



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL MISCELLANEOUS APPLICATION CASE NO. E052 OF 2021**

**NOKIA CORPORATION .....1<sup>ST</sup> APPLICANT**  
**ROSCHIER ATTONERYS LIMITED .....2<sup>ND</sup> APPLICANT**  
**RAJEEV SURI ..... 3<sup>RD</sup> APPLICANT**  
**AAPO SAARIKIVI .....4<sup>TH</sup> APPLICANT**

**VERSUS**

**TECHNOSERVICE LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**  
**DIRECTORATE OF CRIMINAL INVESTIGATIONS .....3<sup>RD</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> Respondent, **Technoservice Limited**, has filed this application dated 8.6.2021, against the 4<sup>th</sup> Applicant, **AAPO SAARIKIVI**. This application is brought under Articles 159(2)(d) of the constitution, section 1A, 1B and 3A of the Civil Procedure Act, and section 5(1) of the Judicature Act, cap 8 Laws of Kenya. The application seeks order that;

1. **THAT** Aapo Saarikivi, the 4<sup>th</sup> applicant/appellant herein be summoned to appear before the court and or be ordered to show cause why he should not be punished by this court for contempt on account of willful and deliberate false statement made to court in his affidavit sworn on 19.2.2021.

2. **THAT** the Honourable court be pleased the punish and commit Aapo Saarikivi, the 4<sup>th</sup> applicant/appellant, to civil jail for a period not exceeding 6 months for contempt of court on account of willful and deliberate false statements made to court in his affidavit sworn in this matter on 19.2.2021.

3. **Costs.**

The application is supported by the affidavit of Bulent Gulbahar sworn on 8.6.2021. Following an agreement of the parties, this application was canvassed by way of written submissions. Both sides only filed their set of submissions.

On the side of the applicant, it was submitted that the main issue for determination herein is whether there are circumstances that give rise to criminal. Contempt of court. Counsel relied on the Halbury’s Laws of Kenya (4<sup>th</sup> Edition 1974), Vol. 9, paragraph 2, that criminal contempt consists of words and acts which obstruct or interfere with the administration of justice. And that civil contempt consists of disobedience to Judgments, orders or other process of court and involving a private injury.

Counsel relied on Carey Versus Laiken (2015)SCC 17, that

***“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.”***

That Aapo Saarakivi perjured himself by swearing an affidavit on averments which he did not have authority to swear, which amounts to contempt of court, a punishable criminality. That the averments were to the effect that he had authority to represent other parties in the matter whereas in fact there was no such authority.

Counsel cited a Kenyan case of Bia Tosha Distributors Limited versus Kenya Breweries & 4 others (2016)eKLR, in which it was held;

***“One needs no reminder that contempt of court comes through four ways. Firstly, there is deemed contempt when there is proven breach of a judgment, court order or undertaking to do or abstain from doing an act. Second, there is the contempt for interference with the due administration of justice. The third category is contempt in the face of the court. The fourth category, is contempt through the making of false statements of truth, often referred to as perjury.....”***

That the swearing of an affidavit on falsehoods is perjury and amounts to contempt which is punishable. And that the contemnor ought to be punished for making the false statements.

Lastly, the applicant cited the case of Cecil Miller Versus Jackson Njeru & Another (2016)eKLR, in which the Hon. Justice Mbogholi Msagha held;

***“Allegations of contempt of court attracts a punishment which is punitive in form of a fine or deprivation of someone’s freedom. Aware of the implications the courts must exercise caution in approaching such issues. At the same time, court orders should not be taken for granted and the dignity and authority must be jealously guarded.....”***

It was suggested that this court do punish the contemnor to pay fines or costs as prayed in the application. It was also urged that this court do summon the contemnor to appear in court to show cause why he should not be subjected to appropriate sanctions.

The aggrieved and contemptuous words were declared to have been deponed to by Aapo Saarakivi in the affidavit sworn on 19.2.2021 wherein he states;

***“I have been duly authorized by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants thus competent to swear this affidavit on their behalf.”***

For the applicants (the Respondents in the present application), it has been submitted that there are 3 issues for determination herein:-

- Where the court is functus officio in respect on this application.
- Whether the court’s jurisdiction had been properly invoked to grant the orders sought.
- Whether Mr. Aapo is in contempt of court.

On the 1<sup>st</sup> issue, it was noted that this court declared itself and dismissed the revision application and that with the court file was closed and the court becomes functus officio in this matter. Counsel relied Blacks Law Dictionary (10<sup>th</sup> edition) page 696, on the meaning of functus officio, that;

***“Having performed his or her officer (of an officer or official duty) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”***

That with the delivery of the ruling, the court can only entertain an application for review or contempt on the ground of breach of

the court's orders (*Simon Ngole Katunga Versus Republic (2020)eKLR*).

That the court should not be invited to re-enter the adjudicatory field by reviewing the evidence contained in the affidavit in support of the application it already determined.

Counsel also submitted that the basis of this application is an affidavit filed in a separate case being High Court Revision Application No. E099 of 2021 which relate to different proceedings, and which affidavit is not part of these proceedings.

On the 2<sup>nd</sup> issue, it was submitted that sections 1A, 1B and 3A of Civil Procedure Act do not apply in criminal proceedings. The preamble to the civil procedure Act was quoted. That the application ought to have been brought under section 5 of the Judicature Act, Cap 8 Laws of Kenya. And that prior to filing for contempt of court, leave must first be *obtained (Eliud Muturi Mwangi Versus LSG Lufthansa Services Europa/Africa GMBH (2015)eKLR*.

Counsel further submitted that the applicant ought to show the public interest in the present application (*KJM Superbikes Limited Versus Anthony James Hinton (2008)EWCA Civ 1280*).

Also that whereas in the case of *Christine Wangari Gachege Versus Elizabeth Wanjiru Evans & others (2014)eKLR*, the court held that leave or permission is not required where committal proceedings relate to a breach of a judgment, order or undertaking, this is not the case herein as our case is based on contempt for making a false allegation. On the last issue of whether Mr. Aapo is in contempt, it was denied that the statements of the 4<sup>th</sup> applicant in the affidavit sworn on 19.2.2021 are factually inconsistent with the averments made by the 3<sup>rd</sup> applicant in the affidavit sworn and filed in *Revision Application No. E099 of 2021 – Rajeen Suir Versus Technoservice limited and 4 others*. That whereas the 4<sup>th</sup> applicant avers that he had the authority of the 3<sup>rd</sup> applicant to swear the supporting affidavit, the 3<sup>rd</sup> applicant has not averred that he did not authorize the 4<sup>th</sup> applicant to swear the supporting affidavit. In effect, therefore, there is no false statement by the 4<sup>th</sup> applicant. It was urged that this application be dismissed with costs.

I have considered the submissions of the 2 opposing sides. I have also carefully considered the authorities relied on by the parties to this application. Perhaps it will be better to start off by narrating the history of this matter as it came to this court. This matter first came to this court by way of an application dated 22.2.2021. The said application sought orders of revision against the orders issued by the lower court in **Chief Magistrate's Court Criminal Case Number E171 of 2021**, that had directed that the applicants (present Respondents) be served with court summons by electronic mail and appear before the trial court virtually for plea taking. In a ruling delivered by this court on 18.3.2021 the said application for revision was dismissed and matter referred back to be dealt with by the trial court in the normal way.

The present applicants, (the Respondents in the initial application) have now brought up this application seeking that the 4<sup>th</sup> applicant (4<sup>th</sup> Respondent in this application), Mr. Aapo Saarikivi, be summoned to appear before this court to show cause why he should not be punished for contempt on account of willful and deliberate false statement made to this court in this affidavit sworn on 19.2.2021. This is the affidavit that was filed in support of the initial application for revision of the orders of the lower court.

From the onset, it is proper to highlight on a few salient elements of the law of contempt. The applicants have relied **on Hulbury's Law of England, 4<sup>th</sup> Edition** on the general definition of contempt. That criminal contempt consists of words and acts which obstruct or tend to obstruct or interfere with the administration of Justice. And that civil contempt, on the other hand, consists of disobedience to judgments, orders or other process of the court.

**Blacks Law Dictionary, 4<sup>th</sup> Edition**, defines contempt as,

*“The act or state of despising the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature, because such conduct interferes with administration of justice.”*

Simply put, it is conduct that impairs fair administration of Justice. Then follows the issue of standard of proof of contempt. On this, this court guided by decision in *Gatharia K. Mitikika Versus Baharini Farm Limited (1985)KLR, 227*, where it was held;

*“Contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily. It must be higher proof than proof of a balance of probabilities, almost, but not exactly beyond reasonable doubt.”*

Consequences of being found in contempt are punitive. They could involve incarceration or fines. In fact, in our present application, the applicant has prayed for both in the alternative. It is therefore upon the applicant to prove the contempt to the high standards set.

The application of the applicant herein is grounded on the statement deposed to by the 4<sup>th</sup> respondent (4<sup>th</sup> applicant in the original application) at paragraph 1 of the affidavit in support of the application dated 22.2.2021 and sworn on 19.2.2021, that;

**“I have been duly authorized by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants, thus competent to swear this affidavit on their behalf.**

It has been submitted that this statement is false, perjurious and in contempt of this court in view of the fact that Rajeev Suri, the 3<sup>rd</sup> applicant (3<sup>rd</sup> Respondent in the original application) has denied giving the 4<sup>th</sup> applicant any such authority or even any knowledge of the case in the first place. Apparently, the 3<sup>rd</sup> applicant has made the those averments in another case being *High Court Revision Application No. E099 of 2021*.

In effect, the applicants are asking this court to find that the 4<sup>th</sup> respondent has lied on oath in view of the denial made by the 3<sup>rd</sup> applicant in the other case. In deciding whether this application is meritorious, this court notes that the original application by the present respondents was dismissed by this court and file accordingly closed. And even at the hearing of the said original application, the issue of truthfulness or otherwise of the contents of paragraph 1 of the affidavit in support of the application never arose. Consequently, no finding on the same was made by the court.

The applicant now seeks to relate the said averments with statements made in a different case which has never been handled by this court. In so doing the applicant has not shown to this court the extent to which that other case has been heard. Or whether the said averment (or denial) of the 3<sup>rd</sup> Respondent has been interrogated and a ruling made declaring the said averment to be truthful as opposed to the averment by the 4<sup>th</sup> Respondent in the affidavit in support of the original application.

This court could very well be dealing with a situation wherein one party alleges a fact which another party however denies. In my view, without a specific finding on which of the 2 averments is truthful, it would be dangerous to point out one of the 2 to be perjurious and not the other.

As seen above the standard of proof for contempt is that of above that of a balance of probabilities, but below that of proof beyond any reasonable doubt (*Gatharia K. Mititika Versus Beharini Farm Limited*)(1985)KLR).

Considering the above observation, this court is convinced that the applicant has fallen short of meeting the above required standard of proof.

Just a short finding on the procedure used by the applicant in this application. This matter remains a criminal revision matter instituted pursuant to provisions of the Criminal Procedure Code. the applicant, has however brought this application under the Civil Procedure Rules. As rightly submitted by the Respondents, the preamble to the Civil Procedure Act settles this issue. That it is an act of parliament to make provision for procedure in civil courts. It is therefore my view that this application ought not to have been brought under the Civil Procedure Act or the rules thereunder. I so find.

The sum total is that this application of the applicants dated 8.6.2021 totally lacks in any merit. I accordingly dismiss the same. I otherwise make no orders as to costs.

**D. O. OGEMBO**

**JUDGE**

**22.3.2022**

**Court:**

Ruling read out in the presence of Mr. Ndungu holding brief for Mr. Kuyo and Ms. Joy for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and Odiembo for Mr. Ataka for applicants.

**D. O. OGEMBO**

**JUDGE**

**22.3.2022**

**Mr. Odiembo:**

We seek leave to file appeal.

**Mr. Ndungu:**

We object. No grounds have been raised in support of application for leave. We ask for copy of the ruling.

**Ms. Joy:**

We do not oppose leave is as of right. We ask for copy of same.

**Mr. Ndungu:**

Under the CPC, there is no automatic right of appeal for an application such as this.

**Mr. Odiembo:**

Right of appeal is open to each party.

**Court:**

The right to appeal is open to any aggrieved party. The objection lacks merit. I dismiss same. It is ordered as follows:-

*i) Leave granted to file an appeal.*

*ii) Certified copies of the proceedings and ruling to be prepared immediately and be supplied to parties upon payment of requisite charges.*

**D. O. OGEMBO**

**JUDGE**

**22.3.2022**



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