



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 190 OF 2015

JAMES MAINA MAIGUA.....1ST CLAIMANT

JOHN NJOGU GACHAU.....2ND CLAIMANT

PAUL MWANGI WARUI.....3RD CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE

ANGLICAN CHURCH OF KENYA.....RESPONDENT

RULING

1. The application before me is the Claimant's notice of motion under a certificate of service. It is dated 5th February 2018 and was filed on 6th February 2018. Through the motion expressed to be under the provisions of Section 3, 4, 5(b) and 28(1) of the Contempt of Court Act No. 46 of 2016, Section 5 of the Judicature Act, Section 1A and 1B and Section 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It is premised on the grounds on the face of the motion and supported by the affidavit of David Onsare. The motion prays for the following:-

1. That this honourable court certify this application as urgent and service be dispensed with in the first instance
2. That the Respondent be committed to civil jail for such period as this honourable court may determine for contempt of court in that being aware of the orders made by the honourable court in this suit on 30th September 2016 and extracted on 6th November 2017 as well as the amended decree issued on 1st November 2017 (hereinafter referred to as 'the said Orders') knowingly and wilfully violated and/or disobeyed and/or disregarded and/or thwarted and undermined the effect and purpose of the Orders and/or knowingly and wilfully failed to take any steps to ensure the said Orders were obeyed.
3. That the Respondent be compelled to pay a fine amounting to Kenya shillings Five Hundred Thousand (Kshs. 500,000/-) as a consequence of failing to comply with court orders.
4. That this honourable court be pleased to grant any other or further orders of the court geared towards protecting the dignity and authority of the court
5. That costs for this application be provided for.

The tenor of the motion is that the Respondent has despite knowledge of the order and decree of the court blatantly failed to comply with the orders contained in the amended decree. This in the mind of the Claimants shows a systemic contemptuous attitude to the proceedings and orders of the honourable court. The Claimants thus urge the court to allow the motion which seeks the committal of the Respondents for failing to reinstate the Claimants despite the order of the court.

2. The Respondents were opposed to this motion and filed grounds of opposition on 23rd February 2018. The first ground was that the application was fatally flawed and has no basis in law. Secondly, that the Respondent is a body corporate and prayer No. 2 of the application cannot issue. Thirdly, prayer No. 3 of the motion is in breach of Sections 28(1), 28(5) and 29 of the Contempt of Court Act No. 46 of 2016. Finally, the application as framed cannot be sustained. By consent of the parties, the application was to be determined on the basis of the pleadings in court and the submissions filed by the parties. The Claimants filed their submissions on 19th March 2018 while the Respondent

filed its submissions on 16th March 2018. The Claimants argue that the application was for civil contempt and that the motion despite not citing the provisions of Section 29(2) of the Contempt of Court Act, the application before the court was not defective. The Claimants assert that the phrase *other enabling provisions of the law* employed in the motion cured the omission to include the said section. The Claimants relied on the cases of **Raila Odinga v I.E.B.C & Others [2013] eKLR**, a Supreme Court of Kenya decision and **Thomas Ratemo Ongeri & 2 Others v Zacharia Isaboke Nyataa & Another [2014] eKLR**, a case from the ELC court at Kisii for the proposition that a court should not be encumbered in the exercise of its mandate by technicalities of procedure in the dispensation of justice. The argument was made that making an application under the wrong provision of the law was a procedural technicality that the court should overlook for the sake of substantive justice pursuant to Article 159(2)(d) of the Constitution of Kenya. The Claimants relied on the case of **Nancy Nyamira v Archer Dramond Morgan Ltd [2012] eKLR** where the court held that citing the wrong provision of the law does not necessarily spell doom to an otherwise meritorious application. The Claimants submitted that ideally the proper provision to be cited was Section 29 of the Contempt of Court Act. The Claimant submitted that since the provisions of Article 159(2)(d) of the Constitution applied and Section 3A and 3B of the Civil Procedure Act were cited, the proper course was for the court to focus on the intention of the Claimants in filing this application. The Claimants submitted that the contempt of court application was not filed in contrary to the provisions of Section 34 Contempt of Court Act as the judgment was delivered on 9th September 2016. It was asserted that the matter has been ongoing litigation, the amended decree was issued on 1st November 2017 and the amended decree was served on the Respondent on 7th November 2017. The Claimants argue that having elected to file the grounds of opposition the depositions on matters of fact by the Claimants were uncontroverted. The Claimants urged the court to exercise its inherent powers to protect the dignity and authority of the court which is a temple of justice, a place of refuge for those seeking justice. It must never be desecrated either through acts of physical transgressions or blatant disregard for its pronouncements. The case of **K. G. Patel & Sons Ltd v John Kabukuru Gituro [2016] eKLR** where Mativo J. held as follows:-

Every court of law is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice. Inherent powers of the court are complementary to those powers and the court is free to exercise them for the ends of justice or to prevent the abuse of the process of the court. The reason is obvious.[8] Legislature is incapable of contemplating all the possible eventualities which may arise in future litigation. Inherent powers come to the rescue in such unforeseen circumstances. They can be exercised ex debito justitiae (as a matter of course) in the absence of express provisions in the Code.

The Claimants assert the Respondent has been aware of the court order after service upon its advocates and therefore the disobedience is willful. The Claimant relied on the cases of **Republic v University of Nairobi & Another ex parte Nabiswa Wakenya Moses [2017] eKLR**, **Sam Nyamweya & 3 Others v Kenya Premier League Limited & 2 Others [2015] eKLR** and **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** for the submission that courts have taken a firm stand on matters of contempt of court. The Claimant cited the case of **North Tetu Farmers** for the elements to be proved in applications for contempt of court such as this one. The Claimants thus urged the court to grant the orders sought.

3. The Respondent's submissions were to the effect that the issue of limitation goes to the jurisdiction of the court to entertain claims and if the matter is statute barred, the court has no jurisdiction to entertain the same. The cases of **Bosire Ongero v Royal Media Services [2015] eKLR** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** were cited for the proposition that the court was not possessed of the jurisdiction to hear the application which is statute barred under Section 34 of the Contempt of Court Act and that the court does not have the jurisdiction to impose a fine of Kshs. 500,000/- or at all. The Respondent submitted that in the **Samuel Macharia v KCB** case, the Supreme Court held that jurisdiction is conferred by the Constitution, statute or both and that a court *cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.* The Respondent thus assert that this court derives jurisdiction to punish for contempt of court from the Contempt of Court Act, Act 46 of 2016. It was submitted that Section 34 of the Act provides that a person cannot initiate contempt of court proceedings after the lapse of six months from the date of the alleged contemptuous conduct. The Respondent submitted that the orders said to have been disobeyed are the ones of the decree of 1st December 2016 and that the contempt of court application was made on 7th February 2018. The Respondent argues that the Claimants therefore having filed the same in February 2018 filed the same out of time. Reliance was placed on the case of **Rosemary Wanjiru Kungu v Elijah Maharia Githinji & Another [2014] eKLR** where Odunga J. observed that *the effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time.* The Respondent submitted that the court cannot issue any of the reliefs sought in the application filed on 6th February 2018 by the applicant as Section 28(1) of the Contempt of Court Act provides that a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment to a term not exceeding six months, or to both. The Respondent argues that there is no provision that permits the imposition of a fine in excess of that provided in Section 28(5) of the Contempt of Court Act. The Respondent cited the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR** where Mabeya J. observed that *in order to hold a corporation with liability for contempt, it is necessary to show that the corporation has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order. In the same way, in order to hold the directors of such a corporation personally liable for breach of an order, such directors should be served with the order or it must be shown that they had personal knowledge of the same.* The Respondent urged the court draw the same analogy as in the case above that the Claimants herein were obliged to demonstrate to the court that the responsible persons in the Respondent were served or had knowledge of the court order as committal proceedings is an action *in personam*. It was submitted that the applicant is obliged to cite and tender evidence before the court to demonstrate the individual persons/trustees who have allegedly failed to comply with the order of the court, show service of the court order upon them or knowledge of the same. The provisions of Sections 107 and 108 of the Evidence Act were cited for the proposition that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts. The Respondent argued that the Claimants had failed to discharge the burden of proof in the matter to show the service of the court order upon them and that the applicant was urging the court to speculate therefore the motion must fail. The Respondent submitted that order no. 4 sought by the Applicants is omnibus and fails to issue due notice to the Respondent of what to expect from the court and eventually denies them a right to raise a response or defend substantively. The case of **Dikianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR** which cited with approval the article of Sir Jack Jacob entitled **The Present Importance of Pleadings** for the position that *as parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of*

pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at trial. The court itself is bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

The Respondent thus submitted that it is clear there is no room for the court to conduct any other business once the parties have set and defined their respective cases and from the forgoing the Contempt of Court Act does not provide for any other remedy other than imprisonment, a fine or both which in any event are not applicable in this case. The Respondent urged the court to find the application is misconceived, fatally flawed, has no basis in law and should be dismissed with costs to the Respondents.

4. The court is grateful to the parties for the research undertaken and the authorities cited. They have been taken into account in rendering the decision. The Respondent raised the issue of jurisdiction and asserted that the court does not have jurisdiction to punish for the contempt of court alleged to have been committed on 1st October 2016 as the motion is made too late in the day. In the case of **Samuel Kamau Macharia v Kenya Commercial Bank Limited & Another** (supra) the Supreme Court of Kenya reiterated that a court cannot arrogate itself jurisdiction exceeding that which is conferred by law. I add, as was held in case of **The Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1** the *locus classicus* on jurisdiction, where the Court of Appeal per Nyarangi JA held that *jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.* If the court finds that there is no jurisdiction it cannot take one more step but will have to down its tools. The decree of Ongaya J. issued in this matter is focal. The judgment of the court was delivered on 9th September 2016 and decree of the court issued on 3rd October 2016. There is an amended decree issued on 6th November 2017 which amended the decree of 3rd October 2016. These are the orders of the court to which disobedience has been called out. The Respondent asserts that the Claimants had to move court before the expiry of 6 months from the date of the decree. In the Respondent's view, the date to reckon for purposes of the contempt application was from 1st October 2016. The Claimants assert that the decree has been disobeyed and asserts it was duly served on the advocates of the Respondent. The Claimants assert the amended decree issued in November 2017 has been knowingly and willfully disregarded by the Respondent. The decree that is material is the amended decree not the decree issued on 3rd October 2016. The court is therefore imbued with jurisdiction as the allegations of disobedience are to a decree issued on 6th November 2017.

5. Contempt of court is governed by the Contempt of Court Act, 2016. The objectives of the Act are set out in Section 3:-

3. *The objectives of this Act are to —*

- (a) uphold the dignity and authority of the court;*
- (b) ensure compliance with the directions of court;*
- (c) ensure the observance and respect of due process of law;*
- (d) preserve an effective and impartial system of justice; and*
- (e) maintain public confidence in the administration of justice as administered by court.*

Section 4 of the Contempt of Court Act provides as follows:-

4.(1) *Contempt of court includes —*

- (a) civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court;*
- (b) criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —*
 - (i) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;*
 - (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or*
 - (iii) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice.*

(2) In any case not relating to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge, judicial officer in relation to any proceedings before the court, on any other manner constitutes contempt of court.

The essence of the power to punish for contempt is to ensure that the dignity and authority of courts is maintained. Obedience to court orders is to ensure that there is law and order. In the motion there is an assertion that the decree was served on counsel for the Respondent, a position that is not controverted by the Respondent. The Respondent is therefore guilty of the offence of civil contempt of court in terms of Section 4(1)(a) of the Contempt of Court Act. Court orders are not mere suggestions or decorative pieces with fancy court seals. They are edicts of the court and must be obeyed. A lot of heavy weather was made regarding the overreach of the Claimants counsel in relation to the

punishment for contempt phrased in prayer 3 and 4 of the application. Applicants do not confer power to punish through their prayers, as the power to punish for contempt flows from statute. Disobedience of court orders is frowned upon and in the statute, the punishment I can mete out to the Respondent is a fine not exceeding Kshs. 200,000/- or imprisonment for a period not exceeding 6 months or to both such fine and imprisonment. In this case, the Respondent who is guilty of contempt is a corporate body and the appropriate order in the premises would be a fine of Kshs. 200,000/- to be paid within the next 48 hours for the disobedience of the court decree issued on 6th November 2017.

Finally, brethren James 3:13 – 18 (RSV) - Who is wise and understanding among you? By his good life let him show his works in the meekness of wisdom. But if you have bitter jealousy and selfish ambition in your hearts, do not boast and be false to the truth. This wisdom is not such as comes down from above, but is earthly, unspiritual, devilish. For where jealousy and selfish ambition exist, there will be disorder and every vile practice. But the wisdom from above is first pure, then peaceable, gentle, open to reason, full of mercy and good fruits, without uncertainty or insincerity. And the harvest of righteousness is sown in peace by those who make peace.

It is so ordered.

Dated and delivered at Nyeri this 15th day of May 2018

Nzioki wa Makau

JUDGE