



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 175 of 2002

JOSEPH MUTUA MBUVA.....PLAINTIFF

VERSUS

WAICHAKEHIRI F.C. (sued through chairman)

ROBERT KIMATI MARETE.....DEFENDANT/APPLICANT

R U L I N G

The application under consideration is the one dated 5th March, 2005. It has been brought under O.XXXIX r1, 2 and 3 of Civil Procedure Rules under the old rules.

The Applicant seeks prayer 2 which is:

“That this honourable court be pleased to order the Respondent/defendant to be jailed for six(6) months for being in contempt of court orders dated 27/11/2002.

The application is premised on three grounds:

- (a) That the Respondent has vowed never to obey any court orders from this court and has not only demanded rents from the plaintiff’s tenants but has threatened the plaintiff.
- (b) That the defendant has even evicted some of the plaintiffs tenants from the plaintiff land despite the existing court orders of this honourable court.
- (c) That the defendant/Respondent has made it impossible for the plaintiff to manage his land as per the court orders.

The application is supported by an affidavit sworn by the Applicant dated 5th March, 2003.

The gist of the affidavit is that the Applicant filed the instant suit simultaneously with an application seeking an order of injunction against the Respondent/Defendant. The deponent avers that the injunction was allowed on 24th October 2002 and confirmed on 27th November 2002. The deponent goes further to aver that the Respondent has failed to obey the court over despite service upon him.

The Respondent, a Co-Operative Society sued through the Chairman has not filed any papers in response to the application. The counsel representing the Respondent M/S opposed the application on points of law.

I have considered the submissions by Mr. Anampiu on behalf of the Applicant and Ms Mwangi on behalf of the Respondent.

Two issues have arisen on points of law which are one, whether the Applicant ought to have sought the leave of the court before instituting the contempt of court proceedings. It is not disputed that the Applicant did not seek leave to bring the instant application. The second issue is whether proof of service of the order alleged to have been breached should be proved.

Mr. Anampiu has urged that only applications brought under the Judicature Act require leave to be obtained before the proceedings for contempt of court are instituted. Counsel urged that the application was brought under O.XXXIX of the Civil Procedure Rules and no leave was required.

Order 39 r 2(3) of CPR (old rules) provides as follows:

“No attachment under this rule shall remain in force for more than one year at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit and shall pay the balance, if any, to the party entitled thereto.”

It is clear from the provisions of Order 39 of CPR that the court has power to punish for contempt under Rule 2(3) of the Order thereto. However, S.5 of the Judicature Act Cap 8 gives the court power to deal with contempt of court and stipulates as follows:

5. (1) 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 that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

The section clearly gives provision of how the power to punish for contempt is exercised. The Court of Appeal in Mwangi H.C. Wangondu vs Nairobi City Council CA No. 95 of 1983 observed.

“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 (R.S.C), Orders 45 and 46 and in Halsbury’s Laws of England, Vol . (4th edition) under the heading “contempt of court”. Briefly the effect of these provisions is that as a general rule, no order of court require a person to do or abstain 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 endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt.”

The application before the Court of Appeal in the cited case was brought for disobedience of an order of

injunction. The Court of Appeal held that the court would not enforce any order requiring a person to do abstain from doing any act unless it is shown

One, that the order was served personally on the person required to do or abstain from doing a certain act in question;

Two, that the order so served was endorsed with a Penal Notice informing the person, served that if he disobeys the order he will be liable to the process of execution to compel him to obey it;

Three, the court must be satisfied that the terms of the injunction sought to be obeyed in the court order in question was phrased in clear and unambiguous terms and are therefore capable of enforcement or implementation and;

Four, that there is proof of the breach of the injunction beyond any reasonable doubt.

In the instant case the Applicant admits that no proof of service has been established because no Affidavit of service of the order of injunction upon the Respondent has been filed. Without proof of service of the order upon the person alleged to be in breach of the injunction, the Applicant cannot hope to satisfy the requirements that the order of injunction was served personally upon the Respondent, that the order so served had an endorsement on it a penal notice and finally that the terms of the order of injunction were clear and unambiguous. For this reason alone the application must fail.

I must answer the other issue whether leave to institute proceedings for contempt of court must be sought before the substantive application is filed.

Ms. Mwangi relied on the persuasive case of **Florence Thirindi Mbogori V. Kabit Rintari and others Meru HCCC No. 131 of 2003.** My learned brother Hon Emukule J. dealt with the issue of leave to file the contempt of court proceedings and observed:

“thirdly and finally therefore, an application for contempt of court for breach of an interlocutory order rule 1(a) or (b) can only be properly founded upon the provisions of section 5(1) the Judicature Act, (Cap 8 Laws of Kenya). The a provision requires that for contempt of court proceedings in Kenya the procedure used by the High Court of Justice in England is applicable in Kenya. The procedure applies in England is that set out in Order LII rule 3(2) of the Supreme Court Rules of England which provides that a person seeking to bring contempt proceedings would first apply for leave of court to bring such committal proceedings, and if granted to bring a substantive motion within 14 days. If those days lapse then, an application made thereafter would be incompetent as it would have been made without leave.”

The cited case is persuasive. I agree to be persuaded by it as good law. The applicant ought to have sought the leave of this court before instituting contempt of court proceedings to enforce injunctive orders issued by this court under O.XXXIX r 1,2 and 3 of the (old) Civil Procedure Rules. That

Having come to the conclusion I have of this application. I find that the application was defective ab initio and secondly that it had no merits whatsoever.

For these reasons this application fails and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF MARCH, 2012

LESIT, J
JUDGE