Law Report

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Aaron Gitonga Ringera & 3 Others v. P.K. Muite & 9 Others

In the High Court of Kenya at Nairobi

Civil Suit No. 1330 of 1991

Judgment

On 21/5/91 the four plaintiffs/applicants (simply referred to as Applicants) filed a chamber summons under Order 39 rule 2(3) and Order 53 rule 1(1) of the Civil Procedure Rules.

By this application they sought this court's leave to prosecute contempt proceedings against the following defendants/respondents (hereinafter referred to as respondents) - Messrs - Muite, Mutunga, Shamalla, Nyachae, Kagwe, Mrs. Njoka, Kariuki and Juma.

The Applicants contended that the 8 respondents be committed and detained in prison for a period not exceeding 6 months because they jointly and/or severally had, as council members of the Law Society of Kenya (LS.K) issued political statements in breach of the court orders issued against them, prohibiting such statements. The orders said to be breached had initially been given by Dugdale J on 14th March 1991 in an *ex parte* injunction application and later confirmed by Mango J in the inter partes hearing and ruling of 30th March 1991. The affidavit in support of this committal for contempt application was sworn by 1st applicant - Ringera, on 17th May 1991 - stating whatever was supposed to be relied on. There were exhibits appended too.

The chamber summons was served, no doubt and the respondents did reply. Mutunga, 2nd respondent swore an affidavit in reply dated 30 May 1991 and filed in court on 5th June 1991 for himself and all the other respondents.

The application for committal was brought under a certificate of urgency.

On 7th June 1991 it opened before me for hearing. Both sides were initially represented. Messrs Shah and Ombogo for the Applicants while Messrs Kapila and Raiji appeared for the respondents. After applications, submissions affidavits and rulings in between, the actual hearing started on 26th July 1991 with applicants still represented and the 8 respondents representing themselves.

It need no repeating here but let it be noted the applicants as well as the respondents are lawyers. They all belong to LSK. The respondents are members of the governing Council of the LSK while the applicants are ordinary LSK members. All practicing lawyers in Kenya must [illegible]

parties is rooted in the plaint filed by the applicants on 14th March 1991. It is yet to be heard. But in paragraph 6 of that plaint it is averred that (in paraphrase) what the respondents had said prior to their being elected into the Council, what had been heard immediately after election and what they are very probably likely to say in future will or would bring the LSK in direct conflict and confrontation with the government. That respondents espoused such political ideas and their statements in this regard were so diametrically opposed to those of the government whereupon the government would even consider to repeal the LSK Act. That such statements coming from LSK council, would be perceived by the government and the public that all LSK members, including the applicants subscribed to them. Applicants argued that this was never their intention as members of LSK, it was not in the objects of LSK Act to spawn such a state of affairs and that applicants had not mandated the respondents, individually and/or jointly, in the Council to create such a state of affairs which they, applicants, saw as prejudicial to their interests. The respondents opposed the injunction application which applicants sought as per the foregoing. Mango, J heard them. He issued an injunction in the items as set out below. Thus on the material before him Mango J, was satisfied that an injunction was deserved by the applicants. He gave the following orders, confirming those given by Dugdale, J. earlier, to remain in force until the suit is finally determined. Since the orders were virtually the same there is no need to speak of either Dugdale J's orders or Mango J's orders. By confirming them on 30th April 1991 it should thus be understood that with effect from 14th March 1991 there were in force court orders *prohibiting* the respondents by restraining.

1) ... the first to 11th defendants jointly and severally from acting in any manner *ultra vires* the objects of the 11th defendant and or its Council as a forum for political purpose to wit:

a) from making any statements which are political in nature and contrary to the Constitution of Kenya and the LSK Act

b) from conducting the business of the 11th Defendant in any manner political;

c) from making any statements which may cause public disaffection and prejudicially affect the peace and good order of the Republic.

d) the 1st defendant from presiding over and/or participating in any council and/or meeting of the 11th defendant and from conducting the business and affairs of or issuing statements and/or participating in any manner whatsoever in any activity of the LSK as its Chairman.

2) The injunction to remain in force until the determination of the suit.

Order 1 (d) restraining 1st defendant, Muite, from chairing meetings of LSK was however lifted by the Court of Appeal on 2nd July 1991 (see Civ. App. Nai. 89/91). But whatever of relevance that 1st respondent may have done/said before this lifting will be adverted to in due course, otherwise other orders i.e. 1 (a), (b) and (c) should be still in office since they have not been discharged or otherwise dealt with and the main suit is still pending. The foregoing generally sets the scenario for the next act on the stage.

Where contempt proceedings are placed before court for hearing quite a number of legal issues and principles come to the fore e.g. existence of the orders that ought to be obeyed or executed; service; proof of breach; penalties etc. The aspect of fact in committal for contempt proceedings includes fairly basic issues: e.g. were court orders in existence; did the defendant (s) know of them; were they indeed breached.

Just before going further it may be useful, though not imperative, to say something about this feature - contempt of court and why the court gets interested in it when an allegation has been filed that it has been committed. The history of it need not be dug up. Suffice it to say that a court issues, orders, judgments and decrees in civil matters when adjudicating over parties' disputes. This is in the courts civil jurisdiction. Those orders, judgments, decrees etc ought to be obeyed by those they are directed to. For justice demands that whoever has a right

They also at the same meeting (and under the same min 30/91:

> ... observed that the ruling of the Hon. Mr Justice Mango did not restrain the Chairman from presiding...

If all had stopped here this court would have found that indeed Respondents had knowledge or were aware of the restraining orders in issue, though service as Applicants attempted to show had in essence not been effected. But the court has already remarked on the essence of service - it brings to the attention of the party being served the existence of a process or order and what the same requires. The party being served gets to know and thus has knowledge of what to obey, execute or otherwise deal with. From the foregoing respondents had knowledge before and even after filing these contempt proceedings that orders of this injunction were in place and ought to be obeyed. Contempt proceedings were filed on 17/5/91. With such knowledge was it then necessary to serve the respondents? Not at all. They already had knowledge of the orders that service could have brought to their attention. It could be dangerous to hold that a person who had notice/knowledge of a court order restraining him/her one way or the other could disregard it unless and until that order is served. The importance of personal service has been well stressed above, nonetheless. There seems to exist however a significant feature in this matter of service ie. regarding mandatory and prohibitory orders because in *Husson v Husson* (supra) the following appears:

> If however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it, if he in fact has notice of it either by his being in court when it is made, or by being served with it or notified of it by telegram or in any other way.

The whole exercise in this connection was however brought to a halt when the counsel for applicants urging necessary inference that the respondents were served and/or that they waived the necessity of service by taking part in the proceedings when the 8th respondent Kariuki on behalf of all the respondents told the court thus:

> Kariuki: we never stated that we were never aware of these orders. All we say is that we were never served with them.

That ended the issue. Respondents were aware and therefore knew of the restraining orders of the court. They were not formally served with them, though. Respondents had notice of the court's orders. That is sufficient. Service of the order is a convenient mode of giving notice. but that is all. So be it-an honest admission in this matter that Respondent knew of the orders. Now did they breach them as alleged? Particularity and proof of what is allegedly the 'offence' ought not to be lost sight of. This is so because proof in contempt proceedings must be higher than on the balance of probabilities almost but not exactly beyond reasonable doubt (see *Mitilikas* case (supra)). So proof must come that far. (In other jurisdictions like U.K. proof is beyond reasonable doubt).

As stated above contempt proceedings are of a quasi-criminal nature. An allegation if denied ought to be proved by the party alleging. But if it is admitted then the aspect of proof need not be gone into except that the facts should support allegation.

In these proceedings there was not much of a denial of the alleged breaches of the injunction orders. Statements allegedly constituting the contempt either by respondents individually of collectively were exhibited - AGR 2, 3, 6. Some if not all were published in the local daily press. The respondents did not deny them. They told the court that they stood by them and were ready to repeat them or add some more. These allegedly political statements are the ones said to be offending the injunction orders that were known by respondents to be in existence (to be obeyed) and are still in existence.

The court did not have the opportunity to have these statements proved by Applicants that they were political and offending because the bit was not denied by Respondents. Indeed they stood by these statements and even intimated they could make similar ones again. Apparently more statements by some of the Respondents have been made even as these proceedings were under way! But be that as it may.

In owning up to the statements said to be constituting the breaches of the orders confirmed on 30th April 1991, Respondents had their reasons:

i) the restraining orders were wide, vague and unclear,

ii) the statements were not outside the LSK objects since the court prohibited only those political statements outside the said objects,

iii) where they were made by individuals they were in their respective personal capacity and not on/for behalf of applicants at all

iv) the judge had not properly addressed himself to the principle and application of *ultra vires* at all

v) the orders had a ring of unconstitutionality in them in that they infringed on the respondents right of expression.

vi) the orders were silencing the LSK which was now being manned by officials properly elected by majority votes at an election.

had the following for each: (i) If the orders were wide and vague and therefore in all honesty incapable of being obeyed, Respondents had all the safety in going back to the judge for clarification. As shall be quoted from case law below, the orders were to be in force and be obeyed until discharged.

Confusion on the part of Respondents as to what the orders said, if such confusion indeed existed, respondents had the opportunity to seek the court's clarification. The record has it that this was not done.

ii) Respondents had no business interpreting what the orders mean and/or excluded. Again recourse to the court for interpretation would have taken care of what followed. This was not done. If it is not the court to interpret to the parties what its orders mean, woe to those parties who take on the role of a judge and begin to interpret and apply court's orders in his/her own way! There would be total chaos and confusion as no two parties would necessarily have the same or uniform interpretation to a given order. Only the judge can do this.

A judge can even review his/her order; there can be an appeal also. This court was sitting in neither of those capacities over the orders in issue.

iii) It was no matter that statements were sometimes made in personal capacities. The orders restrained respondents individually or jointly as members of the LSK Council. This again was not the issue for this court to deal with. Ground no. (vi), if that should be dealt with before (v), this court was not convinced that the orders were silencing the LSK and therefore they deserved to be disobeyed. That argument cannot be tenable in any way. With or without one's own beliefs, suspicions, reasons or otherwise a court order should never be disobeyed in this manner. In any case while reading Mango, J's ruling he said that the LSK should do its duty but only [to the extent] that the statutory provision allows it. Nothing more. Applicants would and should be satisfied with such operations at the LSK as headed by respondents and there would be no hustle. With that let us look at ground (v) above - namely, that when giving the orders the court's approach to *ultra vires* principle was wrong and in any case the orders, in fringed on the respondents right of expression

While this court is incompetent to deal with the way Mango, J. appreciated the *ultra vires* principle and its application, definitely something should be said about the alleged infringement on respondents freedom of expression. For all reasons the two aspects should have been addressed to Judge Mango or before another forum - not this one. In addition, it is a principle well-exercised in contempt matters that it is

on property. The respondent's - Muita, Mutunga, Shamalla, Nyachae, Kagwe, Njoka and Kariuki are again enjoined to obey this court's orders of injunction as pronounced on 30th April, 1991. It has been stated above and it is to be repeated below that the court's orders in issue in no way are intended by any one including the four applicants to deprive respondents of their right of expression as they have made it to be understood by their supporters, sympathisers and the rest. Respondents are only require, as long as they are LSK Council members and this suit subsists, that they should not exercise their freedom of expression in such a way and as per the orders, to the prejudice of the applicants. For indeed that is what rights are about. Everybody has his rights. But in exercising them one should not do so at the detriment of the other. Here Applicants as compulsory members of LSK have asked and the court has found that Respondents' ...ment of freedom of expression espe...ally issuing political statements or con...ucting LSK business in any manner politi...cal, as LSK Council Members jointly and/or individually is injurious to Applicants. This court has a duty to protect them and so it did with an injunction. It should not be made to appear as if all lawyers in LSK or indeed respondents have been gagged. Nobody could do this. Even lawyers other than in LSK Council have made political statements in the past; they are making them now. They will probably make them in future. Applicants are not complaining and they should not complain about that. But once respondents appeared set and indeed made or continue to make their political statements from LSK Council which applicants see as preju...l to them, then they have this injunction ...hem. Indeed LSK is not stopped from ...oing its business at all. Should someone not choose to be honest enough and get this clear distinction across? Should the four Applicants swallow all from respondents in LSK simply because they are few and respondents were elected by a majority? Does democracy mean one should not speak out on the views expressed/held by ones in charge of his/her organisation? Should that one not seek redress from court?

The court has ruled on all the foregoing and that should wind up the matter except for a point or two which really should be considered *obiter*.

Obiter dictum is a Latin expression. In essence it means the court's remarks, observations, made during an order, ruling or judgment but not necessarily or at all being such remarks are "by the way".

Firstly the rights of the respondents, or all Kenyas for that matter are to be enjoyed in full at all times. This includes expression. In case of any infringement on such individuals rights, let all be assured that on seeking redress from this court under Section 84 of the Constitution, redress shall be forthcoming. However as it is inherent in every right, responsibility, obligation and limits should be acknowledged and observed. For no enjoyment of rights is limitless, lest it prejudice others' enjoyment of their own. Such limits or obligations include as for the freedom of expression defamation, blasphemy etc. Further in exercising this particular right one ought to be ware that if one enters a game where words, words and yet more words are the stock-in-trade used backwards and forwards one should submit to the rules of that game. In trading (in) words one would even find to one's utter surprises that some of the players in that game hardly exercise restraint. But in case of a breach the aggrieved party will have recourse to court otherwise, carry on.

Secondly, this court has an impression that a section of the legal fraternity is adopting a tendency of more than belligerent advocacy, if such a term may be used, employing such language which in effect amounts to insulting and abusing judges on a personal level in the course of representing a client. Surely it cannot be said that a client can and does instruct a lawyer to insult judges or indeed any judicial officer this way. Such advocacy is demeaning. Incidents are known where an advocate engages in such a conduct coming complete with discourtesy, slurs theatrics and antics! For such conduct, it is time it stopped and the time is now. Insulting a judge by whatever language neither advances the cause being argued nor improves one's character. The public should wonder what all that is an should not be allowed to think that it is positive and should be copied. Even between counsel themselves. But a court's judgment can be criticised. The judgment not the judge. Judgments form the basis of justice. It is the peoples' justice they should look at it and analyse it. Lady Justice is not shrouded in mystery and intended to be beyond such criticism as will better her image.

All of us have an ideal-always to endeavour to do quality justice to the people. Not that it is only quality justice when one is on the winning side. Either way. But even in criticising a given judgment it shall be prudent for that counsel, legal journalist or re...

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It may also be prudent to note that disputants to a matter are the parties to it. Counsel representing one's adversary is not necessarily that one's adversary at all. Even counsel themselves need not put on a character of actual combatants at all however strongly they are putting their respective clients cases. They are not the disputants.

Another observation: Kenyans have generally come to understand that once a judicial officer is seized of a case he needs all the independence and freedom to reach a fair decision. That is good for justice. They should however, also learn not to comment on a matter once it is *sub-judice* ie. under or before a judge or court. While a matter is under judicial consideration and before it is determined, it should not be a subject of comments or remarks which may give a wrong impression about a likely outcome - which may not be the case anyway. Whether a case is before the lowest court cadre or the highest in the land - leave it alone until it is finalised. And that too is good for justice.

In conclusion:

1. The court's injunction orders against the respondents have been in force since 14/3/91 and they still so remain to be obeyed;
2. The 7 Respondents in these proceedings have been found to have disobeyed those orders - an act which amounted to contempt of court;
3. As consequence the 7 Respondents have each been fined sh. 10,000/- to be paid within 14 days in default of which distress shall levy. They are also further injuncted not to disobey the said injunction orders as long as they are council members of LSK and/or this suit remains pending.
4. Like all Kenyans Respondents are free to enjoy all their rights under the constitution subject to the inherent limits known in enjoyment of rights as stated above or otherwise - not to trample on the others rights, being one. Due protection is under section 84 of the Constitution.
5. The kind of advocacy that tends towards literal insults abuses or insinuations directed to judicial officers to stop.
6. The application succeeds with costs.

Thanks to the counsel and parties who were involved in these proceedings.

Orders accordingly

Dolivered at Nairobi on 23rd of October 1991.

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