



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 49 OF 2018

HELLEN NASAMBU.....PLAINTIFF

VERSUS

JANE NALIAKA SIMIYU.....DEFENDANT

RULING

1. This is a ruling on the application dated 17/5/2019 and filed in court on the same date. That application has been brought by the defendant/applicant seeking the following orders:-

- (1) That this application be certified urgent and the same be heard ex parte in the first instance.
- (2) That the ruling of this court issued on 13th May, 2017 be set aside.
- (3) That this court be pleased to review its own decision given on the 13th May, 2019.
- (4) ...spent
- (5) That costs of this application be provided for.

2. The application is premised under 3A and 63 (e) of the Civil Procedure Act. Order 45 Rule 1(a) & (b), 2 and Order 51 Rule 1 of the Civil Procedure Rules.

3. The grounds on which the said application is made are that the applicant/defendant who is the contemnor has been convicted and sentenced under the Contempt of Court Act No. 46 of 2016 which was declared unconstitutional vide Constitutional Petition No. 87 of 2017 and that the applicant has been convicted and sentenced to pay a fine of Kshs.20,000/= failure to which to serve a jail sentence of 6 months.

4. The application is supported by the affidavit of the applicant sworn on 16/5/2019. That affidavit reiterates the same matters set out in the grounds above.

5. In his opposition to the application, the plaintiff/respondent filed grounds of opposition on 17/6/2019. He stated that the respondent's application dated 14/11/2018 was brought under Section 3, 3A of the Civil Procedure Act and Order 40 rule 3 of the Civil Procedure Rules and not under the provisions of the Contempt of Court Act No. 46 of 2017; that the application is an attempt to defeat the cause of justice as the ruling in Constitutional Petition No. 87 of 2017 did not take away the court's power to punish for disobedience of its court orders and that owing to the overriding objectives and duty of the court to dispense justice granting of the reliefs sought thereof would amount to an injustice to the respondent.

6. The plaintiff/respondent filed submissions on 15/7/2019. The defendant/applicant filed submissions on 22/8/2019. I have considered those submissions.

7. In his submissions on behalf of the defendant the defendant's counsel emphasized on the authority of Kenya Human Rights Commission -vs- Attorney General & Another [2018] eKLR where Justice Mwita held that the entire Contempt Of Court Act No. 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118 (b) of the Constitution. However, notwithstanding that submission, he conceded that the court has discretion to punish the contemnor for having disobeyed the court orders issued on 19/6/2018 but in the same breath submitted that that disobedience was borne of necessity as the applicant had no other alternative land on which to lay her deceased's son to rest. It is the submission of the counsel for the defendant that this court ought to have exercised its discretion to punish the applicant under Order 40 rule 3(1) of the Civil Procedure Rules and not the Contempt of Court Act No. 46 of 2016. It is at that juncture that the application begins to appear to be an exercise in futility, but this court must consider all its aspects before its final conclusion thereon.

8. In his submissions counsel for the plaintiff/respondent took the position that the decision in **Kenya Human Right Commission Case (supra)** did not take away the power of the court to punish for contempt as provided for by **Order 40 rule 3 (1)** of the **Civil Procedure Rules** under which the respondent's application dated **14/11/2018** was brought. He cited the case of **Purity Muthoni Plein -vs- County Government of Laikipia & Another** for the proposition that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless or until that order is discharged. In conclusion he submitted that the application dated **17/5/2019** lacked merit and ought to be dismissed.

9. The grounds upon which a review may be granted are clearly stated in **Order 45 Rule 1** of the **Civil Procedure Rules**. They include discovery of any new and important which after the exercise of due diligence was not within the knowledge of the applicant and or could not be produced by him at the time a decree was passed or order made or an error apparent on the face of the record. The third ground is "*any other sufficient reason.*"

10. I find the submissions of counsel for the defendant are based a perceived mistake of law based on the application of the **Contempt of Court Act 2016** despite the decision in the **Kenya Human Rights Commission case (supra)**.

11. In the case of **National Bank of Kenya Ltd vs Ndungu Njau [1996] KLR 469 (CAK) at Page 381** the court held as follows:-

"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."

12. Does the ground advanced by the defendant fall under the category of any other sufficient reason envisaged by **Order 45 Rule 1**? I hardly think so. Mativo J in the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** cited two decisions to demonstrate the meaning that the court must accord the phrase "*any other sufficient reason*". He stated as follows:

"Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others (9 Supreme Court Cases 596 at Page 608) had this to say:-

"...the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for tabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"

A similar view was held in the case of Sadar Mohamed vs Charan Singh and Another [1963] EA 55, where it was held that:-

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

13. In the light of the decisions quoted above I must assess whether the ground relied on by the defendant has merit.

14. The defendant did not demonstrate that the counsel did not know of the decision now cited, that is the Kenya Human Rights Commission decision, or that the existence of the decision was new evidence, or an error apparent on the face of the record, or one that adversely affected her case.

15. It does not require deep consideration to conclude that that ground does fall within the definition of "*new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant and or could not be produced by him at the time a decree was passed or order made or an error apparent on the face of the record*" contemplated in **Order 45 Rule 1(1)**.

16. In her response to the application for committal orders the defendant had admitted to having disobeyed this court's order. Whatever law was applied by the court it is clear therefore that the admission remains on the record. It is also evident on the record the provisions of **Order 40 rule 3 (1)** under which the application dated **19/11/2018** had been brought mandates this court to punish contemnors in cases of disobedience of court orders.

17. As no ground raised in the review application alters the fact that the defendant had been found, on the basis her own admission, to have disobeyed a court order I find that she was properly convicted and the conviction and sentence must not be interfered with.

18. I must reject her application dated **17/5/2019**, and I hereby dismiss it with no orders as to costs. The sentence meted out against the defendant on **13/5/2019** still stands, and she shall forthwith pay the fine or be committed to serve the sentence.

It is so ordered.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nakitare for the Defendant

Ms. Wanjala for Plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019