



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**E.L.C CASE NO. 195 OF 2014 (0.S)**

**JOSEPH KABURU KIRAGU.....PLAINTIFF (APPLICANT)**

**VERSUS**

**DUNCAN NDUNG’U NDIRAGU.....DEFENDANT (RESPONDENT)**

**RULING**

1. On **8<sup>th</sup> October, 2014** the applicant (**Joseph Kaburu Kiragu**) filed the notice of motion of even date seeking, *inter alia*, to have the respondent (**Duncan Ndung’u**) committed to civil jail for contempt of court orders issued on **19<sup>th</sup> September, 2014**.
2. The application which is brought under **Section 5** of the Judicature Act; **Order 40 Rule (3)** of the Civil Procedure Rules and all other enabling provisions of the law is premised on the affidavit of the applicant sworn on **8<sup>th</sup> October, 2014** and the grounds that the defendant has blatantly violated the orders of the court hereto. The applicant contends that, in order to uphold the dignity of this court and the sanctity of court orders, it is fit and just to grant the orders sought against the respondent.
3. The order in respect of which the applicant seeks to have the respondent punished is annexed to the application and marked **JKK1**. The order, *inter alia*, restrained the respondent by himself, his servants, agents or otherwise howsoever from alienating or further interfering with the applicant’s quiet and peaceful occupation and use of the parcel of land known as **Nyeri/Waituka/1670** (hereinafter referred to as “the suit property”).
4. The applicant contends that subsequent to the issuance of the court order herein, the respondent while aware of the order, on **5<sup>th</sup> October, 2014** through his sons, grandsons and a casual labourer, interfered with the suit property by planting maize crops thereon.
5. The applicant has deposed that he reported the alleged contemptuous activity at Waituka Administration Police Post on the same day vide O/B No.2/5/10/2015. The applicant alleges that after the police officer in charge of the Police Post contacted the respondent by phone, the respondent admitted having sent people to the suit property arguing that he was entitled to plant whatever he wanted thereon, the court order which had been served on him notwithstanding.
6. To prove service of the court order to the respondent, the applicant has annexed to his supporting affidavit a copy of an affidavit of service sworn by **Simon Gibson Gichuki**, a licensed processed server, on **22<sup>nd</sup> September, 2014**.

7. Maintaining that the respondent is in contempt of the order of the court herein, the applicant urges the court to grant the orders sought in order to uphold the dignity of court and the sanctity of court orders.
8. In opposing the application, the respondent filed the replying affidavit sworn on **15<sup>th</sup> October, 2014** in which he deposes that the application is misconceived, incompetent, frivolous, vexatious, untenable and a gross abuse of the process of the court.
9. The respondent further denies having entered into the suit property or being in contempt of any court orders and explains that one part of the suit property has always been occupied by his son, Peter Ndungu while the other is occupied by Godfrey Wachira Ndegwa, to whom he sold a portion of the suit property. To prove that he sold a portion of the suit property to Godfrey Wachira Ndegwa, the respondent has annexed to his replying affidavit a sale agreement executed between himself and the said Godfrey Wachira Ndegwa as **D/163/1**.
10. With regard to the report allegedly made to the police concerning his contemptuous conduct, the respondent contends that the applicant gave the police false information and for that reason he (applicant) was not arrested.
11. In further defence, the respondent filed affidavits from the two persons cited in his replying affidavit, that is, Godfrey Wachira Ndegwa and Peter Kibiri Ndungu.
12. In the affidavit sworn by **Godfrey Wachira Ndegwa** it is explained that the respondent sold to him one (1) acre of the suit property and that he has always been in occupation of the portion sold to him. It is also deposed that the respondent's son has also been in occupation of a portion of the suit property. For those reasons the deponent contends that the respondent is not in contempt of any court orders.
13. On his part, **Peter Kibiri Ndungu** has deposed that he has always occupied and cultivated one portion of the suit property and that the other portion was sold to Godfrey Wachira Ndegwa who has constructed a house there on. Peter exonerates the respondent (who is his father) from blame by arguing that in view of the foregoing, he is not in contempt of any court orders.
14. In further opposition to the application, the respondent filed grounds of opposition dated **15<sup>th</sup> October, 2014** contending that no leave had been sought from the court to institute contempt proceedings against the respondent; that there is no evidence of service of the order upon the respondent; that the application does not disclose material particulars of the alleged disobedience of the court order and that under **Order 4c, Rule 4(2)** the *ex parte* orders have expired. It is reiterated that the application is misconceived, incompetent and without merit. The court is urged to dismiss it with costs to the respondent.
15. On **19<sup>th</sup> February, 2015** when the matter came up for hearing, counsel for the applicant **Mr. Macharia**, reiterated the applicant's contention that the respondent is in disobedience of the court order herein. Referring to the affidavit of service annexed to the applicant's supporting affidavit, he submitted that the order was duly served.
16. Concerning the alleged procedural impropriety in bringing the application, he explained that there is authority (case law) to the effect that one can come under **Order 40(3)** of the Civil Procedure Rules.
17. On his part, counsel for the respondent, **Mr. Wahome**, pointed out that the application is brought under **Section 5** of the Judicature Act and that the 2<sup>nd</sup> prayer states that leave was sought. In this regard, he submitted that under the Judicature Act one does not combine the application for leave and the prayers for contempt in one application. Leave must be sought first, then, the application follows. In this regard he referred to the case of **Gladys Wangui Kangangi v. Samuel Maina Mutugi** (2014) e KLR where it is indicated that:-

**“The quoted order 51 Rule 2 of the Rules of the Supreme Court of England which provides:-**

**“No application for committal against any person may be made unless leave to make:**

- i. Make such an application has been granted in accordance with this rule;**
- ii. An application for such leave must be made ex parte to a judge and must be supported by a statement setting out the name and description of the applicant...**
- iii. The applicant must give notice of the application for leave not later than the preceding day....”**

18. Counsel further pointed out that the current application is not accompanied by any statement or affidavit.

19. With regard to the procedure for contempt contemplated under **Section 63** and **Order 40** of the Civil Procedure Act and Rules respectively, he submitted that since the plaintiff made reference to **Section 5** of the Judicature Act, he bound himself to the procedure contemplated therein. In support of that contention he referred to the case of **Africa Management Communication International Limited v. Joseph Mathenge Mugo & another** (2013) e KLR where it was stated:-

**“...the court correctly held that since the applicant in that case had invoked the court’s jurisdiction under section 5 of the judicature Act, he had bound himself to the procedure under the said provision which is the one applicable in England....”**

20. Counsel further submitted that in the supporting affidavit in paragraphs 4 and 5, the deponent does point out the person who saw the persons described in paragraph 4 carry out the alleged contemptuous activities. He contended that in paragraph 6 and 7, the disobedience is not by the defendants but other individuals whose names are not given. Further that there is nothing to show any report was made to the police on **5th October, 2014**.

21. Concerning the letter annexed to the applicant’s supporting affidavit, dated **21<sup>st</sup> July, 2014** he submitted that the letter was written way before the disobedience took place. With regard to the contents of paragraph 7 of the affidavit sworn in support of the application, he submitted that the police officer referred to therein has not sworn an affidavit to show he made the call and that his name has not been supplied.

22. He also referred to the case of **Theru Ndirangu & another vs. Lucy Wanja Ndirangu & another Civil Application No.146 of 1996** where the Court of Appeal observed:-

**“There is no evidence of service of order, in any event, with notice of penal consequences.**

**Further, the application refers to some interference by a stranger and not the respondents.**

**In these circumstances, the application is incompetent and the same is struck out with costs.”**

23. Mr. Wahome reiterated the contention that the interference herein was by a stranger and there is no evidence of service of an order with notice of penal consequence as by law required. Counsel further referred to the case of **Omega Enterprises (K) Ltd vs. Kenya Tourist Development Corporation & two others Civil Appeal No.59 of 1993** where the Court of Appeal observed:-

**“There is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of inherent jurisdiction of the court without needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make....”** to argue that the order in respect of which the court is being asked to punish is an *ex parte* one.

24. In a rejoinder, Mr. Macharia referred to the affidavit of service annexed to the affidavit sworn in support of the application for contempt and submitted that service was personal. He observed that the order served had a penal notice as by law required.

25. Referring to the contents of paragraph 7 of the supporting affidavit, he contended that the contemnor had admitted that he had planted the maize and sent his son to the suit property.

26. On the question of procedure used to institute the application for contempt, he maintained that they have come properly before the court. In this regard, he submitted that they have quoted **Order 40** of the Civil Procedure Rules. Referring to **Article 159** of the Constitution of Kenya, 2010, which obligates this court to determine issues brought before it without undue regard to procedural technicalities, Mr. Macharia, urged the court to disregard the alleged procedural impropriety.

27. With regard to the reference made to the case of **Theru Ndirangu & another vs. Lucy Wanja Ndirangu** (*supra*), he submitted that courts have held that knowledge of an order is enough to commit one for contempt of court (even without) proof of personal service.

28. The foregoing notwithstanding, he maintained that in the circumstances of this case, the orders were personally served on the respondent. Consequently, he urged the court to allow the application for contempt.

### **Analysis and determination**

29. As pointed out above, by an order issued on **19<sup>th</sup> September, 2014** by **Ombwayo J.**, the Nyeri Environment & Land Court issued an order in the following terms:-

**“1.....;**

**2. pending the hearing and determination and determination of this application, the defendant /respondent, by himself, his servants, agents or otherwise howsoever be and is hereby restrained from alienating and/or further interfering with the plaintiff's/applicant's quiet and peaceful occupation and use of land parcel number NYERI/WATUKA/1670.**

**3.....;**

**4. The notice of motion dated 18.9.2014 be served upon the defendant/respondent and the same be heard interparties on 8/10/2014.”**

30. The current application for contempt seeks to punish the respondent on the grounds that while aware of the above order, the respondent through his agents (his sons, grand sons and a casual labourer) disobeyed the said court order by entering the suit property and planting maize thereon.

31. Although it is contended that there is no evidence that the respondent was served with the court order herein, it is noteworthy that in the replying affidavits sworn in opposition to the application, the question of service of the order is not denied. All what the deponents of the various replying affidavits have done is to explain why they think the respondent is not in contempt of the court order.

32. As the respondent has not denied or controverted the allegation in the supporting affidavit of the applicant to the effect that the respondent was aware of the court order and there being evidence that the respondent was served with the court order and that the order was endorsed with penal consequences, I find the argument by the respondent's counsel that there is no evidence of service of a court order with a notice of the penal consequences on the respondent to be unfounded.

33. On whether the alleged breach of the order of the court has been established, it is noteworthy that the respondent has also not expressly controverted the averment in the plaintiff's supporting affidavit that he carried out the contemptuous activities. Instead of controverting that testimony, he chose to give

explanation why he thinks he is not in contempt, like the explanation that the plaintiff gave the police wrong information and for that reason he was not arrested; that by the time the order was served on him, he had already sold the suit property to a third party and handed over possession to one of his sons.

34. In my view, other than merely denying being in contempt of the court orders herein, the respondent needed to demonstrate the steps he took to ensure that either himself or the persons who claim the suit property under him obeyed the court order which he has not denied having had knowledge of. The respondent cannot be heard to say that he treated the order as being unenforceable as against him without bringing to the attention of the court existence of facts which he thought made the order unenforceable either against him and/or his agents.

35. In view of the foregoing, subject to the respondent's contention that the application is fatally defective for want of form, from the totality of evidence adduced in this application, I am persuaded that while aware of the court order herein, the respondent, through his agents, some of whom are the persons who have sworn affidavits in reply to the plaintiff's application, deliberately or negligently chose to disregard the court order herein which obliged him by himself, his servants, agents or otherwise howsoever to refrain from alienating and/or further interfering with the plaintiff's/applicant's quiet and peaceful occupation and use of the suit property.

36. On whether the application herein is fatally defective for procedural impropriety, I begin by pointing out that the application is premised on both **Section 5** of the Judicature Act and **Order 40 Rule 3** of the Civil Procedure Rules.

37. Based on the decision in the case of **Africa Management Communication International Limited v. Joseph Mathenge Mugo & another**, (*supra*) it is submitted that the application herein is fatally defective for want of compliance with the requirements of **Order 51 Rule 2** of the Rules of the Supreme Court of England listed herein above.

38. Concerning that contention, I wish to draw counsel to the decision of the Court of Appeal in the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**, where it was stated as follows:-

*“Following the implementation of the famous Lord Woolf’s “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and*

*PART 81 thereof effectively replaced Order 52 RSC in its entirety. PART 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedures for four different forms of violations.*

*Rules 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”*

*Rule 81.11- Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).*

*Rule 81.16 – Committal for contempt “in the face of the court”, and*

*Rule 81.17 - Committal for “making false statement of truth or disclosure statement.”*

*An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt*

and be supported by affidavit(s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service. It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12 – committal “for interference with the due administration of justice” and 81.17 – Committal “for making a false statement of Truth or disclosure statement” where, in the former it is expressly provided that:-

“The application for permission to make a committal application must be made by a part 8 claim form.....”

And in the case of the latter,

“A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made.....”

We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order. The application is for that reason, incompetent and is struck out with costs.” (Emphasis supplied)

39. It is clear from the above decision of the Court of Appeal that the procedure with regard to the institution of contempt proceedings has since evolved. In view of the foregoing, I find that the application does not offend Section 5 of the Judicature Act as claimed by the respondents.

40. Further, the applicant also made reference to **Order 40 Rule 3** of the Civil Procedure Rules, which provides for a special procedure for institution of contempt proceedings in respect of injunction and cognizant of the fact that the contempt proceedings herein are in respect of an injunction, as provided for under the said **Order 40 Rule 3**, and being of the view that no prejudice was occasioned on the respondent by reference to **Section 5** of the Judicature Act. I decline to declare the application fatally defective.

41. Having found that the respondent either deliberately or negligently allowed himself and/or his agents to be in breach of the court orders herein, I order that within 14 days from the date of this ruling, the respondent shows cause why he should not be punished for contempt of the court orders.

42. The upshot of the foregoing is that subject to the respondent showing cause why he should not be punished for disobeying the orders of the court herein, the plaintiff’s application for contempt of court is allowed. The plaintiff is also granted costs of the application.

43. Mention on 16<sup>th</sup> April, 2014.

**Dated, signed and delivered at Nyeri this 24<sup>th</sup> day of March, 2015**

**L. N. WAITHAKA**

## **JUDGE**

### **In the presence of:**

Mr. Muchiri Muthoni for the plaintiff

Ms Masaka holding brief for Mr. Wahome

Lydia – Court Assistant