Contempt to be heard as a matter of Priority.

JUDICIAL REVIEW

- *Which should take precedence – an application for Committal to prison for contempt of court OR one to set aside on ground of lack of or excess of jurisdiction.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 1640 OF 2003

ECONET WIRELESS KENYA LIMITED.....APPLICANT

VERSUS

THE MINISTER FOR INFORMATION & COMMUNICATION OF KENYA.....1ST RESPONDENT
COMMUNICATIONS COMMISSION OF KENYA.....2ND RESPONDENT

RULING

On the 4th May, 2005, this court granted leave to the Ex parte Applicant to apply for an Order of Committal to prison against the Hon. Raphael Tuju Minister for Information and Communication and Dr. James Kulubi, the Acting Director of the Communications Commission of Kenya for contempt of court orders.

On the 6th May the 2nd Respondent filed an application under certificate of urgency seeking orders, inter alia, to set aside or discharge Order No. 5 of the ex parte Orders made on the 30th November, 2005. The grounds of the said application were Inter alia.

(a) that the order was made in excess of Jurisdiction of the court under Order 53 LIII Rule 1(4) of the Civil procedure Rules.

(b) That the 2nd Respondent has been restrained from carrying out its statutory duties and regulatory functions under the Kenya Communications Act, 1998 and the subsidiary legislation made thereunder and the Applicant has been granted an immunity from the regulatory process and the supervision of the 2nd Respondents.

(c) That the Applicant has threatened contempt proceedings against the 2nd Respondent for failure to comply with its peremptory demands.

The court certified the application as urgent and fixed it for hearing on 17th June, 2005. On the 13th May, 2005 the Applicant lodged its application for orders of committal for contempt of court. On 17th May 2005, the 2nd Respondent's application for setting aside came up and all parties were present after being served. The matter was stood over to 15th and 16th June, 2005 after directions were given.

The Applicant on the same day took a hearing date for its contempt application at the court Registry. The date take was 15th June, 2005 at 2.30 p.m., the same day and time fixed for the application to set aside.

At the hearing on 15th June 2005 at 2.30 p.m. each Applicant sought to have its application heard first and in priority to the other.

Mr. Njoroge Regeru for the Ex parte Application made his submissions as to why his client's application should be heard first and in priority to the 2nd Respondent's application. Mr. Regeru submitted that an application for committal for contempt of court orders must be heard before any other including one raising the question of jurisdiction. In the alternative, he argued that the 2 applications be heard at the same time.

Mr. Amoko for the 2nd Respondent argued to the contrary and said that his client's application should take precedence as the question of jurisdiction was of paramount importance and ranked higher in priority to that relating to contempt proceedings. The 2nd Respondent got the support of the First Respondent through Mr. Oraro, Dr. Kulubi through Dr. GITHU Muigai and the 1st Interested Party through Mr. Kaluma.

The submissions by counsel are on record. It is a fundamental principle of the Rule of Law that court orders must be obeyed. The importance of this principle has been stated in many decisions in our courts and in particular the court of Appeal.

To demonstrate the importance and seriousness with which the courts will deal with any conduct that may be deemed or found to be in contempt of court or judicial process, it may be necessary to look at some decisions on the subject.

In **GULABCHAND POPATLAL SHAH & ANOTHER** CIVIL APPLICATION NO. 39 OF 1990, (unreported), THE Court of Appeal said:-

> **"..... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors ....."**

In **HADKINSON –V- HADKINSON** (1952) 2 All ER. 567, it was held that:

> **"It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."**

It is my view that due to the gravity with which the law and the court is deem any contempt of court or allegations thereof, the court usually under an obligation to deal with such contempt of court or investigate allegations that it has taken place. This is in particular where the alleged contemnor is a party in proceedings and is affected by the orders granted by the court.

Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged

contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt. So, the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly.

Be that as it may, in the present case the 2nd Respondent strongly submits that when it comes to the question of **jurisdiction**, then the application to determine whether the court had **jurisdiction** when making the orders allegedly violated, must be heard first before that for committal. I was referred to the case of owners of the motor vessel "**Lillian S" –v- Caltex Kenya Limited** (1989) KLR 1 and in particular the decision of the late Nyarangi, J.A. He stated as follows:-

> **"I think that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ....."**

The eminent Judge relied on a text - 'words and phrases legally defined" - vol. 3 – 1 – N page 113 where he got the following statement.

> **".. where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing Jurisdiction must be acquired before judgment is given"**

The Judge of Appeal continued:-

> **"It is for that reason that raised by a party or by a court on its own motion must be decided forthwith on the**

> **evidence before the court. It is immaterial whether the evidence is scanty or limited. A party who fails to question jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during proceedings. As soon as that it is done, the court should hear and dispose of that issue without much a do."**

From the foregoing, it is clear that the question of contempt of court and in particular with alleged contempt of court which has yet to be proven. The aforesaid decision of the court of Appeal is binding on me. I also agree with the sound principles and rationale thereof.

In the English case of GORDON –V- GORDON All ER (1904) P. 163, it is plain that the rule as regards the hearing of persons in contempt does not prevent a contemnor from appealing against an order after commission for the contempt on the ground that the order was made without Jurisdiction.

Vaughan Williams LJ said:-

> **"..... But when you come to the case of an order which is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the ground of appeal, it seems to me that such a case has always been treated as one is which the court will entertain the objection, to the order, though the person making the objection is in contempt."**

In this case before me, contempt has yet to be proved. It is still an allegation at this stage however grave it is. The case of jurisdiction or that the order made was in excess of jurisdiction of the court must be distinguished from the case of an order which, although it is within jurisdiction of the court, ought not it is said to have been made or granted.

As a result, I do hereby hold that the application by the 2nd Respondent must in essence be heard first, thus before that of committal.

Dated and delivered at Nairobi on this 17th day of June 2005

MOHAMMED K. IBRAHIM

JUDGE

17-06-2005

3 P.M.

Coram: Regeru for Applicant

Mr. Nyamodi for 1st Respondent

Mr. Amoko with Miss Shah for 2nd Respondent

Dr. Githu Mugai for Dr. Kulubi

Mr. Kaluma for 1st Interested party

Ruling read.

MOHAMMED K. IBRAHIM

JUDGE

ORDER

Hearing shall be on 12th July, 2005 at 2.30 p.m.

MOHAMMED K. IBRAHIM

JUDGE

This is in respect of Notice of Motion dated 5th May, 2005.

MOHAMMED K. IBRAHIM

JUDGE