



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISCELLANEOUS APPLICATION NUMBER 53 OF 2011

JULIUS MORKONG CHEMTAI.....APPLICANT

VERSUS

ELIUD MURIONG NGEYWA.....1ST RESPONDENT

CHEPKURUI NGEYWA.....2ND RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 26th April 2011 seeking mainly that this court finds the respondents guilty of contempt of court and commits them to jail for a period of six months for disobeying a valid order and decree of court issued on 27th September, 2010.

The facts of the case are summarized as follows: -

On 10th September, 2010 a judgment was delivered against the respondents evicting them from Land parcel No. Elgon/Namorio/261 registered and belonging to the applicant. A decree and order thereof was drawn and issued by the court on 27th September, 2010. It affected the respondents and their successors and agents. The decree contained a penal notice which stated that whoever is served with the decree and order and disobeys shall be liable to a contempt of court punishable by imprisonment or fine or both.

On 24th November, 2010 the decree was executed by evicting the respondents and their family members from the land as well as destroying all the respondents houses and other properties.

In December the same year however, the respondents re-entered the stated parcel of land, put up new houses, and settled on the land. They stay on the land to date.

Upon the above facts, the applicant asserts that the respondents acted in open and clear disregard of the court decree and order despite the penal notice and in open contempt of the court. Hence, they deserve being held in contempt of court and then punished for the same as the law provides.

There is evidence on the record vide an affidavit of service that the decree and order to be executed against the respondents was served upon the Officer Commanding a Police Station of Kapsokwony Police Station. There is no evidence, however, that the decree and order of the court intended to be executed against the respondents, was ever served upon the respondents before execution or even afterwards. The applicant herein points only to the affidavit of service upon the O.C.S. He points none to the respondents. The applicant's assertion in paragraph 4 of his supporting affidavit that service was effected remains true only in so far as the O.C.S of Kipsokwony Police Station is concerned. During the hearing, the applicant admitted that he had not served the respondents.

The respondents deny being served with the court decree and order. In view of the court's finding hereinabove, they are right.

It also emerges from the record that the respondents went back to court after the said eviction and obtained a stay order against eviction or further eviction. This is because they were challenging the judgment from which the decree and order arose, to set it aside. It appeared also that no formal application for execution by eviction had been filed at the lower court.

Be that what it may, the main issue before this court is whether the respondents committed contempt of court in returning to and re-occupying the land from which they had been evicted by court orders which had not been served upon the respondents before they were executed.

In my view, the power of court to commit for contempt is arbitrary and sometimes unlimited. It behoves the court to exercise it carefully and cautiously lest the court misuses it. For that reason, the court will only exercise the jurisdiction in clearest of cases. The court will observe with the greatest care, that the process laid down by law before contempt of court is established, has been strictly followed, especially by the party seeking that contempt has been committed.

In this case, the respondents stated that they were not served with the decree and order of eviction which also carried the penal notice. Such service is important because it is done so as to stop the respondents from doing what the court has ordered them not to do.

Furthermore, it was the responsibility of the applicants to show deliberate disobedience of court orders on the part of the respondents. This he failed to do when he admitted that he had not served them with the court decree and order of eviction, thus showing that disobedience committed, may have not been deliberate.

It is also important to note that such service of court order is expected to be personal upon the respondent unless it is shown that the respondent made that impossible.

I have no doubt in my mind that every lawful order of court must be obeyed and that failure to do so may lead to contempt of court. However, every case will be considered upon its own peculiar facts.

In this case, I find that the eviction order containing the penal notice was not served upon the respondents before eviction. They cannot, therefore, be said to have deliberately disobeyed he said court orders and be condemned of contempt when the orders they were supposed to obey were not priory served on them. This does not mean that the re-entry and re-occupation of L.R. No. Elgon/Namorio/261 by them was lawful or not. The applicant, herein subject to the result of the application to set aside the decree and order now lying in court, may wish to lawfully execute the orders if they will still be valid.

This application is however, dismissed with costs. Orders accordingly.

Dated and delivered at Busia this 7th day of March 2012.

D A ONYANCHA
JUDGE