



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 148 OF 2013

NICHOLAS KIPCHIRCHIR KIMAIYO APPLICANT

=VERSUS=

WILSON KIBET KIMUTAI 1ST RESPONDENT

DIRECTORS, KABIANGA TEA FACTORY LTD 2ND RESPONDENT

RULING

On 19th November, 2013, the Learned Senior Resident Magistrate **Hon. M.W. Njage**, made orders restraining the Respondents from collecting, selling, fetching or in any other way, interfering with the Applicant's actions of harvesting firewood or wood fuel from the forest plantation known as PENON PLANTATION 4 (D).

The Applicant's position was that the said forest plantation had been allocated to him and to the 1st Respondent, **WILSON KIBET KIMUTAI**, by the KENYA FOREST SERVICE.

Those orders were made in the case of **NICHOLAS KIPCHIRCHIR KIMAIYO -VS- WILSON KIBET KIMUTAI & KABIANGA TEA FACTORY LIMITED, ELDORET CMCC NO. 746 OF 2013**.

On 3rd December, 2013, the Applicant, **NICHOLAS KIPCHIRCHIR KIMAIYO** filed an application before this court seeking, *inter alia*, leave to commence contempt proceedings against the Respondents.

The Applicants had also sought orders for the continued detention, at the Eldoret Police Station, of a vehicle Registration Number, KBS 970 D together with the wood fuel in it.

A further prayer was for the committal '*to prison*' of the 1st Respondent and of the Directors of Kabianga Tea Factory Limited.

Immediately after they were served, the Respondents raised a Preliminary Objection.

One of the objections was that it was untenable to seek orders for committal or orders for the continued detention of the motor vehicle, when the Applicant was still at the stage of seeking leave of the court to commence the committal proceedings.

In the face of that Objection, the Applicant withdrew the two prayers from his application. Effectively, therefore, there now only remains a prayer for leave to commence the committal proceedings.

However, the Respondents still have a Preliminary Objection to the said prayer. **Mr. Njuguna**, the

learned advocate for the Respondents canvassed the three (3) remaining limbs of the Preliminary Objection.

First, he submitted that the application for an alleged contempt of court, must be made within the suit in which the said contempt arose. Therefore, the Respondents contend that the matter ought not to be before the High Court. It should, in their opinion, be before the Chief Magistrate's Court.

Secondly, the application was said to be fatally defective because of non-compliance with the rules of procedure. As far as the Respondents were concerned, the rules of procedure had to be adhered to strictly.

And as the Applicant had not filed any Statement of Facts, the Respondents submitted that the application was fatally defective.

The third issue was that the affidavit in support of the application was incompetent because it had been sworn by the advocate for the applicant. As contempt proceedings were said to be very contentious, the Respondents submitted that it was wrong for the advocate for the Applicant to swear an affidavit in this contentious matter. I was therefore invited to strike out the offending affidavit.

In answer to the Preliminary Objection, **Mr. J. K. Korir**, the learned advocate for the applicant, submitted that the Chief Magistrate's Court lacked jurisdiction. He said that it was only the High Court and the Court of Appeal that had jurisdiction to punish for contempt of court.

The Applicant's position was that the Magistrate's Court, which had granted an injunction, only had the discretion to order for the attachment of the property of the contemnor.

The Applicant also asserted that the supporting affidavit was not in relation to matters which were contentious. The matters about which the advocate deponed, were said to have been within his personal knowledge.

As far as the Applicant was concerned, it is only when the matter was being heard that there could arise issues such as those that relate to the service effected upon the alleged contemnors.

If such issues arose, then the Court could be called upon to determine whether or not the said issues were contentious.

Finally, the Applicant expressed the view that there was no requirement in contempt proceedings, for the filing of a Statement of Facts. The Applicant said that Statements of Facts were only required in Judicial Review proceedings.

After the parties had concluded their respective submissions, the Court asked the Respondents if the Magistrate's Court had Jurisdiction to punish for contempt.

Mr. Njuguna, the learned advocate for the Respondents, answered in the affirmative. He said that when the Court had issued an order for an injunction, that court could punish a contemnor.

He went on to explain that in all other cases, it was only the High Court and the Court of Appeal which could punish contemnors.

In determining the Preliminary Objection, I would start by looking at the affidavit sworn by **JONAH K. KORIR**, the learned advocate for the Applicant.

The deponent indicated that he had the conduct of the case, on behalf of the applicant, and he was well versed with the facts. He also said that he had been given the necessary authority to swear the affidavit on behalf of the applicant.

Of course, when an advocate is handling a case, certain facts come to his personal knowledge. Those facts include the things that happened in court, when the case was proceeding.

In this case, the deponent has deponed about the orders which the court issued on 19th November, 2013. Presumably, he was in court when the said orders were made. If that be the case, he can speak to that fact.

The learned advocate also deponed as follows:-

“ 3. ***THAT*** the said orders which in itself contained penal notice was duly served on the 1st and 2nd Respondents on 22nd November, 2013 and 23rd November, 2013, which the Respondents acknowledged service (Annexed hereto and marked “J.K.K.12” is a copy of the process server's affidavit of service).

4. ***THAT*** I am instructed, which instruction, I verily believe to be accurate, that the Respondents ignored, neglected and or refused to obey the said orders, whereof on 27th November, 2013, the Respondents entered the said plantation and removed the wood fuel using motor vehicle registration No. KBS 970 D contrary to the court order. (Annexed and marked J.K.K. 3 are copies of the movement permit of wood fuel from the said plantation.

5. ***THAT*** on the same day, the Applicant, with the aid of police and court bailiff, managed to have the said motor vehicle KBS 970 D confiscated and kept at Eldoret Police Station, whereof the same is still being kept there, but the Applicant is apprehensive that the same may be removed, as a result hereof the Applicant would lose crucial evidence.”

It does appear that the learned advocate was not involved in effecting service of the order. The person who served the said order was **JOSEPH O. OCHIENG**, a licensed Court process Server.

Therefore, the advocate did not have personal knowledge of the service of the order.

The advocate has also made it clear that the facts giving rise to the alleged contempt of court, were not matters which were from his personal knowledge. He has described the facts as “**instructions**”. He has not even specified the particular person who gave him the said instructions.

Although the deponent described those facts as instructions, the truth is that they are the pieces of evidence which form the core foundation for the application before this court.

In effect, the advocate was no longer only acting as the lawyer handling this case on behalf of the Applicant; he had also tendered evidence on behalf of the said client.

In the case of ***KISYA INVESTMENTS LIMITED & OTHERS -VRS- KENYA FINANCE CORPORATION LIMITED, NBI HCCC NO. 5304 OF 1993, Ringera J.*** (as he then was), expressed himself thus;

“... ***By deponing to such matters, the advocates courts
an adversarial invitation to step from his privileged
position at the bar into the witness box. He is liable to
be cross-examined on his disposition. It is impossible and
unseemly for an advocate to discharge his duty to the
court and to his client if he is going to enter into the***

controversy as a witness. He cannot be both counsel and witness in the same case.”

The advocate, **Mr. Jonah K. Korir**, has sworn an affidavit on contentious matters. In fact, he has sworn an affidavit based on information he obtained from other persons. In my honest evaluation of the contents of the affidavit, I find that they are matters about which the deponent cannot give first-hand answers. By reference to “**first-hand answers**”, I mean answers about matters which the person providing the answers, had experienced in person.

In this case, the deponent did not effect service of the orders in issue. That was, reportedly, done by a licensed process server.

The advocate was only “**instructed**” about the alleged removal of wood fuel, aboard a vehicle registration KBS 940 D.

Similarly, the advocate was not involved in the confiscation of the vehicle or the subsequent detention of that vehicle, by the police. Those steps were taken by his client, with the aid of the police and the court bailiff.

To the extent that the affidavit is substantively by a person relying on reported speech; and also because that person was the advocate representing the Applicant in this case, I find that the affidavit is incompetent.

Accordingly, the supporting affidavit is hereby struck out forthwith.

The nett result is that there is now no material to back the application. Therefore, the application cannot be sustained. It can only collapse. Accordingly, the Preliminary Objection is upheld.

Meanwhile, as regards the issue of Jurisdiction, I find that the discretion bestowed upon the Magistrates' Courts, on matters of contempt of court, is very limited. Indeed, I should say that the said jurisdiction only enables the Magistrate's Courts to order for the attachment of the property belonging to the contemnor.

In the event, if the Applicant was intent on seeking orders beyond the attachment of the property of the alleged contemnor, he was entitled to come before the High Court.

When a party comes to the High Court, seeking to have action taken against another person, in relation to the violation of an order given by the Magistrates' Court, it is important that the Applicant should place before the High Court all the requisite material, which would enable the Court make an informed decision. The said material would be in the nature of an affidavit.

There is no requirement for a Statement of facts, when a party was seeking the leave of the High Court to institute proceedings for the committal of a person alleged to be guilty of contempt of Court.

It follows, therefore, that the other two limbs of the Preliminary Objection are overruled.

Finally, the costs of the Preliminary Objection and of the application for leave, are awarded to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 17TH DAY OF JANUARY, 2014.

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FRED A. OCHIENG

JUDGE.