



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 43 of 2007

JOHN KUNDU KHISA PLAINTIFF

V

KENNEDY KHISA KUNDU DEFENDANT

RULING

The Defendant/Applicant filed a Notice of Motion seeking to have the orders of the late Justice Stella Muketi made on 08/12/2011 reviewed and set aside. Before the application could be heard, the Advocate for the Plaintiff/Respondent Mr. J. M. Wafula filed a Notice of Objection on the ground that the Defendant/Applicant was in contempt of court order and that he should not be heard until he purges the contempt. On 30/07/2007, the Plaintiff in this suit filed a notice of motion seeking a mandatory injunction against the Defendant herein compelling the Defendant to vacate and or remove all his belongings out of the premises on Plot No. 50 Sikhendu Market and thereafter return the Plaintiff's household goods back to the premises. The Defendant's lawyers were duly served with the application but no Replying Affidavit was filed. The application therefore proceeded ex-parte and a mandatory injunction granted as prayed for in the application. The Defendant did not comply with the orders given. He instead embarked on making applications seeking to set aside the ex-parte order. On 10/08/2011, the Defendant filed an application seeking to set aside the ex-parte order and seeking to be allowed to file a Replying Affidavit in opposition to the application which originated the orders which were issued ex-parte. This application was heard and was dismissed by the late Justice Stella Muketi in a ruling delivered on 08/12/2011. It is after the dismissal that the Defendant filed an application on 16/05/2012 in which he seeks to have the orders of the late Justice Stella Muketi reviewed and set aside. This is the application Mr. J. M. Wafula does not want the Defendant given audience on until he purges the contempt.

It is not contested that the Defendant was ordered out of the premises on Plot No. 50 Sikhendu Market. The Defendant is still in the premises. He was duly served with the order requiring him to move out but he has not moved out. There is therefore no dispute that he is in contempt of a valid court order. Now the question which needs to be answered is whether he should be barred from being heard on this application until he purges the contempt. Mr. J. M. Wafula for the Plaintiff relied on the case of **Mawani Vs Mawani 1977 KLR 159**. In this case the Respondent had been given custody of two children of the marriage. In defiance of the court order, the Applicant removed the children from Kenya on the same night and flew them by air to Pakistan. He then appointed an Attorney who came to make an application. The Respondent's lawyer argued that he should not be heard on his application until after he purged the contempt i.e. bringing back the two children to the jurisdiction of the court. The court agreed with the Respondent's lawyer and refused to hear the Applicant until he purged the contempt.

In the case cited hereinabove, the court was referred to the judgment in the case of **Hadkinson Vs Hadkinson [1952] 2 All ER 567 at 575** where Denning L. J. said as follows:-

“I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed”.

In the Hadkinson case, a wife's petition for divorce, she was given custody of the child of the marriage but directed not to remove the child from the jurisdiction without the sanction of the court. This she proceeded to do. The father obtained an order directing her to return the child within the jurisdiction. She appealed and the Court of Appeal held that she was not entitled to be heard until she purged her contempt by returning the child within the jurisdiction. The disobedience of the mother impeded the course of justice since it was impossible for the court to enforce its orders in respect of the child.

In the present case, an order was given ex-parte compelling the Defendant to move out of the premises at Plot No. 50 at Sikhendu Market. He has not moved out. I agree that he is in contempt of a valid court order but the question which I pose is this; is his continued disobedience of the order impeding the course of justice? I do not think so. This is because the order was given ex-parte. This was a mandatory order given at interlocutory stage. The dispute herein involves a son and a father. It has not been shown that the Defendant's disobedience is hindering the court from ascertaining the truth or enforcing its orders. The continued disobedience of the court order is not in any way impeding the course of justice. In fact if the Defendant is given audience, the court will ascertain the truth. Looking at the circumstances of the case as can be seen from the pleadings, it is imperative that the Defendant be heard on his application so that the truth of the case can be known. I therefore find that this is not a suitable case where I can order that the Applicant should not be heard until he purges the contempt. The upshot of this is that the Plaintiff's objection is disallowed. Costs shall be in the cause.

It is so ordered.

Dated, signed and delivered on this 14th day of May, 2013.

E. OBAGA

JUDGE

COURT

Ruling delivered at 9.30am in the absence of parties. Parties can read the contents of the ruling in the registry.

Court Clerk: Koskey.

E. OBAGA

JUDGE

14/05/2013