies Act rendered the contempt void as the sale was not sanctioned by the court. She concluded by submitting that the aforesaid defects rendered the Petitioners application defective.

7. Mr. Muriithi, counsel for the petitioner/applicant submitted that section 224 of the companies Act did not apply as the issue was that there was an order in place which the respondent had disobeyed. On failure to comply with mandatory requirements, counsel submitted that **Order 54 rule 2** of the Civil Procedure Rules did not require leave. He relied on the case of **Fidelity Commercial Bank Ltd vs Shamsherali Karim Kurji & Another[2006] eKLR**. He further submitted that **Order 40 rule 3** did not require service upon the alleged contemnor and that service of the application upon Mr. Rabongo's lawyer was sufficient. He relied on **Odunga's digest Vol. 2 Page 1210** where Khamoni J, in the case of **William Sapuro Kimaana v National Bank of Kenya Limited and Another HCCC NO. 1933 of 1999** held that where the alleged contemnor was served through his advocates that service sufficed.

8. In reply, Ms. Wanjiru relied on the case of **Nyamodi Ochieng Nyamogo & Anor. V Kenya Posts and Telecommunications Corporation (Supra)** where the effect of personal service was upheld. She submitted that **Order 40** of the Civil Procedure Rules was applicable in that case because the matter involved the liberty of the person.

9. I have carefully considered the pleadings and the submissions by Counsels and can now make my view on the points of preliminary objection raised by the Respondent herein.

10. On the first ground of objection, my view is that Section 5(1) of the Judicature Act as well as Section 63 (c) of the Civil Procedure Act set out the court's jurisdiction to punish for contempt as the procedure for moving the court in that regard. The Sections provide:

***"5. (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."***

***"Section 63 (c) on the other hand provides that;***

***"63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed;-***

***(a).....***

***(b).....***

***(c) Grant a temporary injunction and in case of disobedience convict the person guilty thereof to prison and order that his property be attached and sold.***

11. The High Court of Justice in England exercises the power to punish for contempt of court under **Order 52** of the Rules of the Supreme Court. The instant application has not complied with some of the rules herein including the requirement that the applicant must give notice of the application for permission not later than the preceding day to the Crown Office (equivalent of the Attorney General's

chambers- State Law Office in the case of Kenya). There is no evidence that the Attorney General was given the requisite notice. Ground 1 of the preliminary objection stands.

12. On the second ground of objection, the Respondent contended that the application was not personally served on the alleged contemnor. On the other hand the applicant submitted that service upon the respondent's Advocate was sufficient. Order 52 Rule 3(1) of the Supreme Court practice Rules makes it mandatory for the contemnor to be served and failure to do so renders the application defective. The **Halsbury Laws of England Volume 9, 4<sup>th</sup> Edition at page 37** which deals with the necessity of personal service in the contempt of court proceedings provides thus:-

***“As a general rule no order of the court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. In case of an order requiring a person to do an act the copy must be served before the expiration of the time within which he was required to do the act.”***

13. That no personal service was effected upon Mr. Rabongo was not rebutted by the petitioner/applicant. Neither was any reason advanced to justify why the court should depart from this trite rule that an alleged contemnor must be served personally. In the premises, I uphold the second ground of objection.

14. On the third ground of objection, it is the Respondent's case that the sale was void according to **Section 224** of the **Companies Act** and therefore there could be no contempt. I beg to disagree. What is in issue here is the disobedience of a court order. The parties herein entered into a consent on 28<sup>th</sup> October 2011 which was adopted as a court order. It is the said order that the respondent disobeyed amounting to contempt. Therefore, the issue of whether the sale was void or not does not absolve the Respondent from obeying valid court orders. In the circumstances, the third ground of objection fails.

15. In the result, the preliminary objection raised by the respondent is allowed in terms of grounds 1 and 2 with the effect that the Notice of Motion application dated 15<sup>th</sup> June 2012 fails for non-compliance and is hereby struck out with no orders as to costs.

16. However, in the exercise of the court's overriding objective and inherent powers, and in the interests of justice, I grant leave to the Applicant to re-institute a fresh application that complies with the requirements faulted in the application under determination, in particular, the requirements of personal service upon the alleged contemnor and service upon the Attorney-General. The alleged contemnor is, in the same spirit, invited to purge his apparent contempt by reversing the unauthorised sale or remitting to court the proceeds thereof to obviate punishment by this court for disobedience once a compliant application for contempt is re-instituted.

17. Costs of the present application shall be in the cause.

**IT IS SO ORDERED.**

**DATED, DELIVERED AND SIGNED THIS 4<sup>TH</sup> DAY OF OCTOBER 2012**

**J.M MUTAVA**  
**JUDGE**