

**NASINU TOWN COUNCIL v SAFEWAY ELECTRONICS LTD AND
TAUZ KHAN (HBC0008 of 2011S)**

HIGH COURT — CIVIL JURISDICTION

5 BALAPATABENDI J

1 March, 5 December 2012

10 **Practice and procedure — judgments and orders — committal for contempt of court
— motion entered for hearing — time limits — strict compliance — leave lapsed —
High Court Rules O 52, rr 2, 3.**

15 The plaintiff had been granted leave to apply for an order of committal against the
second defendant. The order had been sought for contempt of court as a result of the
alleged breach of an order made by the Magistrates' Court. The motion was not entered
for hearing within 14 days from the date of granting leave.

Held –

20 The strict compliance of time limits and requirements are mandatory and should be
adhered to in committal proceedings. Having considered the provisions of O 52 of the
High Court Rules 1985, and the authorities on contempt proceedings, the Court concludes
that the applicant failed to comply with the aforementioned strict compliances.

Application for contempt is struck-out.

Cases referred to

25 *Chiltern District Council v Keane* [1985] 1 WLR 619; *Gagnon v Macdonald* (1984)
TLR 631; *Gordon v Gordon* [1946] P99; 62 TLR 631; *McIlraith v Grady* [1968] 1
QB 468; *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005]
FJCA 46; *Payne v Payne* (unreported) Court of Appeal (Eng) March 28th 1979,
cited.

30 *S Tivivata* for the Plaintiff.

Chaudhary for the Defendants.

Balapatabendi J.

Background

35 [1] This is an application for contempt made by plaintiff, Nasinu Town Council
against Tauz Khan, the 2nd Defendant, to the substantive proceedings.

40 [2] On 11 February 2011 his lordship Mr W Calanchini granted leave ex-parte
to the plaintiff to apply for an order of committal against the 2nd Defendant.
Plaintiff relied on the two affidavits of Simione Navikarua Chief Executive officer
of Nasinu Town Council sworn on 26 August 2011 and 11 November 2011
respectively in support of its application. The order had been sought for contempt
of court as a result of the alleged breach of the order made by learned Resident
Magistrate of Nasinu Magistrate Court Mr Sumudu Prema Chandra, on 9
45 December 2010.

[3] The order made by the Nasinu Magistrate Court in favour of Nasinu Town
Council are:-

- 50 a) The defendant to cease operation of illegal Mechanical Garage from the
residential B lot located at, lot 1 & 2 DP 4266, Vesivesi Road, Laucala Beach Estate.
b) The Defendant to cease illegal operation of LPG service station from the said lot.
c) The Defendant to stop operation of the Taxi Business from the lot.

- d) *The premises to be clean and all debris, vehicle maintenance is to be removed from the premises.*
- e) *The drainage where defendant may have spilled the oil to be cleaned if there has been any discharge of oil or other noxious materials.*
- 5 f) *The defendant to operate with the business for which he was given an approval from the plaintiff that is Special Use Electronic Workshop.*
- g) *Cost will be considered in the cause and issues notices to defendant.*

[4] Applicant in its application for contempt states that the said order was duly served on the Respondent and it was acknowledged by him without prejudice. It is alleged in the application that the Respondent is continuing the operation of the illegal business in its Residential 'B' area which has caused irreparable problem to the nearby neighbours.

[5] An affidavit sworn by Ilaitia Koroi, Senior Enforcement officer dated 26 August 2011 deposed that he did serve the order of court on 17 August 2011 on the defendant and accepted the same without prejudice by the defendant.

[6] The inter-partes Notice of Motion dated 29 August 2011 in pursuant to O 52 r 3 of High Court Rules 1985 was filed in court by the Applicant, and listed for mention on 16 September 2011.

20 [7] On 16 September 2011, court directed, for the Defendant to file answering affidavit within 21 days and plaintiff to file a reply within 21 days thereafter and listed for mention on 4 November 2011.

[8] Answering affidavit of Taus Khan sworn on 10 October 2011 was filed on 11 October 2011 and affidavit of service sworn by Louisa Penjueli dated 19 October 2011 filed in court confirming the serving of documents on 13 October, 2011.

[9] On 4 November, 2011, court directed Nasinu Town Council further 7 days to file a reply and relisted for mention on 1st December, 2011.

30 [10] Reply to the answering affidavit was filed in Court on 11 November 2011 and affidavit of service dated 15 November 2011 was also tendered confirming the serving of reply of answering affidavit on 14 November 2011.

[11] On 1 December 2011 court listed the application again for hearing on 3 February 2012 and on 3 February 2012, relisted for hearing on 15 February 2012.

35 [12] On 15 February 2012 hearing was relisted for 1 and 3 March 2012 as the counsel for the plaintiff informed court those 2 days is required for hearing and notice to be served on Respondent.

[13] On 1 March 2012 counsel for respondent raised a preliminary objection to the application for contempt to the effect that leave was granted by his Lordship Justice Mr W. Calanchini on 11 February 2011 and motion was not entered for hearing within 14 days from the date after leave was granted and thereby the leave granted to the plaintiff to commit respondent to trial has lapsed. Counsel for the Respondent further stated that after the lapse of leave, applicant is required to seek fresh leave to issue committal proceedings against Respondent.

45 [14] In the Written Submission filed on 1 March 2012, Counsel for the Respondent has raised two further objections.

- 1) *The orders sought by the Plaintiff in its motion are imprecise and does not refer to any Court orders that were made and subsequently breached. As such we submit (with respect) that the Court cannot make any orders for committal as the motion was filed is void of particulars. For example, there are no grounds listed in the motion which would support the order sought for committal of the 2nd Defendant.*
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2) Further, and notwithstanding anything to the contrary elsewhere in these submissions, the orders in the Magistrates Court were made against Tauz Khan t/a Safeway Electronic Ltd.

5 Law and Analysis

[15] Order 52 of the High Court Rules deals with the procedure to be followed in an application for contempt of Court.

Order 52 r 2(2) states as follows:-

10 (2) An application for such leave must be made *ex parte* to a judge in chambers, and must be supported by a statement setting out the name and description of the Plaintiff, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

15 [16] The above provisions of the procedural law clearly state the manner in which the application for contempt should be made to court.

The O 52 r 3 states as follows:

20 3.-(1) When leave has been granted under r 2 to apply for an order of committal, the application for the order must be made by motion and, unless the Court granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

25 [17] Taking into consideration of the background events and the case record, it is abundantly clear that the leave was granted by Calanchini J on 11 February 2011 and the motion in terms of O 52 r 3 was not entered for hearing within 14 days from the date of granting leave. Order 52 r 3 (2) states that the effect of the non-compliance of the said provisions of the law which clearly states that leave granted by court shall lapse if the motion had not been entered.

30 [18] Counsel for the applicant in his written submissions in this regard has taken up the position that the issue of highlighting procedures in the High Court Rules in relation to this particular committal proceeding is a delaying tactic used in a political like nature to divert the minds of all parties and the court away from the substantive matter.

35 [19] Authorities on contempt are many. As was said in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 46; ABU0011&Abu0011A.2004L (22 April 2005):

40 As is well understood, the standard of proof in civil contempt is proof beyond reasonable doubt (Re Bramblevale Ltd [1970] Ch 128). Furthermore, the prescribed procedural steps antecedent to the exercise of the jurisdiction must be scrupulously observed and strict compliance insisted upon (*Gordon v Gordon* [1946] P 99).

“No man’s liberty is to be taken away unless every requirement of the law has been strictly complied with” per Lord Denning MR in *McIlraith v Grady* [1968] 1 QB 468 at 477B; and see *Chiltern District Council v Keane* [1985] 1 WLR 619 at 621f; also:

45 *Gordon v Gordon* [1946] P 99; 62 TLR 217

Gagnon v Macdonald (1984) TLR 631

Payne v Payne (unreported) Court of Appeal (Eng) March 28th 1979.

50 [20] Further, the strict compliance of the time limits and requirements are mandatory and should be adhered to in committal proceedings. Having considered to provisions of the procedural law set out in O 52, and authorities on

contempt proceedings, I conclude that that the applicant has failed to comply with the aforementioned strict compliances.

[21] I do not wish to deal with the 2nd and 3rd objections raised by the Respondents as the 1st objection is necessarily fatal for the continuation of application for contempt and I conclude that the leave granted by this court has lapsed after 14 days of granting leave.

Orders

- 1 The application for contempt is struck-out.
- 2 Liberty to apply.
- 3 Cost summarily assessed of \$500.00 in favour of 2nd Defendant.
- 4 Orders accordingly.

Application struck-out.