



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**

**Civil Appeal 46 of 2005**

NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT.....APPELLANT

AND

BOYA RURAL NURSING HOME LTD ..... RESPONDENT

(Appeal from the ruling and order of High Court of Kenya at Kisumu (Tanui J) dated

5<sup>th</sup> October, 2004

in

MISC. CIVIL APPL. NO. 250 OF 2003)

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**JUDGMENT OF COURT**

This is an appeal from an interlocutory order of the superior court (Tanui J) dated 5<sup>th</sup> October, 2004 wherein the superior court committed four officers of the appellant – **National Hospital Insurance Fund Board of Management**, namely; Dr. Hassan – Chief Executive; Makone Ombese – Operations Officer; Lucy Rono – Chief Legal Officer and Emily Bwisa – Kisumu Area Manager to 6 months civil jail for contempt of court order dated 27<sup>th</sup> July, 2004 to pay Kshs.3,580,375/= to the respondent **Boya Rural Nursing Home Ltd.**

The impugned order was made in a Judicial Review application which was commenced by an application on 5<sup>th</sup> November, 2003 seeking leave to apply for orders of:

***“1... Mandamus compelling the respondent to pay applicant the sum of Kshs.3,580,375.00 for claims payable by the respondent to the applicant for medical services rendered to holders of National Hospital Insurance Fund (NHIF) cards between years 1998 and 2002.***

***2... Alternatively, an order of mandamus to compel the respondent to pay applicant the sum of Kshs.1,725,800/= and in the further alternative the undisputed sum of Kshs.572,800.00.***

***3... To prohibit the respondent from refusing to recognize the applicant as an accredited hospital and to further prohibit the respondent from refusing to accept honour and pay claims submitted to it by the***

*applicant.*

**4... Mandamus to compel the respondent to receive, accept from process and pay the applicant claims to be made from time to time pursuant to the applicant's right under the National Hospital Insurance Fund Act.**

**5... Prohibition prohibiting the respondent from refusing to pay the applicant for claims already submitted to the respondent as at the time of filing the application those lodged thereafter and those to be lodged by the applicant from time hereafter.**

**6... THAT leave if granted pursuant to prayer 4 hereof to operate as a stay of the proceedings and acts of the respondent to pay the Applicant for claims already lodged and to be submitted to the Applicant from time to time until this application is heard and determined”.**

The ex parte application was heard and allowed on 13<sup>th</sup> November, 2003. Leave was ordered to operate as a stay in the following terms:

**“2. Let this leave operate as a stay of the acts complained of pending the hearing of the intended judicial review”.**

On 21<sup>st</sup> November, 2003 the respondent filed a Judicial Review application pursuant to the leave already given.

The appellant filed a replying affidavit to the application for judicial review sworn on 26<sup>th</sup> November, 2003 by ROBERT ODERO OTOMO – the appellant's Manager at Nairobi Industrial Area Office.

The application for Judicial Review was fixed for hearing on 3<sup>rd</sup> February, 2004. The application was however adjourned to March 2004, the court ordering that the interim orders be complied with. The application was thereafter adjourned on several occasions and has not been heard to date.

Meanwhile, the respondent filed an application dated 11<sup>th</sup> February, 2004 for leave to institute contempt proceedings against the appellant and its Chief Officer for disobeying the order dated 13<sup>th</sup> November, 2003 to pay Shs.3,580,375.00. The leave to commit the appellant's Chief Executive was granted on 29<sup>th</sup> March, 2004 in the absence of the appellant's advocate. Thereafter on 2<sup>nd</sup> April, 2004 the respondent filed another application dated 1<sup>st</sup> April, 2004 seeking leave to institute contempt proceedings against four officers of the appellant – viz Dr. Mohamed Hassan; Mr. Makone Ombese; Lucy Rono and Emily Bwisa for failing to pay Kshs.3,580,575.00 as ordered on 13<sup>th</sup> November, 2003. On 6<sup>th</sup> May, 2004, an order was made that the appellant do pay the amount due in full within 14 days and in default the respondent be at liberty to execute.

On 19<sup>th</sup> July, 2004 the appellant filed an application dated 13<sup>th</sup> July, 2004 for two orders, namely, that the:

**(i) Court do order the appellant discharged from meeting the sum of Kshs.3,580,375/= as the amount payable being Kshs.3,296,055.00 had been fully paid between 1998 and 2002.**

**(ii) That appellant is not bound to pay the claim of Kshs.791,000 as the same was rejected as being unpayable and reasons thereof given to the applicant.**

Both the appellant's application dated 13<sup>th</sup> July, 2004 and the respondent's application dated 1<sup>st</sup> April, 2004 for leave to commit the four officers of the appellant to civil jail came for hearing on 21<sup>st</sup> July, 2004 when the respondent's application was allowed and appellant's ordered to attend court on 29<sup>th</sup> July, 2004 to show cause why they should not be committed. The appellant's application for discharge from paying was adjourned to the same date. On 27<sup>th</sup> July, 2004, the appellant filed a second application dated 26<sup>th</sup>

July, 2004 asking the court to set aside and vacate the orders of 21<sup>st</sup> July, 2004 and order that an independent auctioneer be appointed by court to take proper accounts regarding the respondent's claim. It was deposed in support of the application that the appellant had already paid all the valid claims and would suffer double jeopardy if it was to pay again.

On 29<sup>th</sup> July, 2004, the appellant offered to deposit the entire sum in court pending the taking of the accounts. That offer was opposed by Mr. Ongoto, the appellant's counsel in the superior court, whereupon a consent order was recorded to the effect that the appellant was to pay Kshs.3,580,375.00 to the respondents on or before 6<sup>th</sup> August, 2004 pending appointment of an auditor to verify the respondent's claim.

By a letter dated 30<sup>th</sup> July, 2004, Lucy Rono, Chief Legal Officer of the appellant protested to their advocate's M/s. Ongoto & Co. Advocates, among other things, that they had no instructions to record a consent order in terms recorded on 26<sup>th</sup> July, 2004 or that the appellant would deposit the same amount in court and sought clarification.

M/s. Ongoto & Co. Advocates explained by a letter dated 2<sup>nd</sup> August, 2004 that they had encountered unprecedented hostility in court and the court had declined to hear the application for discharge and that the consent order was recorded purely to forestall the warrants.

On 6<sup>th</sup> August, 2004, the appellant filed a third substantive application asking the court to set aside several specified orders including the order of 21<sup>st</sup> July, 2004 and a declaration that the entire process of execution or purported enforcement of the court orders or contempt order is null and void. The application is supported by lengthy affidavit of Lucy Rono, in which she has raised various weighty legal and factual issues relating to the proceedings and the orders so far made by court. We quote below a few paragraphs of her affidavit:

***"8. THAT the order granting stay pursuant to prayer 6 and the prayer itself are ambiguous but read together with prayer 4 it is clear that the claims referred were claims to be made.***

.....

***10. THAT there was nothing in the order given on 13.11.04 compelling the applicant to pay to the respondent the sum of Kshs.3,580,375.00 sought in Prayer 1 of the chamber summons or at all and this in fact was the reason why the respondent went ahead and filed the substantive motion on 21.11.04 which motion is still pending.***

.....

***38. THAT it is clear from the submissions of counsel on 29.7.04 that both advocates Mr. Ongoto were under the mistaken perception that exparte order of 3.11.03 and subsequent order of 3.2.04 and 6.5.04 required the applicant to pay Kshs.3,580,375.00 which is incorrect because no such orders were made and could have been made in the circumstances of this case.***

.....

***41. THAT M/s. Ongoto & Co. Advocates clearly went beyond their instructions and mandate in concluding the consent of 29.7.04.***

.....

***47. THAT I am advised by the Applicant's counsel on record that the consent recorded on 29.7.04 looked at as a contract, contravenes public policy in that it purports to take away the applicants right to defend the claim in prayer 1 of the Notice of Motion and the respondent is clearly trying to circumvent a scrutiny of his claim.***

**48. THAT I am informed by counsel for the Applicant that as a matter of procedure Notices to show cause are processes in execution issued in ordinary civil proceedings lacking the special character of the procedure for judicial review and they are heard, not by a Judge, but by a Deputy Registrar of the High Court. It is therefore surprising that the court purported to entertain the notices to show cause.**

**49. THAT the respondent has exposed the applicant and its officers to all these complications through a deliberate or mistaken interpretations of the court order and the pursuit of reliefs that were never granted by the court.**

.....

**52. THAT the applicant is being denied a chance to contest these judicial review proceedings which are highly irregular on account on non – service upon the Attorney General as legal representative of the Republic of Kenya who is a party.**

**53. THAT the claims of the respondent are unstainable by way of judicial review and the respondent is executing without complying with the mandatory rules of procedure since no order was drawn sent for approval and extracted as provided by the law.**

On 20<sup>th</sup> August, 2004 the court issued Notices to show cause why execution should not issue under **Order XXXI Rule 18 Civil Procedure Rules** to the four officers of the appellant which notices were fixed for hearing for 28<sup>th</sup> September, 2004. Mr. Otieno for the appellant opposed the application and contended that the hearing of the Notices should have awaited the hearing of the appellant’s application dated 6<sup>th</sup> August, 2004 which was scheduled for hearing in a week’s time on 6<sup>th</sup> October, 2004.

The four officials of the appellant were, however, committed. The learned Judge in a brief ruling said in part:

**“However on 6<sup>th</sup> August, 2004 the respondent filed an application seeking to set aside orders made by consent on 29<sup>th</sup> July, 2004, 21<sup>st</sup> July, 2004, 6<sup>th</sup> May, 2004 and 3<sup>rd</sup> February, 2004. They do not appear to have been interested in purging their contempt or to show cause why they should not be committed to civil jail.**

**It is now settled that any party who wishes to challenge a court order ought to obey it first and then question it later. In the present case, the respondent’s officials who were cited are now trying to come to court which they have disobeyed for other orders. This cannot be done”.**

There are eight grounds of appeal which are aptly condensed in ground 8 of the appeal, thus:

**“The purported contempt proceedings as well as the orders alleged to have been breached were irregular in their entirety and were made without jurisdiction and were nullities and as such there was no obligation to abide by them”.**

The grounds of appeal refer to several procedural irregularities which Mr. Otieno, learned counsel for the appellant ably argued. Two of the procedural irregularities go the root to the committal order and to the jurisdiction of the learned Judge to make the Committal Order. First it is contended that no application to punish the appellant and its officers was made to court. Secondly, it is contended that the procedure of taking a Notice to show cause was completely inappropriate and wrong in the circumstances of the case.

There were two applications for leave to cite appellants for contempt dated 11<sup>th</sup> February, 2004 and 1<sup>st</sup> April, 2004 respectively. Both applications were mainly brought under **Section 5** of the Judicature Act. In both of them, the respondent alleged that the appellant had disobeyed the order of 13<sup>th</sup> November, 2003 requiring it to pay Shs.3,580,375.00 to the respondent. The respondent was in the first instance given leave to commence contempt proceedings against appellant’s Chief Executive on 29<sup>th</sup> March, 2004.

Leave was given for the second time to commit the four officers of the appellant on 21<sup>st</sup> July, 2004.

The respondent had invoked the jurisdiction of the superior court under **Section 5** of the Judicature Act to punish for contempt. Under that section the superior court exercises jurisdiction as for the time being is possessed by the High Court of Justice of England. Thus, the applicable procedure is the English procedure. By **Order 52 Rule 3 (1)** of English RSC (Supreme Court Practice 1997 – Vol. I part 1) an application for committal is made by motion after leave is granted which notice of motion must be served personally on the respondent even when he is legally represented. The Rule provides:

**“3. (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to a Divisional Court and, unless the Court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.**

**(2) Unless within 14 days after leave was granted the motion is entered for hearing the leave shall lapse.**

**(3) Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.**

**(4) Without prejudice to the powers of the Court or judge under Order 65, rule 4, the Court or Judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so”.**

In this case, the respondent did not file any application for committal of the appellant or its officers either after the grant of first leave or grant of second leave. This is conceded by Mr. Wasuna, learned counsel for the respondent. Mr. Wasuna, submitted, however, that the learned Judge did not require respondent to file a formal application and that the learned Judge was entitled to proceed summarily as he did. Since no formal application was filed it follows that the respondents and its officers were not served with any application which itself is a serious irregularity in law.

The consequence of failure to file a formal application for committal is that the appellant and its officers were denied an opportunity to know what they were accused of and the supporting evidence and more fundamentally an opportunity to reply to the accusations through a replying affidavit or oral submissions at the hearing. The denial of an opportunity to be heard is a serious breach of the rules of natural justice.

The superior court issued Notices to show cause why execution should not issue under **Order XXI Rule 18 Civil Procedure Rules**. That procedure is employed in execution of decrees in civil proceedings in the specified circumstances.

That procedure is inappropriate in committal proceedings which have penal consequences and is highly irregular thus, rendering the committal order in this case a nullity.

It is apparent from the ruling of the learned Judge that he understood the law to be that a contemnor who has made an application to set aside the order alleged to have been disobeyed cannot be heard on such application unless and until he has obeyed the order first and then question it later. If that is so, then the learned Judge with respect misapprehended the law for a court has an absolute discretion whether or not to hear a contemnor who has not purged the contempt. In ***Hadkison v Hadkinson*** [1952] 2 All ER 567 Denning L.J. said at page 575:

**“I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed”.**

That passage was cited with approval by the High Court in *Mawani vs. Mawani* [1977] KLR 159 although in that case the court declined to hear the contemnor.

In the commentary to **Order 52 Rule (1) (12)** of English RSC 1997 Supreme Court Practice Vol. I part I, the authors state at page 835:

***“Effect of party being in contempt:***

The court has a discretion whether to hear a contemnor who has not purged his contempt. However where a contemnor not only fails to comply with an order of the court but, for example, makes it clear that he will continue to defy the court’s authority whatever the outcome of an appeal, the court is entitled to exercise its discretion to decline to entertain his appeal (*X. Ltd v. Morgan Grampian (publishers) Ltd* [1990] 2 WLR 1000 [1990] 2 All ER 1, L.J.). A court’s power to refuse to hear an alleged contemnor in support of an appeal against the order in respect of which he is said to be in contempt, should be exercised only exceptionally. The proper approach is first to decide whether he has an arguable case and, if so, to decide whether the judgment should be set aside or the contempt proceedings should be adjourned until the appeal has been heard. *Atlantic Capital Corporation v. Johnson, The Independent*, September 26, 1994, C.A. (Glidewell & Legatt L.JJ. & Sir Michael Kerr). The court will exercise discretion to hear contemnors who have not purged their contempt where the contemnors are trustees, and it is in the interest of the beneficiaries under the trust that the application should be heard (*Clarke v Heathfield* [1985] ICR 203, CA). Moreover, a contemnor who appeals against an order committing him for contempt on the ground of lack of jurisdiction in the court to make the original order, has of course, a right to be heard (*Gordon v Gordon* [1904] P. 163, CA).”

Mr. Otieno submitted, among other things, that the Judge should not have dealt with contempt proceedings before hearing the pending application, that the application for judicial review was for a recovery of a disputed debt; that final orders were made in the dispute without giving the appellant a chance to be heard and that the superior court never in fact made any order for payment of money. Lucy Rono – the appellant’s Chief Legal Officer has raised similar matters in her long affidavit to support the application dated 6<sup>th</sup> August, 2004.

Since the application for judicial review and three other applications made by the appellant are still pending for hearing, it would be imprudent and indeed preemptory to refer to matters pending adjudication by the superior court.

We are, nevertheless of the view that since the appellant’s application of 6<sup>th</sup> August, 2004 raised numerous important matters which went to the jurisdiction of the court to commit its officer to jail for contempt including the non-existence of any court order capable of being disobeyed and there being no formal application for committal of the appellant’s officers, the superior court, in the interest of justice, should have heard the appellant’s application before committing the appellant’s officers.

In addition, the superior court in deciding whether or not to hear the appellant’s application first should have taken into consideration that the appellant is a statutory body which was merely protecting public funds and that the appellant’s officers had nothing to gain personally by disobeying the court order.

Lastly, the foundation of the order of committal is the alleged disobedience of the court order dated 3<sup>rd</sup> November, 2004 requiring the appellant to pay Shs.3,580,375.00. The respondent never specifically applied for an order of payment of the money in the *ex parte* application for leave. The only order the respondent sought was that, leave, if granted, to operate a stay. The order of stay as granted was *prima facie* ambiguous and unintelligible.

The learned Judge undoubtedly had no jurisdiction to make an order for payment of disputed claim in an *ex parte* application for leave to apply for Judicial Review.

The order of stay given on 3<sup>rd</sup> November, 2003 is not *prima facie* an order for payment of

Shs.3,580,375.00. Thus, the court *prima facie* lacked jurisdiction to make a committal order.

On the question of costs, we have already observed that the order of stay was *prima facie* ambiguous and unintelligible. A lot of costs were incurred by the respondent in an attempt to implement the order. Similarly, the appellant incurred a lot of costs in the various vain attempts to have the order rescinded. The appellant's advocates claim to have encountered unprecedented hostility from the court.

In the circumstances, the respondent is not wholly to blame for the costs so far incurred by the appellant. Accordingly, it is just that the respondent should pay half of the costs.

For the foregoing reasons, we allow the appeal. We set aside the order of the superior court given on 5<sup>th</sup> day of October, 2004.

The appellant is awarded half of the costs of this appeal and half of the costs of the committal proceedings in the superior court.

**Dated and delivered at Kisumu this 9<sup>th</sup> day of February, 2007.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR