



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL SUIT NUMBER 956 OF 2011

GODFREY KAMAU KIMANI.....PLAINTIFF

VERSUS

THOMAS WAMBURA..... DEFENDANT

RULING

1. This is an application by way of Notice of Motion dated 5th January, 2012 seeking to commit the Respondent herein to civil jail for six (6) months for contempt of court. The motion is made pursuant to leave of the court which was granted on 30th December, 2011 to commence the said contempt proceedings. It is brought under Rules 2 and 3 of the High Court Practice and Procedure Rules, Section 5 of the Judicature Act, Section 3A of the Civil Procedure Act, and also under Order 52 Rules 2 and 3 of the Supreme Court Practice Rules of England.

2. The grounds upon which the application is premised are:

***“a) That on the 20th December, 2011 this honourable court issued an order restraining the Respondent, his agents and servants from evicting the applicant.*”**

b) That the said court order mentioned in [a] above also ordered the respondent to remove an advertisement board from the applicant premises.

c) That on the 23rd December, the Respondent was served with the said order and his advocate was served on the 22nd December, 2011.

d) That despite being served, very much aware of its purport and effect the respondent has continued with the disobedience which is deliberate and intentional the said order.

e) That despite being served the Respondent has continued to neglect and ignore the court order and in effect flagrantly disobeying the said order.

f) That he continued flagrant (sic) disobedience continued to demean the court's being put in disrepute."

3. The application is supported by the Plaintiff's affidavit deponed on 5th January, 2012. In his affidavit, the Respondent gives a background of this matter. He points out that this court issued an order dated 22nd December, 2011 in the following terms:

“

2. That the Respondent is hereby restrained from evicting the tenant contrary to Chapter 301.

3. That the Respondent hereby ordered to remove the Advertisement Board from the tenant's premises immediately....”

It is important to note the tenor of these orders of the court.

4. The matter emanated from a case between the parties in a Business Premises Rent Tribunal (BPRT) case Number 271/2011, Mombasa, whereby the Tribunal on 2nd December, 2011 issued the following orders against the landlord, who is the Respondent herein:

“1. The landlord is restrained from evicting the tenant contrary to Chapter 301.

2. The landlord is ordered to remove the Advertisement Board from the tenant's premises

immediately.

3. The landlord is ordered to reconnect power to the premises today.

5. The first observation I note is that the order of the Business Premises Rent Tribunal (BPRT) was not conformed into the order of this court in its entirety. Order Number 3 of the Business Premises Rent Tribunal (BPRT) order of 2nd December, 2011 was, for whatever reason, omitted from the order issued by this court. Thus, when, in the central paragraph of his Affidavit in support of his application herein, the Applicant makes his deposition at paragraph 7, he says:

“7. That the said Respondent though duly served has fragrantly (sic) and without cause and/or neglect to comply with the said orders and has instead gone ahead and unlawfully punished the application(sic) herein by:

a) Entering the suit premises and occupying the kitchen herein and converting it into his bedroom.

b) Locking the main entrance and denied the Applicant access thereto.

c) Threatening the Applicant with physical violence.

d) Disconnecting water and electricity supply to the premises.”

The above are the alleged acts of contempt as against the court’s order, for which the applicant seeks a citation of contempt.

6. It will be immediately evident, and this was also pointed out by the Respondent’s counsel at the hearing, that items (c) and (d) in the list of alleged acts of contempt are not in the list of items contained in this court’s order. As for items (a) and (b) it was for the Applicant to provide evidence to prove them as against the Respondent before an order of committal could be issued.

7. The Respondent filed a Replying Affidavit deponed on 13th January, 2012. He said that he agreed to the court orders and had complied therewith. Paragraphs 6-9 and 12 of his affidavit respond to the alleged acts of contempt as follows:

“6. That I have not done any of the acts mentioned by the Applicant at Paragraph 7(a), b) and c of the affidavit.

7. The subject matter premises in this suit do not have a kitchen hence, the Applicant is misleading the court at Paragraph 7(a) of the supporting affidavit and in any event I have not occupied any part meant for the Applicant.

8. That the subject matter premises has always been a single room which is still occupied by the affidavit.

9. That I have not locked the entrance to the premises as my family members who reside on one part of the premises use the same gate to come in and go out.

....

12. That it is well with my knowledge that the court did not directly or indirectly issue any orders related to the issues complained of at paragraph 7 a), b) and c) of the supporting affidavit.”

8. The Applicant filed a further affidavit on 19th January, 2012. In it, he deponed that-

- On 22nd November, 2011, the Respondent locked the main hall and left the kitchen open and advertised that the premises was vacant.

I note that this was before issuance of the court’s order.

- On 21st December, 2011, the Applicant and one Joyce Kilungu were repulsed from entering the premises.

I note that there was however, no evidence of any such repulsion, such as by affidavit of Joyce Kilungu.

- That the Respondent from 23rd December, 2011, kept the gate locked until past 8.00 a.m. or later to ensure the Applicant did not do business.

- That the Respondent had instructed his advocate to levy distress for rent.

9. I have studied the affidavits deponed and filed as between the parties. It was for the Applicant to prove the alleged acts of contempt which were against the court order of 22nd December, 2011. The hearing on 19th March, 2012 gave the Applicant an opportunity to prove these acts of contempt, particularly in respect of the eviction of the Respondent.

10. It is trite law that the level of proof of contempt is above a balance of probabilities, since it is a serious charge, for if true, the contemnor will face incarceration. See **Sean Francis Jones vs Cedar Rutakyamira Morgan and Another** in Nairobi HCC Misc Appeal Number 152 of 2004.

Lord Denning in **Re: Bramble Vale Limited** [1970] I Ch 128 at 137 stated of contempt:

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

11. It may have been clear to the Applicant, but it was not made clear to the court, even at the hearing, how or when the Applicant had been evicted in contravention of the court order. For it was stated in the further Affidavit that he had access although not at the hours he chose. It was un-clear whether the suit premises comprised of one room or more rooms than one, for the information emanating from the (BPRT) case on the suit premises was not brought to bear through the deposition in the affidavits provided. It was also not clear whether the access which the Repondent’s family had through the main gate was the only access to the suit premises and that the Applicant was barred from using it or did not have keys to it.

In **Republic vs Commissioner of Lands and Others ex parte James Kiniya Gachiri, Misc Application Number 149 of 2002 Nairobi; Nyamu J, (as he then was) held that:**

“Where committal is sought for breach of an injunction, it must be made clear what the Defendant is alleged to have done and that it is breached....The Notice of Motion must state exactly what the alleged contemnor had done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge.

The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof which is the criminal standard not being attained especially affidavit evidence.”

12. I would add that ambiguity in affidavit evidence that does not amplify, clarify or ascertain and confirm the particulars of contempt so that the court has to go through a lengthy, or circumlocutory reasoning process to satisfy itself as to the alleged breach amounts to a negation of the standard of proof required for committal. In this case, there was such ambiguity in the evidence that the Applicant's counsel had to add from the bar as to relevant information, and the court had to keep seeking clarification. In those circumstances, there was a failure to meet the requisite benchmarks for committal.

13. In my view, the Respondent's Replying affidavit cast doubts on the Applicant's case which the Applicant did not adequately respond to in his further Affidavit. I have pointed to a number of them in paragraph 11 herein. The case of the Applicant was based essentially upon breach of Paragraph 3 of the court order of 20th December, 2011, restraining the eviction of the Applicant. The supporting affidavit at paragraph 3 (a) and 3 (e) states the breaches to include:

a) That he (the Respondent) has locked the main entrance and denied the applicant access thereto....

e) That the Respondent has locked the kitchen and converted it into his private room."

Proof of all these particulars was required beyond reasonable doubt. Unfortunately, the Applicant was not equal to the task.

14. Accordingly, the Applicant's application for citation and committal cannot be granted, and it is hereby dismissed with costs to the Respondent.

Dated and delivered this...29th.Day of March, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d)