



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL CASE NO 590 OF 1988**

**ALPHONCE ANDALO & ANOTHER**

**t/a Highspeed General Supplies ..... APPLICANT**

**VERSUS**

**JAMES GLEEN RUSSEL LTD.....RESPONDENT**

**RULING**

The Notice of Motion application which came for hearing was filed in court on 23rd March 1988. *Ex-parte* orders had been granted to the applicant on 7/3/88. It was the *inter-parte* hearing which came before me. However, before the application could be argued on its merits, Mr Vohra for the respondent raised a preliminary objection to the effect that the application is misconceived in that it is asking for an order to commit the respondents to civil jail yet according to decided cases now being followed by the High Court, leave for such an application has not been sought from a judge in chambers.

He submitted that this is a rule of procedure of the Supreme Court of England, which our High Court is adopting, by virtue of section 5 of the Judicature Act, Chapter 8, Laws of Kenya. He also produced a recent Ruling of this court in HCCC No 474/86 *Njoroge Njuguna v Muthee Njuguna*.

Mr Nyakundi for the applicant opposed this preliminary point on the ground that the order his clients are seeking is in respect of disobedience of a court order granted on 7/3/88 under order XXXIX rule 2 sub-rule 3 of Civil Procedure Code. That they are not dealing with prerogative orders, where leave has first to be obtained. That in matters of disobedience the procedure of court orders under order XXXIX of the Civil Procedure Code, a way of dealing with the situation is set out in rule 7.

Having summarized the arguments of the 2 learned counsel, I have the following to say, and that is, Reading through the Civil Procedure Code I find that Section 63 (c) empowers the court to grant a temporary injunction and in cases of disobedience,

“Commit the person guilty thereof to prison and order his property to be attached and sold .....

However, as far as obtaining an order for injunction to restrain and seek redress in cases of disobedience are concerned, the procedure to be adopted is prescribed in order XXXIX rule 2, sub-rules 1 and 3. Rule 9 of the same order has the specific mandatory provision to the effect that applications under rules 1 and 2 (order XXXIX) shall be by summons in chambers.

In this case, and at the present moment the application on record is for an order for committal to civil jail,

for breaching a court order. The application has, of course, not yet been argued.

I have read through several decided cases of this court on this point. These cases provide a useful guide as to how to deal with applications of this kind.

Perhaps the 1st point to deal with is whether disobedience of a court order amounts to a contempt of court. Mr Nyakundi submitted that it is not, and went on to state,

“Disobedience of a court order is not in strict terms a contempt.....”

From my reading of decided cases which have developed the law in this area, our courts seem to be using the Supreme Court of England Rules deriving the authority to do so, from the Judicature Act, Cap 8, Laws of Kenya. Section 5 of the Act confers on the High Court and the Court of Appeal.

“.....the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England .....”

However, there are no express procedural rules laid out in our law, so that it appears as if not only the English substantive law govern the matter, but the English procedural rules as well.

Such a procedural rule in England is found in order 52 rule 2 of the Rule of the Supreme Court, which provides as follows:-

“No application to a Divisional Court for an order for committal against any person may be made unless leave to make such an application has been granted.....”

As the Supreme Court requires that an application be made to a judge in chambers, I consider that the rule is not inconsistent with the provisions of our order XXXIX rule 9 of the Civil Procedure Rules. This means that the procedure for contempt would more or less take the same form as that for the prerogative orders.

But, to come back to Mr Nyakundi’s submission that disobedience of a court order is not in strict terms a contempt of court, I would find here that such disobedience is infact a very common form of contempt of court, as seen in the Supreme Court Practice Rules of 1985.

From the above discussion, I find that the preliminary objection raised by Mr Vohra has succeeded and I award him costs to that effect. My ruling is therefore that before the applicant can seek an order from court committing the persons named in this application to civil jail, he must first obtain leave from a judge in chambers, and, that application for leave must be served on the Attorney-General, who will come into the proceedings simply as “*amicus curiae*”.

Dated and Delivered at Nairobi this 16<sup>th</sup> Day of May, 1988

**J. A. ALUOCH**

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**J U D G E**