



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. APPLICATION. NO. 201 OF 2013

JOSEPH NYAGA NJAGI.....1ST APPLICANT

HARRISON NJIRU NJERU.....2ND APPLICANT

MUGANNE ITTA (suing as trustees and officials of

CHRIST TRUE VINE MINISTRY CHURCH.....3RD APPLICANT

VERSUS

MICHAEL NDUMA.....1ST RESPONDENT

JOSEPH NJIRU IRERI.....2ND RESPONDENT

RULING

This is an application dated 15/1/2014 brought under Section 5(1) of the Judicature Act Cap. 8 Laws of Kenya. It seeks for orders that this honourable court be pleased to order the arrest and detention of Michael Muchira Nduma and Joseph Njiru ireri to prison for a term not exceeding six months. It is supported by the joint affidavit of the 1st and 2nd applicants. The grounds relied on are that on 19/12/2013, this court gave an order for stay of execution of a judgment that had been made in favour of the 2nd respondent in HCCA No. 19 of 2012.

The 2nd respondent filed a replying affidavit sworn on 25/9/2014 in which he depones that he was not served with the said order. He had no knowledge of the existence of the said order at the time he evicted the applicants from his land NGANDORI/KIRIGI/8594. For that reason he cannot be said to be in contempt of orders that he had no knowledge of. The applicants have not annexed any affidavit of service to show that the 2nd respondent was served.

The application was disposed of by way of written submissions. The applicants were represented by Duncan Muyodi & Company Advocates while the respondent were represented by Bwonwonga & Company Advocates. The counsels filed submissions on behalf of the parties.

The statutory basis of contempt of court in Kenya is Section 5 of the Judicature Act and Section 63(e) of the Civil Procedure Act. Section 5 provides

“The High Court and the Court of Appeal shall have the same Power to punish for contempt as is

for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate Courts.”

On 1st of October 2012, the Civil Procedure Rules was amended and part 81 (Applications and proceedings in relation to contempt of court) replaced Order 52 of the Rules of the Supreme Court of England. Part 81 provides different procedures for four different forms of violation with 81.4 relating to committal for breach of a judgment, order or undertaking to do or to abstain from doing an act. This provision is relevant to the proceedings in this application.

In their submissions the respondents argue that the applicants have admitted that they have evicted the applicants and that in paragraph 8 of their affidavit they have indicated that they were fully aware of the said orders. However, the replying affidavit sworn on 25/9/2014 contains no such admission or indication that the applicants were aware of the relevant orders.

It is also noted that the applicants have not annexed an affidavit of service to demonstrate service on the 2nd respondent. In their submissions the respondents have cited the case of **JUSTUS KARIUKI MATE & ANOTHER VS MARTIN NYAGA WAMBORA & ANOTHER [2014] eKLR**. The Court of Appeal held in that case that the applicant in an application for contempt must prove that personal service was effected on the respondent or in the alternative that the respondent had knowledge of the order. The court further observed that a person will be held to have notice of a fact or condition if that person:-

- i. Has actual knowledge of it;*
- ii. Has received information about it;*
- iii. Has reason to know about it;*
- iv. Knows about a related fact.*

The court observed that the law of contempt of court has since changed and it stands today, knowledge of an order is sufficient for purposes of contempt proceedings.

The 2nd respondent stated that he was not served with the orders for stay of execution. He said that he learnt that the application for stay of execution and the interim orders for stay were taken to his advocates office which was closing for holidays from 21st December 2014 to 5th of January 2015 which papers were received under protest. There was no service that was done personally on the 2nd respondent. It is not in dispute that the applicants did not obtain an order for alternative service.

The applicants have not adduced any evidence of service on the respondents. In the case of **MWATARARE WA MWARABU & ANOTHER VS RAIYA S. SEIF & ANOTHER [2007] eKLR** the court emphasized the importance of personal service on an alleged contemnor and quoted with approval the case of **MWANGI WANGONDU VS NAIROBI CITY COMMISSION (Court of Appeal at Nairobi Civil Application No. 95 of 1995)** where the Court of Appeal held:-

“..as a general rule no Order of Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the Order has been served personally on the person required to do or obtain from doing the act in question.”

Similarly in the case of **ORIENTAL COMMERCIAL BANK LTD VS RAJNI K. SOMAIA [2014]** the court citing *Borrie & Lowe in the Law of Contempt 3rd Edition at 558* stating:-

“Even if the contempt powers are sought to be invoked the courts will be reluctant to exercise their powers and will only do so in the clearest cases namely, where an offender, having had proper notice of the order, has been shown beyond reasonable doubt to have committed the contempt. In most cases the offender will have been shown to have deliberately or willfully disobeyed the court

order.”

It is my considered opinion that in the absence of service, let alone personal service on the respondents as required by the law of the orders made on 19/12/2013, the respondents cannot be found guilty of contempt of court. The applicants have not shown any seriousness in this application. It is within their knowledge that they did not serve the order on the respondents. One wonders how they would expect to obtain orders against the respondents in the circumstances. For this reason they must meet the costs of the application.

This application is an abuse of the due process of the court and it is hereby dismissed with costs to the respondents.

DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Okwaro for the 2nd Respondent