



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 2165 OF 1996

AND

IN THE MATTER OF THE ESTATE OF KIMANI KANYORO (DECEASED)

AND

SUSAN WAMAITHA.....APPLICANT

AND

NAOMI NJOKI KIMANI.....1ST RESPONDENT

MARY NJERI KIMANI.....2ND RESPONDENT/1ST CITED PERSON

WARIARA KIMANI.....3RD RESPONDENT/2ND CITED PERSON

AHMED NOORDIN.....4TH RESPONDENT/3RD CITED PERSON

RULING

The application for determination is the Notice of Motion dated 11th March 2011. The Motion was taken out by Susan Wamaitha, herein after called the applicant, citing Mary Njeri Kimani, Wariara Kimani and Ahmed Noordin (hereinafter called the cited persons) for contempt of court. The application is supported by the affidavit of the applicant sworn on 9th March 2011, and filed in court on 10th March 2011 with the summons for leave dated 9th March 2011. The Motion dated 11th March 2011 was filed pursuant to leave of court granted on 11th March 2011.

The applicant's case is that the court did make an order on 28th February 2011 and 3rd March 2011 directing the cited persons to restore the applicant into possession of premises/property known as LR No. 36/11/222, 6th Street, Eastleigh Section II. She had previously been evicted from the said premises on 12th February 2011. The orders, were allegedly extracted and duly served on the cited persons. The said cited persons did not comply with the orders as they did not restore the applicant back to the premises nor allow her to access the premises. When the applicant's advocate wrote to the advocates for the 1st and 2nd cited persons asking them to facilitate obedience of the said order, they were informed that the orders could not be complied with as the property had been sold. She asserts that the cited persons are in contempt of the court orders.

The cited persons were served with the application and have filed their replies. The 1st cited person swore an affidavit in reply on 28th March 2011 on her own behalf and that of the 2nd cited person. The

3rd cited person swore his affidavit on 25th March 2011. The 1st and 2nd cited persons rely on their affidavit of 28th March 2011 as well a previous one sworn on 19th February 2011. The said affidavit had been sworn by the 1st cited person.

The 1st and 2nd persons' case is that Rawal J. (as she then was) had on 23rd February 2009 given the applicant's mother thirty (30) days to give an account of the rents collected failing which the 1st and 2nd cited persons were to be at liberty to sell LR No.36/11/222, Eastleigh, Nairobi. The applicant's mother failed to render the account as ordered, and the 1st and 2nd cited persons, in the face of that default, sold the property to the 3rd cited person. They state that the applicant and her mother were not living in the premises at the time of sale. The said sale was effected on 8th November 2010, according to a conveyance document attached to the said affidavits, and the conveyance was registered on 23rd November 2010. They assert that their legal possession of the property came to an end on 23rd November 2010, and thereafter they were not capable of complying with the orders made on 28th February 2011 and 3rd March 2011. They take the position that the person in the position to comply with the said orders was the 3rd cited person. They conclude that they did not have capacity to comply with the said orders as at the time the said orders were made they were not in control of the said premises.

In his reply, the 3rd cited person asserts that he is the registered owner of the subject property and that he has never been party to the proceedings that gave rise to the said orders. He states that he had only been served with one order dated 17th March 2011, and it was then that he learnt of the orders that he is said to have disobeyed. He argues that as he was not privy to the proceedings before Kimaru J it cannot be said that he is in breach of them; and in any event Kimaru J did not order that the said orders be served on him. He further avers that the applicant was never a tenant in the said premises, as when he negotiated with the tenants to get them to vacate she was not in occupation of the said premises. He further argues that the said order was ineffective against him as it did not bear his name although it affected the property held in his name. It did not however bear the reference number of the property nor the name of the building hence making it an ineffective and vague order. It is also said to be irregular as it does not indicate who is to be restored to what property, as it only referred to the 1st administrator without identifying the said administrator by name or by the estate she was said to be administering. He also argues that the order is effective as it relates to former **"owners"** of the property and therefore it cannot be effected as the property had since changed ownership.

I have gone through the record. The orders alleged to have been impugned were made on 28th February 2011 and 3rd March 2011. The said orders were predicated on an application dated 9th February 2011, which sought stay of execution of orders made in a ruling delivered on 29th February 2009, and orders restraining the 1st and 2nd cited persons or their agents, servants or petitioners in respect of **LR NO.36/11/222**, 6th Street from evicting, removing, or harassing or otherwise interfering with the applicant's and the 1st administrator's peaceful occupation of **LR NO. 36/11/222**. The said application was placed before Kimaru J on 28th February 2011 when it was argued. Counsel for the applicant stated that the applicant was evicted from the suit premises after the application, dated 9th February 2011 was filed in court. The court was invited to find that the eviction was unlawful. It was also stated that the property had been sold to a third party. Counsel for the applicant submitted that the said sale violated the *lis pendens* principle. It was argued for the cited persons that there was no stay of execution to prevent the sale.

After hearing oral arguments, Kimaru J. reserved his ruling for 2nd March 2011 at 3.00p.m. In the meantime His Lordship directed that the 1st administrator be restored to the building together with the applicant with immediate effect. Kimaru J. delivered a detailed considered ruling on 3rd March 2011 confirming his earlier order of 28th February 2011. Formal orders were extracted from the orders of 28th February 2011 and 3rd March 2011. The first order was extracted on 28th February 2011. The order stated:-

"That I hereby direct that the first administrator be restored to the building together with the applicant with immediate effect"

The second order of 3rd March 2011, stated:-

“The applicant and the 1st respondent be restrained into possession of the suit premises in LR No.36/11/222, 6th Street Eastleigh Section II with immediate effect”

The law in Kenya governing civil contempt of court has been stated over the years by the courts. The High Court’s power to punish for contempt of court is set out in **Section 5(1)** of the Judicature Act, which states as follows:-

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and the power shall extend to upholding the authority and dignity of subordinate courts.”

The Kenyan procedural law of civil contempt is the same as the contemporary English law of civil contempt. The current procedure in England is set out in **Orders 45** and **52** of the Rules of the Supreme Court of England. The procedure in **Orders 45** and **52** was summarized in **Awadh -vs- Marumbu (2004) 1 KLR 454**. The salient features of the procedure are:-

1. An *ex parte* summons in chambers for leave to bring contempt proceedings;
2. The summons is supported by a statement setting out the name and a description of the applicant, description and address of the person sought to be committed and the grounds on which committal is sought;
3. A verifying affidavit accompanies the statement;
4. Notice of the application is served on the registrar of the High Court of intent to file the application a day before the application is actually lodged the court;
5. The application is placed before a judge who may or may not grant leave for the filing of the substantive application; and
6. Once leave is granted, the substantive application, in form of a Motion, is filed in court within 21 days of leave being granted.

Service of the court order alleged to have been breached and a notice of penal consequences is one of the cardinal prerequisites of the contempt application. Before the alleged contemnor can be punished for contempt, it must be established that he was served with the order that he is alleged to have violated or disobeyed. In simple terms, he must be shown to have been aware of the order through the same being served on him. Secondly, the said order must be endorsed with a notice of penal consequences – that is an endorsement warning the person served that if he disobeys the order there will be penal consequences. The fact of service and the notice of penal consequences must be demonstrated in the statement and affidavits. Contempt of court attracts penalties that are usually awarded in criminal matters, and therefore contempt proceedings have a criminal character according to the court in **Re Bramblevale Ltd (1970) Ch. 128**. A higher standard of proof of service of the order is therefore required.

The next matter for consideration is whether the proceedings before me have complied with the procedure set out above. Leave was sought vide a chamber summons dated 9th March 2012 and filed in court on 10th March 2011. The same was supported by a supporting affidavit sworn on 9th March 2011 by Susan Wamaitha. It would appear that there was non-compliance with the rules. Firstly, the summons was not supported by a statement. Secondly, there is no evidence that the same was served on the registrar of the High Court. Thirdly, as there was no statement, no verifying affidavit was filed.

Following grant of leave, a Motion, being the substantive application dated 11th March 2011, was filed in court on 14th March 2011. The Motion was regularly filed within the 21 days.

The Order of 28th February 2011, extracted the same day, names, as parties, only the 1st and 2nd cited persons. I note that it does not have the penal notice endorsed on it, but rather attached on a separate piece of paper in type print of a different font from that on the order itself. The penal notice, however, indicates that it was meant for service upon the 3rd cited person although he was not party to the proceedings leading up to the order of 28th February 2011. The said order was purportedly served on the Officer Commanding the Pangani Police Station, Njugi B.G. Advocates and on the 3rd cited person. The

3rd cited person is said to have accepted service but declined to acknowledge receipt by signing on the principal copy.

The order of 3rd March 2013, extracted on the same day, is endorsed with a penal notice on its face, which bears the certificate of the Deputy Registrar to the effect that it is a true copy of the original order. There is an affidavit of service sworn by Richard Oduor on 7th March 2012, to the effect that he served it on the police, the area chief, and the advocates for the 1st, 2nd and 3rd cited persons. It is alleged that the 1st cited person received service in the presence of some named persons, but it is not indicated whether or not she signed the principal order to acknowledge receipt. The 2nd cited person was allegedly served through her son but the said son is said to have declined to acknowledge receipt by endorsing on the original order. The 3rd cited person was alleged to have been served personally at the suit premises. He accepted service, but declined to sign on the principal document. The copy of the principal order returned with the affidavit of service bears the signature of only one of its supposed six recipients, that is the advocates for the 1st and 2nd cited persons, Ngugi B.G. & Co. Advocates.

The issue then that arises whether the said orders, the ones purported to have been breached, were indeed properly served on the persons who are alleged to have since violated them. Liability for contempt attaches upon the alleged contemnors upon evidence of service of the orders alleged to have been violated by the said contemnors.

Before I consider whether or not there was service, I will examine whether the said orders could validly be impugned. In other words, are they orders in respect of which a person can be punished for contempt of court.

The order of 28th February 2011, as indicated elsewhere, does not bear a penal notice on its face. The penal notice appended to it appears on a separate page and it is in a font different from that in the principal order. The certificate of the registrar that the copy of the order is a true one appears in the principal order. There is no court stamp on the penal notice. The law on endorsement of the order with a penal notice has been stated succinctly in a number of cases including *Victoria Pumps Ltd & Another -vs- Kenya Ports Authority & 4 others* (2002) 1 KLR 708 and *Alldean Satellite Network (K) Ltd -vs- The Kenya Anti-Corruption Commission & Another HC Misc Appeal No. 114 of 2007*. It was held in *Victoria Pumps Ltd & Another -vs- Kenya Ports Authority & 4 others* (supra), that a penal notice should be at the very end of the order, but not part of it. In *Alldean Satellite Network (K) Ltd -vs- The Kenya Anti-Corruption Commission and another* (Supra) this was taken a little further when it was held that the penal notice should be endorsed on the order at the end of the order so that anybody reading the order cannot miss to notice the penal notice. Otherwise, where the penal notice is on a separate page attached to the order the possibility of the notice being attached to the order later cannot be ruled out. The order as arranged in this case cannot possibly form a basis for a prosecution of a person for civil contempt. The order of 3rd March 2011 appears to fully meet the requirements for a proper endorsement of a penal notice as set out in *Victoria Pumps Ltd & Another -v- Kenya Ports Authority & others* (supra) and *Alldean Satellite Network (k) Ltd -vs- The Kenya Anti-Corruption Commission and another* (supra).

For a person to be punished for civil contempt, it must be established that he was served personally with the order the subject of the contempt proceedings. The order of 28th February 2011 was not served on the 1st and 2nd cited persons personally. The affidavit of service on record alleges that the same was served on the advocates for the said 1st and 2nd cited persons, Messrs Njenga B.G. & Co. Advocates. This does not amount by whatever measure to personal service. The 3rd cited person is alleged to have been served personally that he accepted service but refused to sign the principal order. In his replying affidavit he denies being served with this order. The order of 3rd March 2011, was served on the advocates for the 1st and 2nd cited persons. Regarding the 1st cited person it is alleged that the order was served on her in the presence of some persons, named in the affidavit of service, but it is not indicated whether she signed on the principal order to acknowledge receipt of service. The copy of the principal order returned with the affidavit of service does not bear her signature or mark. The 2nd cited person was not served in person, as the said order was allegedly served on her son who did not sign the principal order. This was clearly not personal service. There is no evidence that the son brought the order to the attention of the 2nd cited person, and there is no explanation in the first place, why service was effected

on the son instead of on the 2nd cited person herself. It is alleged that the 3rd cited person was served with the order, but declined to sign the principal order. In his papers, however, he denies being served with the order of 3rd March 2011.

The court in *Re Bramblevale Ltd* (supra) said, and I quote verbatim, for emphasis sake;-

“Contempt of court is an offence of a criminal character. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt..”

It was noted in the same judgment that the guilt of the alleged contemnors must be proved ***“with such strictness of proof... as is consistent with the guilt of the charge.”*** In the local decision of *Mutitika -vs- Baharini Farm Ltd* (1985) KLR 227, it was stated that the standard of proof of contempt of court is higher than that required in civil cases, but not as high as proof beyond reasonable doubt. The offence is serious enough to attract imprisonment. It was noted in *Chiltern District Council -vs- Keane* (1985) 2 All ER 118 that where the liberty of a subject is involved, procedural rules must be strictly complied with. It would appear that the fair trial principles which apply in criminal proceedings are relevant in contempt proceedings.

The law of contempt of court requires that the contemnors had been served with the orders said to have been violated. The material placed before me does not satisfy me that there is evidence to the degree of proof required in cases of this nature to satisfy me that there was personal service of all the cited persons. I am not convinced beyond balance of probability that there was personal service of the said orders on the cited persons. As this touches on the personal freedom of the said cited persons, I am hesitant to hold that they were all personally served with the said orders.

Regarding the orders themselves, I am of the view that the person who drafted the extracted orders ought to have endeavoured to make them clear and less ambiguous. Instead of simply referring to the ***“1st administrator and the applicant”***, they ought to have referred directly to them by their names as the ruling of Kimaru J. was very clear on who was being referred to. However, to a person like the 3rd cited person who was not party to the proceedings before Kimaru J. there was a possibility of his not being able to understand the purport of the said orders. The order of 28th February 2011 was particularly vague. The Order of 3rd March 2011, in my view, ought to have set out the names of all the persons to whom the order was directed. The application dated 9th February 2011 specifically targeted the 1st and 2nd cited persons as well as ***“their servant, agent and/or purchaser in respect of LR No. 36/11/222 6th Street Eastleigh Section II.”*** The extracted order should have included this bit.

Guided by the principles stated in *Chiltern District Council -vs- Keane* (supra) and *Nyamogo & Another -vs- Kenyan Posts and Telecommunications Corporation* (1990 -1994) EA 464, that failure to conform to the rules of procedure on civil contempt renders the application fatal, and that rules have to be complied with, I have reluctantly come to the conclusion that the application herein has not fully complied with the rules. The strictness on compliance with the rules is linked to the fact that it is all about the liberty of the persons cited. I find that no notice was served on the Registrar of the High Court as required by the rules, no statement was filed, the order of 28th February 2011 was not properly endorsed with a penal notice and the alleged personal service of the orders on the cited persons was not strictly proved. I will dismiss the Notice of Motion dated 11th March 2011.

I will not award costs to the cited persons for the reason that the said orders of 28th February 2011 and 3rd March 2011 remain uncomplied with to date. Kimaru J. was aware of the purported sale when he made the said orders, and therefore the fact of the purported sale cannot be a legitimate excuse for failing to obey valid court orders. The court made orders that must be obeyed. To facilitate the implementation of the orders of Kimaru J. made on 28th February 2011 and 3rd March 2011, I hereby order Mary Njeri Kimani, Wariara Kimani and Ahmed Noordin to restore Susan Wamaitha and Naomi Njoki Kimani to the subject premises in LR No.36/11/222, 6th Street, Eastleigh Section II with immediate effect. The matter shall be mentioned after seven (7) days for compliant.

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF August, 2013.

W. M. MUSYOKA

JUDGE