



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (P), MARAGA & OUKO, J.J.A)

CIVIL APPLICATION NO. 233 OF 2007 (UR 144/2007)

CHRISTINE WANGARI GACHEGE APPLICANT

AND

ELIZABETH WANJIRU EVANS1ST RESPONDENT

PETER GACHEGE NJOGU2ND RESPONDENT

MARY WANJIKU GACHIGI 3RD RESPONDENT

ELIZABETH WAMBUI4TH RESPONDENT

MARY NYAMBURA5TH RESPONDENT

MARGRET WANJIRU6TH RESPONDENT

SALOME NJOKI7TH RESPONDENT

ANTHONY GACHIGI8TH RESPONDENT

ZAINABU WANJIRU GACHIGI9TH RESPONDENT

JOSEPH GACHIGI ZAMBETAKIS10TH RESPONDENT

JENIFFER WANJIRU ZAMBETAKIS11TH RESPONDENT

JOHN IRUNGU ZAMBETAKIS12TH RERSPONDENT

(Being an application for leave to institute contempt proceedings against the proposed contemnors herein for breaching the orders (E. M. Githinji, Onyango Otieno, Aluoch, J.J.A) delivered on 25th April 2008

in

CIVIL APPLICATION NO. 233 OF 2007)

RULING OF THE COURT

The point we have been asked to determine was framed on 9th December 2013 by the Court, differently constituted, as follows:-

“.....Whether the Notice of Motion dated 14th November, 2013 should be heard *ex parte* before a single judge.”

The motion of 14th November 2013 seeks that leave be granted to the applicant to commence contempt of court proceedings against some 9 named individuals including four advocates on allegations that they are in breach of orders issued by this Court on 25th April 2008. It is apparent to us from the notice of withdrawal of application filed in this record, that there was an earlier application, Civil Appeal (Application) No. 16 of 2007 involving the same parties and seeking the same prayers which was apparently withdrawn before the present one was brought.

Even though the application under consideration is headed “*EX PARTE*” learned counsel for the applicant, Mr. Musyimi, informed us that he was persuaded by the registry staff that such applications must be placed before a full bench of the Court, perhaps because the impugned order was made by a full bench. Mr. Musyimi also relied on **Order 52 Rule 4** of the **Rules of the Supreme Court of England** and this court’s decisions in **Republic V. Tony Gachoka**, Cr. Application NAI. 4 of 1999 and **David Makali & 3 Others V. Republic** Cr. Application No. NAI. 4 and 5 of 1994 (consolidated). **Order 52 Rule 4** aforesaid states that:-

“4. (1) Where an application for an order of committal may be made to a court other than a divisional Court, the application must be made by notice and be supported by an affidavit.

(2) Subject to paragraph (3), the Notice of Motion, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed.

(3) Without prejudice to its powers under Order 65, Rule 4, the Court may dispense with service of the Notice of Motion under this rule if it thinks it just to do so.

(4) This rule does not apply to proceedings brought before a single judge by virtue of Order 64, Rule 4.”

With respect this provision does not relate to applications for leave but to the substantive motion for contempt. Similarly, the cases of **Hadkinson V. Hadkinson** [1952] Vo. 2 All ER 567, **In re Tuck, Murch V. Loosemore** [1906] Ch 692, **M. V. P and others**, [1992] 4 All ER 833 and **Butler V. Butler** [1962] 4 All ER 833, cited by learned counsel for the applicant are irrelevant to the question before us as they do not deal with the procedure for the institution of contempt of court proceedings.

Mr. Simiyu, representing the 1st respondent, Mr. Githui for the 4th to the 12th respondents and also holding brief for Mr. Ndolo for the 3rd respondent as well as Mr. Oonge for the 8th and 9th respondents submitted that the application for leave can only be heard by a single judge. Both Mr. Githui and Mr. Oonge particularly urged us to strike out the application if it is found to have been filed in the wrong forum; that in terms of **Rule 53** of the rules of this Court there is no procedure for the full bench to

transfer an application to a single judge for determination, but arguing that the converse is permissible. Learned counsel also urged other grounds that are not germane to the determination of the question of procedure of commencing contempt of court proceedings hence we shall not comment on those submissions.

The former Constitution, unlike the current one, did in **Section 72 (1) (b)** recognize the power of the courts to punish for contempt of court in the following words:-

“72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases.

.....

(b) In execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal.....”

Therefore, today the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is **Section 5** of the Judicature Act. In addition, **Section 63 (c)** of the Civil Procedure Act provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor’s property. **Section 28 (4)** of the Supreme Court Act vests in that court the power to punish for contempt. Of relevance to the matter at hand is **Section 5 (1)** of the **Judicature Act** which provides as follows:-

“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.

(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.” (Emphasis Supplied)

The emphasis imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought. This duty was noted by H.G. Platt J. and D.C. Porter, Ag J. (as they then were) **In the Matter of an Application by Gurbaresh Singh & Sons Ltd** Misc. Civil Case No. 50 of 1983, where they said:-

“The second aspect concerns the words of Section 5 – “for the time being”, which appear to mean that this Court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules.”

Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement date of the Judicature Act, Cap 8, Laws of Kenya, the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions; the Queen’s Bench, the Chancery and the Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the common law. But the procedure to be followed in commencing, prosecuting and punishing contempt of

court cases was, until 2012, as will shortly be explained, provided for by **Order 52 Rules 1 to 4** of the **Rules of the Supreme Court RSC**), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place established the Court of Appeal, the High Court and the Crown Court all together to be known as the Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial functions of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provided the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made *ex parte* to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

These rules have been applied in Kenya with uneven degree of consistency. See **John Mugo Gachuki V. New Nyamakima Co. Ltd** H.C. Civil Case No. 456 of 2011, **Republic V. County Council of Nakuru, ex parte Edward Alera t/a Genesis Reliable Equipment**, HC Jr. No. 74 of 2010 **National Bank of Kenya Ltd. V. County Council of Olekejiado & 2 others**, H.C. Civil Misc. (JR) No. 5 of 2012. The only consistent feature in the decided cases we have read is the requirement that leave to bring contempt of court proceedings must be obtained prior to the bringing of the substantive committal application. From the provisions of **Order 52 RSC**, it is clear that such leave in the High Court of Justice in England would be obtained on an application to a judge in chambers.

Republic V. David Makali & 2 others, Criminal Application No. 2 of 1994, was an application for leave that went before a full bench (Cocker JA, as he then was, Omolo JA and Tunoi, JA, as he then was) which bench also heard the main motion for committal.

In **Republic V. Gachoka & Another**. Criminal Application No. Nai 2 of 1999, an application for leave was heard and granted on 16th February 1999 by three judges (Kwach, JA, Tunoi, JA, as he then was and Shah, JA). The substantive motion brought pursuant to that leave was heard by 7 judges (Gicheru JA, as he then was (dissenting), Kwach, Omolo JJA, Tunoi, JA, as he then was, Shah, Lakha and Owour, JJA). These decisions were rendered 15 and 20 years ago respectively. Today, in 2014, in considering the question raised in this application, those cases may not provide authority in terms of procedure in instituting an application for contempt. We must therefore ascertain the prevailing state of the law of contempt in England today.

Following the implementation of the famous Lord Woolf's "**Access to Justice Report, 1996**", The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced **Order 52 RSC** in its entirety. PART 81 (**Applications and Proceedings in Relation to Contempt of Court**) provides different procedures for four different forms of violations.

Rules 81.4 relates to committal for "*breach of a judgment, order or undertaking to do or abstain from doing an act.*"

Rule 81.11- Committal for "*interference with the due administration of justice*" (applicable only in criminal proceedings).

Rule 81.16 – Committal for contempt "*in the face of the court*", and

Rule 81.17 - Committal for "*making false statement of truth or disclosure statement.*"

An application under **Rule 81.4** (breach of judgment, order or undertaking) now referred to as "*application notice*" (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.

It is clear from this summary that leave, now called "*permission*" is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in **Rules 81.12** – committal "*for interference with the due administration of justice*" and **81.17** – Committal "*for making a false statement of Truth or disclosure statement*" where, in the former it is expressly provided that:-

"The application for permission to make a committal application must be made by a part 8 claim form....."

And in the case of the latter,

"A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made....."

We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the **Second Supplement to the 2012 White Book** that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court's order. The application is for that reason, incompetent and is struck out with costs.

In conclusion, the need for a local law on the subject of contempt of court, has been raised in several cases. We can only hope that the Kenya Contempt of Court Bill, 2013 providing the legal framework for contempt of court proceedings in this country will be tabled in Parliament soon for debate. But before that is done we shall continue relying on foreign law to guide us. Because in terms of Section 5(2) of the Judicature Act, the court in punishing for contempt exercises ordinary criminal jurisdiction, it is

paramount that the procedure for instituting such proceedings be scrupulously followed.

Dated at Nairobi this 14th day of February 2014.

P. KIHARA KARIUKI

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PRESIDENT, COURT OF APPEAL

D.K. MARAGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR