



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS NO. 225 OF 2010

Betty Ihavi Ambundo.....APPLICANT

VERSUS

Jimmy Mabango Ambundo.....RESPONDENT

RULING

The applicant herein Betty Ihavi Ambundo filed a notice of motion dated 17/5/2010. This application is brought under section 5(1) of the Judicature Act Cap 8 of the Laws of Kenya, Sections 3, 3A, 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya, Orders L rules 1 and 9 and XXXIX rule 2A(2) of the Civil Procedure rules, Order 52 rules 2 and 3 of the Supreme Court practice of England 1999 and all other enabling provisions of the law, seeking the following orders,

1. That Jimmy Mabango Ambundo the respondent herein be committed to prison for such period of time as this honourable Court may deem fit.
2. The costs of and/or occasioned by this application and obtaining leave thereto be paid by the respondent.

This application is based on the grounds that on 18th of January 2010 the late Honourable S. A. Okato issued an order restraining the respondent from interfering with the applicant's peace or threatening the applicant's life, trespassing on her person, intimidating, coercing and blackmailing her, threatening the applicant's job security and integrity, tarnishing her reputation and the integrity of several of her colleagues at the work place. That Since the order was given, the respondent has contracted the applicant's work colleagues using threats and intimidation under the guise of seeking to serve them with process which is causing their client personal humiliation and is threatening her integrity and job security .Therefore the respondent is in willful and blatant contempt of the Court by virtue of the above stated actions.

The applicant further states that it is in the interest of justice that the orders sought ought to be granted as there are no other means of enforcing the dignity of court since the court has inherent powers to prevent an abuse of its process and punish parties for contempt.

The application is supported by the applicant's verifying Affidavit dated 17th May 2010. She deposed that on 19th February 2010 the respondent was served with a valid restraining order restraining the respondent from interfering with the applicant's peace or threatening the applicants life, trespassing on her person, intimidating coercing or tarnishing her reputation and the integrity of several of her colleagues at the work place but the respondent refused to sign the court order. He however he acknowledged receipt of the court order on the 19th March 2010 by signing at the back of the order. Despite receiving the court order, the respondent has disregarded the same and continued to call the applicant's place of work and has in the

process harassed intimidated and blackmailed the applicant's co-workers thereby putting her job security at a risk. On 17th February 2010 the respondent called the UN Deputy Chief of Security indicating that he had a letter to deliver to the Resident Representative. The respondent stated that his advocate intended to serve the Resident Representative with summons to appear in court. On 24th February 2010 the Respondent again threatened to go to the press if the Deputy Chief of security did not co-operate with his demands with regards to service of summons. On 24th February 2010, in the afternoon, the Respondent also called the office of the Resident Representative and left a message with the Executive Assistant saying that the Resident Representative should inform the respondent how he would like to be served and if the Resident Representative failed to do so he would go to his house with TV Cameras for the purpose of embarrassing the Resident Representative. On 27th February 2010, the respondent sent an email to three of the applicants work colleagues asking them how they would like to be served with summons. She further averred that the applicant's colleagues have sent several emails to the United Nations Diplomatic Police Unit informing them of the continuous harassment and requesting that the Respondent be stopped from harassing UNDP staff members. The applicant further says that the respondent has also contracted the applicants advocates in which the respondent sent a very disturbing email. These actions committed by the respondents are humiliating and threatening her integrity and job security not only to the applicant but also her colleagues who are very senior members of UNDP.

The application is opposed and the respondent in doing so has filed a Replying Affidavit dated 8th December 2010. He avers that the process server alleges that on 19th February 2010 he served him with a Court order at his residence at old Jamhuri Estate. The process server did not however indicate how he identified his residence and the gate number as it is not indicated. He avers that it is not enough to state that he served him at Old Jamhuri Estate without clearly indicating the specific residence.

That the affidavit of service sworn by Eric Osiango on 12th May 2010 purportedly for service upon him on 19th February 2010 is false therefore there was never any service or personal service upon him on the said date or at all. That on 19th March 2010 a one Eric Osiango called him and requested to meet him which he agreed. At 2:15 pm he met the said Osiango outside the entrance to Jamhuri Phase 1 Estate whereupon he tendered an order dated 15th January 2010 upon him. He read the same and he advised him to acknowledge receipt thereof by signing on the reverse side of the same. He also states that although he signed on the reverse side of the said copy of the order, the order did not have any writings or endorsement of a notice of penal consequences. He says that he has been advised by his advocates that in a case of this nature Personal service is mandatory not only of the order but of the penal notice warning of the consequences of non-compliance therefore service of the order upon him on 19th March 2010 without the penal notice endorsement was not only irregular and incompetent but in breach of the procedure of commencing contempt proceedings.

Further, the respondent states that since contempt proceedings are of a serious nature, there must be strict compliance of the law and of procedure, and that the degree of proof in contempt proceedings is definitely higher than the ordinary cases and therefore urges this court to strictly examine the affidavit of service treat the same with a lot of caution. The respondent further stated that if the applicant had intended to endorse the notice of penal consequences on the order, the same ought to have been printed on the reverse so that there would be no manipulation of the document whatsoever. The purported Notice of penal consequences in the process server's handwriting is an afterthought and an addition made well after he signed the order on 19th March 2010 in the circumstances the applicant has not fulfilled the mandatory requirement of service to enable her institute contempt proceedings against him.

The respondent further stated that the affidavit of service which is the basis of these proceedings is false as the process server at paragraphs 2, 3, 4 and 5 alleges that on 19th February 2010 he served him with an order and that he failed to acknowledge receipt of the same yet on 19th February 2010 the respondent together with his three sons Samuel, Jesse and Aaron left Nairobi at 7.30 am for their upcountry home at Ingotse village in Kakamega District. The children were on their midterm break and they took advantage of the same to visit their home. That the allegations therefore by Eric Osiango at paragraph 2,3 4 and 5 of the affidavit of service annexed to the application are totally false and misleading. The respondent therefore believes that the applicant is stretching an order beyond its scope to cover persons or activities

that the said order was not meant to and goes further to explain that the order is clearly issued for the benefit of the applicant and cannot be stretched to cover unnamed third parties as the applicant now intends and in that light therefore any communication to the applicant's colleagues not tarnishing their integrity cannot be said to be in violation of the order.

The respondent believes that the applicant has all along made and sought desperate attempt to put him behind bars, to have him punished as a way of settling her personal scores with him and not that he has violated any lawful court order or prejudiced her person in any way. That the order referred to herein was very specific as to the person it was meant to protect, and also specific as to the actions that he was barred from doing. It was not a blanket order meant to deny him his basic rights of expression, association, communication or dealing with the applicant on matters concerning their three sons.

I have considered the oral submissions made in court which basically reiterate what is deponed in the affidavits filed by the parties.

The issues to be determined in this application namely;

- a. Whether the contemnor, (the respondent) in this matter was served with the court order bearing a penal notice.
- b. Whether the Respondent willfully disobeyed the court order deliberately and intentionally and whether the application dated 17th May 2010 should be allowed.

In the case of **Augustine Marete Rukunga vs. Agnes Njeri Ndungire & Anor, HCCC 2160 of the** court was emphatic when it stated that

“The consequence of a finding of contempt is penal. The standard of proof is beyond reasonable doubt. The applicant therefore had to prove service beyond reasonable doubt and I must be satisfied that the respondents disobeyed the court order made on the 9th December 1998 and that they did so willfully or intentionally”

From the reading of the above case, it is essential to establish whether the defendant intentionally, by its conduct disobeyed a court order. In order to establish this, it is imperative to dispense with the question on whether the defendant was indeed served with the court order dated 15th January 2010 and Penal Notice.

This question can only be responded to by the examination of the affidavit of service dated 12th May 2010 by Eric Osingo, who is a court process server. He states that he served the respondent who was well known to him who upon service acknowledged receipt of the said order signing on the back of the order.

Further to the above, the case of **Kariuki & 2 others vs Minister for Gender, Sports, Culture & Social Services & 2 Others Miscellaneous Civil Application No. 389 of 2004** Lenaola J. pointed out that the case of *Mwangi Wangodu –vs- Nairobi City Commission CA 95/1988 (unreported)* set down rules as regards service of orders subject to contempt proceedings in this country. In that case, the court said;

“the Procedure for committal for civil contempt in England where an order of sequestration is sought is set out under the Rules of the Supreme Court (RSC) orders 45 and 46 and in Halsbury’s Laws of England, vol 9 (4th edition) under the heading ‘contempt of court’. Briefly the effect of these provisions is that as a general rule, no order of court requiring a person to do or restrain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

The Respondent does not deny that he was served with the order dated 18th January 2010 which has a written penal notice at the back. I have noted the arguments raised, ordinarily a penal notice will be typed

and an order, this one is hand written. The Civil Procedure Rules provides for the notice but does not give the format whether it should be typed or hand written. In my view there was a proper penal notice given at the back of the order which was signed by the advocates for the plaintiff and served upon the respondent and he acknowledged service. In regard to the above cited authorities, the applicant has proved to the satisfaction of this court that personal service of the order was served upon the Respondent.

ii) *Whether the aforementioned person willfully disobeyed the court order willfully and intentionally and whether the application dated 22nd November 2011 should be allowed.*

There must be demonstration that the court order has been disobeyed beyond reasonable doubt. According to the holding in the Case involving **AUGUSTINE MARETE HCCC 2160** (previously quoted) the learned judge stipulated that the applicant must prove beyond reasonable doubt that the respondent disobeyed the court order made and that they did so willfully and intentionally. This principle was laid out in the case of **Hadkinson –vs-Hadkinson (1952) All ER 567** where the court stated that court “*orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up.*”

Merely stating that the order issued was not a blanket order was not a leeway for the respondent to flagrantly breach the order served on him in fact he has breached each and every order he has been asked to desist from. The court order restrained the respondent from interfering with the petitioner’s peace or threatening the petitioner’s life, trespassing on her person, intimidating, coercing and blackmailing her, threatening the petitioner’s job security and integrity and tarnishing her reputation and the reputation and integrity of several of her colleagues at work place pending the hearing and determination of the petition and until further orders of the court are made. The Respondent’s conduct in this matter reveals that he had the clear intention of disobeying the order. These contemptuous actions are in the form of leaving messages using his mobile number of [*particulars withheld*] to Gordon Oyatta. A telephone call by the respondent to one Thomas Kuyan, a colleague of the applicant. In this conversation, the respondent used offensive language saying that the said Thomas had an affair with the applicant. Another email sent by the respondent to Gordon Oyatta a colleague of the applicant stating that “*As you are aware that I have filed for divorce .Our lawyer has filed a cross petition for divorce and they intend to put you, chuma and Thomas on the stand. You are fully aware what both of you have in common. Please let me know when you want to be served .It would be embarrassing to serve at home in Kasarani in front of your people .Let us do this thing in a civilized manner*” Sent on 26th February 2010. An email from the Respondent sent to Aeneas Chuma, Thomas Ole Kuyan Gordon Oyatta, Katya Melliush, Joram Mkunde and Peter Marshall all colleagues of the applicant on 27th February 2010 telling them of the affair and special relationship with the applicant and a letter addressed to the applicants advocate dated 29th April 2010 as shown in annexure **BIA2** of the applicant’s verifying affidavit.

Having established that the Respondent is in contempt of the orders served on him, I will now decide on whether by committing the Respondent to prison will be of any principle considering that he is having custody of their 3 children and the root cause of this suit emanates from a divorce matter that is pending in court.

The process of contempt should not be invoked in aid of a civil remedy where some other method of achieving the desired result is available. This is especially so in the context of domestic or family proceedings.

In the case of **Thomas-vs- Thomas 1985 CA 214**, Bush J made a general observation that “*Question of punishment for the past behavior on concepts of the damage to the dignity of the court if an order is disobeyed should not enter into consideration in a domestic jurisdiction. The object of the exercise is to enforce the breached order in the sense of getting it working or putting something more workable in its place. Whilst there may be causes where the draconian powers of the court to imprison or fine may have to be invoked they should be regarded as a weapon of last resort*”

However there are times when the use of that weapon cannot be avoided if the courts authority is

disobeyed or a victim left unprotected. I will therefore give the respondent an opportunity to show cause why he should not be committed to civil jail for contempt applicant to appear before this court for direction on what would happen if he continue in contempt. Respondent to pay costs of this application.

Orders accordingly.

Dated, Signed and delivered this 17th Day of May 2013

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk