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| Case Number:    | Civil Case 104 of 1989  |
| Date Delivered: | 08 Sep 1989   |
| Case Class:     | Civil   |
| Court:          | High Court at Mombasa   |
| Case Action:    | Ruling  |
| Judge:          | Erastus Mwaniki Githinji  |
| Citation:       | Abdulsalam Alimohamed & 2 others v Ali Kawil [1989] eKLR  |
| Advocates:      | Mr Asige for the Defendant, Mr Satchu for the Plaintiff   |
| Case Summary:   | <p><b>Abdulsalam Alimohamed &amp; 2 others v Ali Kawil</b></p> <p>High Court, at Mombasa September 8, 1989</p> <p>Githinji J</p> <p>Civil Case No 104 of 1989</p> <p><b><i>Civil Practice and Procedure</i></b> – <i>contempt of court – disobedience of a court’s order of a stay - whether an application for contempt can be made orally by way of Notice to show cause – Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rule 9.</i></p> <p>The plaintiff who obtained summary judgment against the defendant demolished the suit premises despite the fact that the court had granted a stay of execution in favour of the defendant.</p> <p>The defendant’s counsel therefore applied for notice to issue against the plaintiff to show cause why he should not be committed for contempt of court. The application was however opposed by the plaintiff’s counsel who argued that the order</p> |

could not be granted without a formal application.

**Held:**

1. Order XXXIX rule 9 of the Civil Procedure Rules provides that applications in cases of disobedience of injunctions shall be made by summons in chambers

2. There is no provision in order XXI of Civil Procedure Rules empowering the court to issue a Notice to show cause why a person in breach of an order should not be committed to prison.

3. Whether an order for committal is being sought to aid the applicant or the authority of the court sufficient evidence must be put before the court and the procedure of a notice to show cause is incapable of being a just and effective instrument.

*Application dismissed.*

**Cases**

1. *Mandavia (GR) v Singh* [1962] EA 730

2. *Laroya v Mityana Staple Cotton Co Ltd* [1958] EA 194

3. *Gupta Sea Tours Ltd v South Coast Hotels Ltd & another* Mombasa High Court Civil Case No 364 of 1988

4. *Jennison v Baker* [1972] 1 All ER 997; [1972] 2 WLR 429; [1972] 2 QB 52; (1971) 115 SJ 930

**Statutes**

1. Civil Procedure Rules (cap 21 Sub Leg) order XXI; order XXI rule 35; order XXXIV rule 2; order XXXIX rule 9

2. Rules of the Supreme Court [UK] order 52 rule 4, 5

3. Judicature Act (cap 8) section 5(1)

**Advocates**

*Mr Asige* for the Defendant.

|  |                                     |
|--|-------------------------------------|
|  | <i>Mr Satchu</i> for the Plaintiff. |
| Court Division:  | Civil                               |
| History Magistrates:   | -                                   |
| County:  | Mombasa                             |
| Docket Number:   | -                                   |
| History Docket Number:   | -                                   |
| Case Outcome:  | Application dismissed               |
| History County:  | -                                   |
| Representation By Advocates:   | Both Parties Represented            |
| Advocates For:   | -                                   |
| Advocates Against:   | -                                   |
| Sum Awarded:   | -                                   |
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 104 OF 1989**

**ABDULSALAM ALIMOHAMED**

**ABDULHAMID ALIMOHAMED**

**MOHAMEDNAZIR ALIMOHAMED..... PLAINTIFF**

**VERSUS**

**ALI KAWIL ..... DEFENDANT**

**RULING**

The court on 28/7/89 allowed the plaintiff's application for summary judgment but ordered stay of execution of the decree for 7 days to enable the defendant to file a formal application for stay of execution pending appeal.

The defendant filed a formal application for stay of execution pending appeal on 2/8/89 which registry fixed for hearing on 25/8/89. The defendant filed the Notice of Appeal on 2/8/89.

When the formal application for stay of execution came for hearing on 25/8/89, Mr Asige for the defendant informed the court that in breach of the order for stay of execution, the plaintiff demolished the suit premises rendering the formal application for stay of execution useless. Mr Asige therefore applied for notice to issue to the plaintiff to show cause why he should not be committed for contempt of the court order. Mr Satchu argued that the order sought cannot be granted without a formal application.

Mr Asige argues that the court has jurisdiction to issue order for notice to show cause to issue without formal application.

The affidavit filed by the defendant states that the plaintiff demolished the premises on 5/8/89. If that is so, the order made on 28/7/89 staying the execution for 7 days expired on 4/8/89 and by 5/8/89 when the premises were allegedly demolished the order had expired by effluxion of time. To avoid the applicant being caught in such a situation, I had on 28/7/89 ordered any date at the convenience of Mr Asige, be fixed for hearing of the formal application for stay of execution. It was for Mr Asige to fix the application filed on 2/8/89 before 4/8/89 but instead the application was fixed for hearing on 25/8/89.

Secondly, the order for stay of execution was in effect in the circumstances in the form of an injunction restraining the plaintiff from demolishing the premises.

Order XXXIX rule 9 provides that applications in cases of disobedience of injunctions as in Order XXXIX rule 2 shall be made by summons in chambers. I cannot find any provision in Order XXI of Civil Procedure Rules empowering the court to issue a Notice to Show Cause why a person in breach of an order such as in this case should not be committed to prison. Order XXI rule 35 which provides for a

procedure to be followed by court when a person appears in obedience to Notice to Show Cause applies to money decrees.

In Kenya case of *G R Mandaria v Rattan Singh*, [1962] EA 730, the application for committal to prison for disobeying court order to deliver certain deeds, documents and papers was made by way of a Notice of Motion.

Similarly, in the Uganda case of *Kasturilal Laroya v Mitiyana Staple Cotton Co Ltd & Anor.*, [1958] EA 194, an application for committal for disobedience to prohibitory order was made by a Notice of Motion. I have been referred to the case of *Gupta Sea Tours Ltd v South Coast*

*Hotels Ltd and Another* – Mombasa HCCC 364/88 where the court on being informed from the bar that a court order had been disobeyed issued an order for Notice to show Cause why an officer of the second defendant should not be committed. It is true that, in that case there was no formal application and that when the officer of the second defendant appeared in obedience to the Notice, he was cross-examined and subsequently punished by way of a fine for disobedience of court order.

That decision is with respect not binding on this court. Section 5(1) of the Judicature Act provides that the High Court and Court of Appeal have the same powers to punish for contempt of court as is for the time being possessed by the High Court of Justice of England. Order 52 rule 4 of the English rules of Supreme Court provides that an application for committal for contempt to the Supreme Court must be made by a Notice of Motion supported by an affidavit. Order 52 rule 4 of the Supreme Court Rules provides that an application for committal for contempt to the Supreme Court must be made by a Notice of Motion supported by an Affidavit. Order 52 rule 5 of the English Rules of the Supreme Court however allows the Supreme Court to commit without a formal application where the court may think it necessary to commit on its own motion. The English practice is that the Notice of Motion is required to be served and that where the order requires a positive act to be done, there must be evidence to prove the service of the order alleged to have been disobeyed.

In *Jennison v Baker*, [1972] 1 All ER 997, for example, the application for an order of attachment committing the landlord to prison for disobedience of the order in the interim injunction was made by way of a formal application supported by affidavits.

I am therefore persuaded by the practice adopted in the *G R Mandavia* (supra); *Kasturilal Laroya* (supra); the English practice and by absence of jurisdiction to issue Notice to Show Cause in the Civil Procedure Rules that a formal application must be made for committal for disobedience of orders made in exercise of civil jurisdiction.

As the plaintiff has already demolished the premises, his committal to civil jail will not aid the defendant in any way and the principles which the court must consider before making order for committal as stated in the case of *Kasturilal Layora* would not apply.

The defendant would not therefore be asking for committal of the plaintiff to vindicate his own rights but rather to vindicate the authority of the court for the good of the public. It is true as the case of *Jennison v Baker* (supra) indicates that the court can order committal of a party in breach of injunction or court order even when the breach has rendered the injunction order ineffective just as in this matter.

But whether the order for committal is being sought to aid the applicant in the action or to vindicate the authority of the court for the good of the public, sufficient evidence must be put before the court and it is my view that a Notice to show Cause is incapable of being a just and effective instrument except where

the court decides to act on its own motion. For the reasons stated, I reject the oral application for issue of Notice to Show Cause why the plaintiff should not be committed. Costs to the plaintiff.

The defendant is at liberty to properly move the court.

Dated and Delivered at Mombasa this 8<sup>th</sup> Day of September, 1989

**E.M. GITHINJI**

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**JUDGE**



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