REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 456 of 2011

JOHN MUGO GACHUKI.....APPLICANT

VERSUS

NEW NYAMAKIMA CO. LTD..... RESPONDENT

RULING

The plaintiff/applicant herein, **John Mugo Gachuki**, instituted these proceedings by way of a plaint dated 19th October 2011 filed on 24th October 2011 seeking the following orders:

a) An injunction to restrain the Defendant by herself, her servants or agents from harassing, interfering with possession and quite enjoyment of plaintiff premises situated Nyamakima building and general damages, costs and interests.

b)Any other relief the court may deem fit and just.

The plaint was filed together with Chamber Summons dated the same day seeking both prohibitory and mandatory orders of injunction inter alia praying that that the defendants opens the suit premises under the supervision of the OCS Kamkunji Police Station as ordered by the Business Rent Tribunal Court. The applicant then filed a Notice of Motion on 21st November 2011expressed to be brought under the provisions of Order 51 Rule 1 of the Civil Procedure Act (sic) and section 3 of the Civil Procedure Act and Section 5 of the Judicature Act (Cap 8), Section 12 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) (Cap 3001) and all enabling provisions of the law.

By the said motion, the applicant herein seeks the following orders:

1. That this application be certified urgently and the same be heard ex-parte in the first instance.

2. That the Defendant be ordered to open the business premises immediately and failure to do, the Tenant be allowed to break and access the premises with the supervision of the OCS Kamukunji Police Station as ordered by the Business Rent Tribunal Court.

3. That an interim injunction be issued and/or restraining the defendant and/or his servants and/or Agents and/or employees be prohibited forthwith by this court from unlawfully intercepting/harassing, intimidating and/or evicting, closing, threatening/interfering/tampering, disposing by and/or in any manner whatsoever and /or howsoever with the Applicant occupation and lawful enjoyment of suit premises at Plot No. 209/139/1 Room No. 117 Nyamakima House.

4. That the OCS Kamukunji Police Station to oversee compliance and that peace prevails.

Served with the said application the respondent filed a Notice of Preliminary objection dated 2nd December 2011 and filed on 9th December 2011 in which it contended that that the application is outside the provisions of the Civil Procedure Act and Rules and the Judicature Act; that the application is brought wrongly without seeking leave of the court; and that the respondent never disobeyed the orders of the court.

It is these objections that are the subject of this ruling.

In his submissions, **Mr Agina**, learned counsel for the respondent stated that before instituting contempt of court proceedings against an individual there should be a notice to the Attorney General pursuant to the provisions of the Judicature Act and the relevant United Kingdom statutory provisions. Secondly learned counsel submitted that the application for leave to institute contempt of court is to be lodged in the High Court pursuant to which an Originating Motion is lodged. These requirements have not, in counsel's view, been complied with hence there are no contempt of court proceedings before the Court. The purpose of the Notice to the Attorney General is to draw the attention of that office to such proceedings since the same are criminal in nature.

In opposing the objections, the plaintiff who is appearing in person, contended that he is before the Court to enforce the orders of the Court. According to him leave was given on 15th November 2011 in the present case. He however conceded that he has not approached the Attorney General at all. To him he has followed the procedures as directed by the Court.

In a reply **Mr Agina** stated that on 22nd November 2011 **Hon. Mr Justice Mwera** only ordered that the application be served but did not grant leave. To counsel, the Courts do not litigate on behalf of the parties and therefore the issue of filing proceedings in accordance with the directions of the Court does not arise.

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.

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 as enacted.

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, is that the court comprises three (3) divisions – the Chancery, the Queens Bench and the Family Division. 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 said Rules, 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 the applicant 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 of the Judicature Act, by virtue of 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 said Rules which means the applicant must seek leave to institute the proceedings. The application itself should also 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 without jurisdiction and a nullity. See **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**

In **Republic vs. The Attorney General *Ex Parte* Bindi A. Gadhia Kisumu HCMA No. 124 of 2005 Mwera, J** held *inter alia*:

"It cannot be in dispute that section 5(1) of the Judicature Act does import into our jurisdiction the application/procedure for the time being in use in the United Kingdom as regards committal for those in disobedience of the court orders and the provision of law in England which up to this time the courts in Kenya should invoke to commit for contempt is Order 52 of the Supreme Court Practice Rules and the latest book in which that is traced is the SCPR, 1997...The applicant having admitted that he did not file the application for leave along with the statement and the verifying affidavit, both mandatory features of such move, then the application is fatally flawed from the beginning...The application for leave which should precede the substantive motion fell foul of the law when that application was not notified to the registrar a day before its hearing. All the 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 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".

Save for equating the Crown Office to the Registrar's Office, I associate myself with the learned Judge's holding on the other issues. In my considered view, the Crown Office in this country is the Attorney General's office.

The first issue taken by Mr Agina is that the Notice to the Attorney General was not served. Ordinarily the allegation that a notice required to be served was not so served ought not to be the subject of a preliminary objection. In Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is

to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"… The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute".

Where a party alleges that a notice was not served, there is no way the respondent can prove service save by way of a replying affidavit thus removing the objection from the realm of a preliminary objection. However, it is a totally different matter where the factual set up is not in dispute. In this case, it is conceded by the applicant that no approach at all has been made to the Attorney General. It follows that there has been no notice given to our equivalent of the Crown Office in England. That being the position and as contempt of Court proceedings connote an element of criminality in the sense that they allege an affront to the rule of law, failure to notify the office of the Attorney General of the intention to institute the same is not a mere procedural technicality but a matter of substance. I, accordingly find that these proceedings were not instituted in strict compliance with the law and are therefore incompetent. That would have been sufficient to dispose of this matter. However, for the sake of completeness of record I will deal with the other issues raised as well.

The second issue is that no leave to institute these proceedings was given. The applicant contends that he was issued with the leave on 15th November 2011. The instant file is a skeleton file and the first proceedings in this file commenced on 16th December 2011. It is accordingly impossible to determine from the record whether or not leave was actually sought and granted. I therefore cannot state with certainty whether or not leave was actually sought and granted.

The next issue is that the proceedings were instituted by way of a Notice of Motion rather than a Originating Notice of Motion or Summons. Whereas the correct procedure would be the Originating Notice of Motion and not just a Notice of Motion, I am not prepared to hold that the failure to indicate that a Motion is "Originating" in contempt of Court proceedings is fatal in light of the provisions of Article 159(2)(d) of the Constitution.

However, in this case, the orders alleged to have been disobeyed were issued by the Business Premises Rent Tribunal and not this Court. Where a party intends to commence contempt of court proceedings, the same are not to be instituted in separate civil proceedings commenced by plaint as the applicant did in this case. As already indicated the procedure is by way an application for leave together with statement. It follows that on this ground the application dated 18th November 2011 is incompetent as well.

It follows that the Notice of Motion dated 18th November 2011 is struck out but with no order as to costs.

Dated at Nairobi this 6th day of November 2012

G V ODUNGA
JUDGE

Delivered in the presence of
The applicant
Mr Agina for the respondent