



Case Number:	Civil Appeal 36 of 1989
Date Delivered:	13 Jul 1989
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Richard Otieno Kwach, Joseph Raymond Otieno Masime, John Mwangi Gachuhi
Citation:	Ochino & another v Okombo & 4 others [1989] eKLR
Advocates:	Mr Ombete for the Respondent.
Case Summary:	<p>Ochino & another v Okombo & 4 others</p> <p>Court of Appeal at Nairobi</p> <p>July 13, 1989</p> <p>Gachuhi, Masime & Kwach JJ A</p> <p>Civil Appeal No 36 of 1989</p> <p>(Appeal from the order of the High Court at Nairobi, Mbaluto J, in HCCC No 1572 of 1988, dated 28th November 1988)</p> <p><i>Civil Practice and Procedure</i> – <i>contempt of court – committal to civil jail for disobedience of a court order – form of an application for such committal – failure to serve contemnor with an indorsement of penal consequences before filing the application – whether application proper.</i></p> <p>The 1st appellant who was the Secretary to the Kenya Petroleum Oil Workers Union, the 2nd appellant, was cited for contempt and imprisoned by the High Court for one month.</p>

The accusation against the 1st appellant was that in disobedience of a court order, he held a meeting at which a decision was taken to dismiss the respondents from the 2nd appellant union.

The court order in issue however did not have an endorsement of penal consequences.

Held:

1. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

2. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

3. The Court will only punish as a contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

4. that the defendant has proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.

5. Since the correct procedure was not followed in bringing the application for contempt, there was no competent application before the learned judge and consequently no basis upon which the committal of the 1st appellant could be sustained.

Appeal allowed.

Cases

Mongondu, Mwangi v Nairobi City Commission Civil Appeal No 95 of 1988

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rule 2(3)

2. Judicature Act (cap 8) section 5

	Advocates <i>Mr Ombete</i> for the Respondent.
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	HCCC No 1572 of 1988
Case Outcome:	Appeal allowed
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Masime & Kwach JJ A)

CIVIL APPEAL NO 36 OF 1989

JACOB ZEDEKIAH OCHINO & ANOTHER.....APPELLANT

VERSUS

GEORGE AURA OKOMBO & 4 OTHERS.....RESPONDENT

JUDGMENT

(Appeal from the order of the High Court at Nairobi, Mbaluto J,

in

HCCC No 1572 of 1988, dated 28th November 1988)

July 13, 1989 the following Judgment of the court was delivered.

Mr. Jacob Zedekiah Ochino (the first appellant) is a veteran trade unionist and holds the powerful position of general secretary in the giant Kenya Petroleum Oil Workers Union, the second appellant in this appeal (hereinafter referred to simply as "the Union").

All the five respondents are also members of the Union and office bearers of the Union either at the Nairobi Branch or at the national level. Over the last few years, there has been a bitter struggle for power within the Union which came to a head when on April 18, 1988, the first appellant called a meeting of the Executive Committee of the Union for April 27, 1988, to consider disciplinary action against the first four respondents. Although the fifth respondent was also a member of the Executive Committee, the first appellant decided for no apparent reason, not to invite him to attend this crucial meeting. The respondents thought that the action contemplated by the Executive Committee contravened the Union's constitution and promptly filed a suit seeking a declaration in terms and an injunction restraining the Executive Committee from taking disciplinary action against the four respondents and from excluding the fifth respondent from the meetings of the Executive Committee.

On April 26, 1988, the respondents obtained an *ex-parte* order of injunction under order 39 of the Civil Procedure Rules from Mr Justice Gicheru (as he then was), the operative part of which reads:

"That the status quo be maintained."

Although the service of this order upon the first appellant and the Union was disputed by the first appellant and the Union, Mr Justice Mbaluto who made the order which has given rise to this appeal,

found as a fact that they had been served with the order and we therefore do not have to determine in this appeal whether or not that finding was right or wrong. He found that service was effected on the first appellant on April 26, 1988, at or about 5.16 pm.

Having been served with the order commanding them to maintain the status quo, the Executive Committee went ahead the following day namely April 27, 1988, to hold its meeting at which a decision was taken to dismiss George Aura Okombo, Benson Mbatia, Albert Ominde Omukuba and Gabriel Oyuga from the membership of the Union. The first appellant then forwarded the necessary notification to the Registrar of Trade Unions to effect the changes. This letter is dated April 27, 1988, and must have been dispatched immediately after the meeting of the Executive Committee.

As the meeting of the Executive committee was held in flagrant violation of the court order, the respondents made an application seeking the committal of the first appellant to civil jail for contempt of court and for a declaration that the proceedings of the Executive Committee meeting held on April 27, 1988, be declared null and void.

The application came before Mbaluto, J who after hearing submissions from counsel for both parties found the contempt charge against the first appellant proved and made an order for his detention in prison for one month. He also made an order requiring the Registrar of Trade Unions to reverse the changes made by him following receipt of notification of change filed by the first appellant on April 27, 1989, thereby restoring the state of affairs to the position in which they were prior to the meeting of April 27, 1988. That is the status quo which the order of Gicheru, J (as he then was) was intended to maintain. It is that decision which has given rise to this appeal.

Although the order made on April 26, 1988 was served on the first appellant as found by the judge, Mr Ombete for the respondents, conceded that no further copy was served on the first appellant with an indorsement of the penal consequences in case of disobedience, before the application for his committal for contempt was made.

The power to deal with contempt of court is provided for under section 5 of the Judicature Act (cap 8) and order 39 rule 2(3) of the Civil Procedure Rules. We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. As this court pointed out recently in the case of *Mwangi Mangondu v Nairobi City Commission* (Civil Appeal No 95 of 1988):

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”

Mr Ombete after reading *Mwangi Wangondu's* case during a short adjournment, quite properly, conceded the part of the appeal relating to the committal of the first appellant for contempt. We have no doubt that since the correct procedure was not followed in bringing the application for contempt, there was no competent application before the learned judge and consequently there is no basis upon which the committal of the first appellant can be sustained. His appeal against the order for committal for contempt succeeds and is allowed and we set aside that order.

With regard to the order directing the registrar of Trade Unions to restore the position to the situation prevailing prior to the meeting of the Executive Committee held on April 27, 1988, we would not disturb that order as by doing so we would be lending judicial support to the first appellant's disobedience of the order of a competent court made on April 26, 1988, and which he sought to circumvent by filing the notification of change

This part of the appeal fails and is dismissed.

With regard to costs, since the present contest has ended in a draw, so to speak, we think that the fairest order to make in the circumstances would be for each party to bear his own costs and we so order.

Dated and Delivered at Nairobi this 13th day of July , 1989

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR



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