



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1188 OF 2001 (OS)

1. LINDA GUARINO.....1ST APPLICANT

2. LUIGI GUARINO.....2ND APPLICANT

VERSUS

NJENGA MWANGI

T/A NJENGA MWANGI & CO. ADVOCATES.....RESPONDENT

RULING

1. The applicants filed a notice of motion dated 24th September, 2015. They pray that the respondent be held in contempt of the court order given by Hon. Justice Ransley on 16th February, 2005 and that the respondent be committed to civil jail for a period of six months. The motion is brought under section 5 of the Judicature Act, section 1A, 1B,3A and 63 (c) of the Civil Procedure Act and order 40 rule 3 (1) and (3) of the Civil Procedure Rules 2010, part 81 of the Civil Procedure (Amendment No. 2) rules, 2012 of England.

2. The applicants claim that the court on 16th February, 2005 gave orders as follows:

i. The respondent do within 14 days deliver to the applicants and/or their current advocates and file in court a cash account of all monetary dealings between him and Njenga Muchiru Advocates hereto as advocates for the applicants for the period between 10th April, 1997 to 3rd December, 1998 in reference to the intended sale of L. R. No. 12144/20 Muiru lane, Lang'ata.

ii. Alternatively, the respondent do deliver the sum of KShs. 7,000,000 together with interest thereon at the prevailing commercial rates from 16th April, 1997 (in respect of KShs. 700,000) and from 25th August, 1997 (in respect of KShs. 3,000,000)

iii. And the respondents do deliver to the applicants the sum of KShs. 3,665,010 together with interest thereon at prevailing commercial rates from the period of 16th April, 1997 to 25th August, 1997 until the date of payment.

iv. In default of payment within fourteen (14) days aforesaid judgment be entered against the respondent for the sum of KShs. 7,365,010 and interest thereon at 2% over and above commercial bank lending rates with effect from 16th April, 1997 until payment in full.

v.. The applicants do have leave to execute forthwith for the principal and interest prior to the

taxation of the bill of costs.

vi. The respondent do pay to the applicants the costs of this summons as between advocate and client to be certified by the deputy registrar of this court together with interest at court rates from the date of taxation until payment in full.

vii. That in default of compliance with each and every item of this order within fourteen (14) days from the service of this order upon the respondent, this court do order the respondent to appear before it personally on such date as may be ordered to show cause:

a. Why this court should not discipline the respondent under section 56 of the advocates act for professional misconduct in not honouring his professional undertaking to the applicants or otherwise as this court thinks fit.

b. Why this court should not hold the respondent in contempt of court and punish him in terms of section 5 of the Judicature Act for failure to comply with this court's order.

3. The applicants contended that the respondent was served with and was at all material times aware of the orders but failed to comply.

4. Despite several attempts to serve the respondent, the respondent declined to endorse an acknowledgment on the original copy of the motion. There was no appearance on the day the motion was set down for hearing in court. Mrs. Omwenga learned counsel for the applicants gave a background of the dispute as follows: that the respondent was instructed to act for the applicants in purchase of property known as L. R. No. 12144/20 Muiru lane, Lang'ata (*'the property'*). The applicants were advised to deposit with the respondent the full purchase price in the sum of KShs. 7 Million together with KShs. 365,000/- being disbursements. That despite making the said payments, the transaction did not materialize since a third party lodged a caveat against the property claiming chargees interest. The applicants then filed an originating summons dated 24th January, 2001 demanding a refund of the monies.

5. The court on 16th February, 2005 granted the applicants' application dated 24th January, 2001. That the respondent was served with the decree on 29th June, 2005 and has always been aware of the order. That the respondent was summoned on 28th May, 2014 by Justice Waweru who questioned him as to why he has been unable to comply with the orders. That the court being dissatisfied by his explanation directed that contempt proceedings be commenced against the respondent. It was indicated that the applicants had also commenced disciplinary proceedings with the advocates' complaints commission.

6. I have considered the dispositions and the submissions of the learned counsel for the applicants. The application proceeded ex-parte as the respondent failed to attend court despite having been served with the application.

The orders sought in the application herein arises from a decree that was issued on the 20th day of June, 2005 in the originating summons dated the 24th January, 2001. The first prayer seeks for an order that the respondent be held in contempt of the court order given by Hon. Mr. Justice Ransley on the 16th February, 2005 while prayer 2 seeks committal to civil jail of the respondent.

What is contempt of court?

Contempt of court is defined in Blacks Law Dictionary as follows;

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment”

Lord President Clyde's dictum in *JOHNSON Vs. GRANT 1923 SC 789* however cautioned that;

“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged”

7. I have perused the court orders that were given by Hon. Justice Ransley on the 16th February, 2005, the said orders directed the respondent to pay a total sum of Kshs.7,365,010/- and interest thereon at 2% over and above commercial bank lending rates with effect from 16th April, 1997 until payment in full.

The order further gave the plaintiffs/applicants leave to execute forthwith for the principal and interest prior to the taxation of the bill of costs.

Those orders were given in civil proceedings and though the respondent has defaulted in payment of the decretal amount, he in my view, cannot be said to be in contempt of court as to warrant issuance of an order finding him in contempt of court.

The applicants herein have already obtained a judgment against the respondent and what now remains is the execution of that judgment. Under section 38 of the Civil Procedure Act the court has powers to enforce execution and it provides.

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of a decree-

- (a) By delivery of any property specifically decreed;
- (b) By attachment and sale or by sale without attachment of any property;
- (c) By attachment of debts;
- (d) By arrest and detention in prison of any person;
- (e) By appointing a receiver; or
- (f) In such other manner as the nature of the relief granted may require.

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison.

It is on record that the respondent herein was given an opportunity to explain why he has not paid the decretal sum when he appeared before Waweru J. but he could not give good reasons why he has failed to do so. Secondly, the application was served on him but he did not file any response or attend court during the hearing.

In the premises, aforesaid, this court has no option but to grant prayer 2 of the application dated 24/9/2015.

Costs of the application shall be borne by the respondent.

Dated, signed and delivered at Nairobi this 23rd February, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Applicant

..... for the Respondent