



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPEAL NO. 123 OF 2015

IN THE MATTER OF: CIVIL APPLICATION BY THE APPLICANT FOR AN ORDER OF COMMITTAL TO CIVIL JAIL FOR CONTEMPT OF COURT

AND

IN THE MATTER OF: CIVIL SUIT NO. 1198 OF 2014 RAMADHANI SALIM VERSUS EVANS M. MAABI T/A MURPHY AUCTIONEERS AND ANOTHER

RAMADHAN SALIM.....APPLICANT

VERSUS

EVANS M. MAABI T/A MURPHY AUCTIONEERS.....1ST RESPONDENT

WINFRED WANJIKU GAITHO.....2ND RESPONDENT

RULING

1. The application before me dated 25th May, 2015 is premised on the provisions of Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya, Part 81.4 of the English Civil Procedure Rules, 2012, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all the enabling provisions of the law. It seeks the following orders:-

(i) Spent;

(ii) That the respondents herein Evans M. Maabi and Winfred Wanjiku Gaitho be committed to civil jail for a period of six (6) months for the willful disobedience of court orders issued on the 24th June, 2014 by Honorable S.K. Gacheru and 5th February, 2015 by Honourable R. Kitagwa;

(iii) That the respondents herein do furnish security for appearance by depositing to the court a sum of Kshs. 1,500,000/=;

(iv) That the OCS Central Police Station oversees the compliance of these orders; and

(v) The costs of this application be borne by the respondents herein.

2. The application is supported by the affidavit of Ramadhan Salim sworn on 26th May, 2015. The 2nd respondent filed a replying affidavit sworn on 11th June, 2015 to oppose the application.

3. On 15th August, 2016, when the application was listed for hearing, Mr. Waithera for the respondents sought leave to file a fresh affidavit to oppose the application herein. The court granted him leave to do so and gave directions as to the filing of written submissions. On 18th July, 2017, the court fixed the application for hearing on 20th September, 2017. On the said date neither the respondents nor their Counsel attended court. Mr. Mwadzogo, Learned Counsel for the applicant informed the court that, M/s Waithera Advocates had been served with a hearing notice and an affidavit of service was on record. Counsel stated that the court gave directions for personal service to be effected on the respondents. It was submitted for the applicant that an order was issued by Honourable Gacheru, former Chief Magistrate, that was given on 24th June, 2014 restraining the respondents from transferring, selling, disposing or in any way alienating motor vehicle registration No. KAV 301S. Counsel stated that the said order was served on the respondents and the firm of E.N. Waithera was appointed to appear for them.

4. It was submitted that the application before the lower court was heard by Kitagwa R.M., on 5th February, 2015 in open court and a ruling was delivered in the presence of the Advocates for the parties herein. Counsel stated that the Hon. Magistrate ordered that motor vehicle registration No. KAX 301S be returned to the applicant. The court was informed that copies of the orders thereof were served on the Advocate and personally on the respondents.

5. Mr. Mwadzogo indicated that despite the said service of the court order, the respondents transferred the motor vehicle to a third party by the name of Msafiri Naplita and the motor vehicle's body type was changed from a mini bus to a lorry/truck. It was submitted that as at 9th February, 2015 the motor vehicle was in the name of the 2nd respondent and the body type was a mini bus but on 23rd March, 2015, the name of the owner and body type was changed. Counsel further stated that the respondents appealed against the ruling of Kitagwa on 5th March, 2015 and the appeal is awaiting hearing.

6. A perusal of the file herein indicates that the 2nd respondent filed a replying affidavit on 11th June, 2015. In paragraph 4 thereof, the deponent states that she had already effected the transfer in May, 2014 and therefore the orders had been overtaken by events. Although the said paragraph states as such, there were no documents attached to the affidavit to back up the said deposition.

7. A court that has been moved to cite a party for contempt of court must be sure that there was personal service on the alleged contemnors. The affidavit of service filed on 20th September, 2017 shows that that law firm of E.N. Waithera and Company Advocates was served on 28th July, 2017 with a hearing notice to the present application. In paragraphs 5 of the said affidavit, the Process Server states that on the same day he proceeded to the office of the 1st respondent located at Asha Trust Building where he tendered to him copies of the documents but he refused to sign stating that he had an Advocate on record. The Process Server's affidavit further indicates that he went to the office of the 2nd respondent located along Meru Road, Mombasa and tendered to her the copies of documents but she refused to sign stating that she had an Advocate on record.

8. Should I then proceed to cite the respondents for contempt of court due to the fact that they did not attend court on the day scheduled for hearing? The respondents herein had instructed the law firm of E.N. Waithera to act on their behalf. He failed to attend court on the appointed date. In the circumstances of the present application, it was not farfetched for the respondents to have informed the Process Server on record that they had an Advocate on record.

9. In the case of **Onyango Oloo vs Attorney General** [19866 – 1989] EA 456, it was held:-

“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant, and the appellant's legitimate expectation to benefit from the remission by release ... the principles of natural justice applies where ordinary people would reasonably expect those making decision which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard There is presumption of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice..... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at “

10. The rules of natural justice not only apply to administrative actions but also in legal processes in that a person will not be condemned unheard unless and until it has been shown that they were duly informed of the need to defend themselves but they blatantly disregarded hearing notices or summons to attend court. This court is very hesitant to make a finding that the respondents disobeyed court orders and thereby hold them guilty of contempt of court without giving them a chance to be heard. It is apparent from the affidavit of service filed on the 20th September, 2017 that the respondents had confidence that their Advocate would represent them in court as they informed the Process Server that they had an Advocate on record. The impression given by the said statements is that they expected their Advocate to be served with the hearing notice to attend court on their behalf. Article 50 (1) the Constitution of Kenya provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”

11. This court will give the respondents an opportunity to attend court to defend themselves. I therefore make the following orders:-

(i) Summons do issue to Evans M. Maabi t/a Murphy Auctioneers and Winfred Wanjiku Gaitho to attend court on 3rd of May, 2018 to show cause why they should not be cited for contempt of the court orders issued on 24th June, 2014 and 5th February, 2015; and

(ii) Costs of the application dated 25th May, 2015 will abide the outcome of the contempt of court proceedings.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of March, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mwadzogo for the applicant

No appearance for the respondents

Mr. Oliver Musundi - Court Assistant