



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. 21 OF 2015**

**BETWEEN**

**HON. GABRIEL O. OCHIENG .....1<sup>ST</sup> APPLICANT**

**COUNTY ASSEMBLY OF KISUMU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PAMELA APONDI OMINO ..... RESPONDENT**

**(An Application for leave to the applicant to cite the respondent for contempt of court against the ruling of the Court of Appeal at Kisumu (Maraga, Azangalala & Kantai, J.J.A.) dated 25<sup>th</sup> March, 2015**

**in**

**Civil Application Nos. 4 & 5 of 2015 (consolidated)**

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**RULING OF THE COURT**

1. In its judgment delivered on 12<sup>th</sup> January 2015 in Petition No. 297 of 2014, the Employment and Labour Relations Court (the ELRC) held that the Kisumu County Assembly unlawfully impeached the Speaker of the Kisumu County Assembly, Ann Atieno Adul. Upon the application of the County Executive of Kisumu, the County Assembly of Kisumu and the Hon. Gabriel Ochieng, in its ruling delivered on 25<sup>th</sup> March 2015 in Civil Application Nos. 4 & 5 of 2015, this Court stayed the execution of ELRC's said judgment.
2. In this application brought under **Order 40 Rule 3** of the Civil Procedure Rules, **Section 5** of the Judicature Act (Cap 8 of the Laws of Kenya) and "*all enabling provisions of the law*", Hon. Gabriel Ochieng and the County Assembly of Kismu (the applicants) have come back to this Court and sought orders for leave to cite Pamela Apondi Omino (the respondent) for contempt of court. The application also comprises an order requiring the respondent to show cause why she should not be cited for contempt of court and jailed for six (6) months.
3. From the grounds on the face of the application, Hon. Gabriel Ochieng's affidavit sworn on 11<sup>th</sup> May, 2015 in support of the application and the submissions by Mr. Rodi, learned counsel for the applicants,

the applicants' case is that in total disregard of the said stay order and the standing orders of the County Assembly of Kisumu, the respondent had broken locks and stormed the Assembly while it was in session thus disrupting its business and that she has continually frustrated Hon. Gabriel Ochieng's discharge of his mandate as the elected Acting Speaker in place of the respondent. In the circumstances, the applicants pray that this application be allowed and the respondent should either be reprimanded and ordered to refrain from any further interference or be cited for contempt of court and jailed for six months.

4. According to Mr. Rodi, though the respondent was not party to either Petition No. 297 of 2014 or Civil Application Nos. 4 & 5 of 2015, the stay order was directed to the office of the former Speaker and therefore binds the respondent who was purportedly elected Deputy Speaker, a position which does not at any rate legally exist.

5. Citing the cases of **Justus Kariuki Mate & Another v. Hon. Martin Nyaga Wambora & Another**, [2014] eKLR; **Teachers Service Commission v. Kenya National Union of Teacher & 2 Others** [2013] eKLR and **Ibrahim Haji Issak v. Kenya Meat Commissions & Another** [2013] eKLR, Mr Rodi argued that although the respondent has not been served with the stay order, she is aware of it as its existence is public knowledge.

6. In response, Mr Otieno, learned counsel for the respondent, dismissed this application as frivolous and totally misconceived. Enumerating instances in support of his submission that this application is incompetent, counsel said the respondent was not party to either the petition before the ELRC or the applications in which the stay order was granted; that the stay order was not directed to the office of the former Speaker as the applicants claimed; and in the absence of evidence that the existence of the order is public knowledge and that the respondent was actually aware of it, service of the same upon her was mandatory. On those submissions, counsel urged us to strike out this application with costs.

7. We have considered these rival submissions together with the authorities cited to us. We have also read the application and the averments in both the supporting and replying affidavits.

8. This application having not been made in Civil Application Nos. 4 & 5 of 2015 in which the stay order was granted, **Order 40 Rule 3** of the Civil Procedure Rules is inapplicable. The application should therefore have been brought only under **Section 5(1)** of the Judicature Act (Cap 8 of the Laws of Kenya] and the procedural rules thereunder. That section provides that,

**“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.”**

9. The provision that provides for the procedure followed by the High Court of Justice in England is **Order 52 rule 2 of the Rules of the Supreme Court**. Rule 2(1) of those Rules requires an applicant to obtain leave of the court before applying to cite a person for contempt of court. It reads:

**“No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.”**

It is clear from this provision that before commencement of contempt proceedings, leave to commence such proceedings must first be obtained. The rationale for this requirement is because of the nature of contempt proceedings. Contempt of court is not a private matter. It amounts to interference with the course of justice which is a public wrong. This is how the Chancery Division of the High Court of Justice in England explained this rationale in the case of **Mariar Ltd V R.E. Teach (Engineering) Ltd. (1999) EWHC 843:**

**“But under CPR 32:14 a private individual can only bring committal proceedings with the permission of the court. The reason for that is the nature of the proceedings. These are not proceedings where the alleged contempt consists of the breach of an order obtained by an**

**individual in protection or furtherance of his own private right. It is a case of an allegation of public wrong, not private wrong. Interference with the course of justice is plainly a public wrong and it is right therefore that there should be a public control over the launching of proceedings for this species of contempt.... They are brought in the public interest and are in some respects like criminal proceedings.”**

10. Under **Order 52 Rule 2(2)** of the said English Supreme Court Rules the application for leave should be made ex-parte to a Judge in chambers and the provision provides for an elaborate procedure to be followed. In this Court, it is made to a single judge sitting in chambers while the main application is made to the full court. The two cannot be lumped together in one application as the scope of the jurisdiction of a single Judge is quite different from that of the full court.

11. The other step in the contempt of court applications is that the order with an endorsement of the penal consequences for its disobedience should be served personally upon the alleged contemnor. There is of course an exception to this if, as stated in the above cited cases, the contemnor is shown to have been aware of it.

12. In this case, besides the fact that the respondent was not party to Petition No. 297 of 2014 before the ELRC or Civil Application Nos. 4 & 5 of 2015 before this Court no evidence, leave alone even an assertion in the affidavit in support of the application, has been provided to show that the respondent was aware of the stay order. The applicants want us to assume, first, that the order was of public notoriety, and secondly, that the respondent must have known about it.

13. As contempt of court has criminal consequences, no assumptions should be made, and the procedural steps set out in the Rules must be strictly complied with--**Jacob Zedekiah Ochino and Another v George Aura Okombo & 4 Others Civil Appeal No.36 of 1989**. The requisite steps having been flouted in this matter, we agree with counsel for the respondent that this application is incompetent. Consequently, the same is hereby struck out with costs.

**DATED and delivered at Kisumu this 24<sup>th</sup> day of July, 2015.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**