



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MACHAKOS

Civil Appeal 25 of 2012

1. JULIUS MUTHUSI KINAMA

2. ISAIAH MUTISO MUTUNGI

3. ANDREW NZEKI.....APPELLANTS

VERSUS

1. SAMMY MUTISO MUENDI

2. MESHACK NZIOKI

3. SIMON MUSYOKI MULWARESPONDENTS

(Being an appeal against the ruling in Kangundo Senior Principal Magistrate's Court SPMCC No. 56/2011 by Hon S.N. Mwangi, R.M. on 16/2/2012)

RULING

1. If this were a legal thriller, it would probably be entitled “*Legal Technicalities on Stilts: Umpteenth Episode.*” Here is why. The Respondents in this case were the first to go on the offensive. On 19/07/2011, they took out a Plaint at the Principal Magistrate’s Court in Kangundo against the Appellants. In the main, the Plaint prayed for injunctive relief against the Appellants in the following terms:

- A permanent injunction restraining the [Appellants] herein from interfering with the worshipping and leadership of AIC Kaukiswa
- A release of the withheld church equipment, registers and all other assets.

2. Contemporaneously with the Plaint, the Respondents filed an application for interlocutory relief in much the same terms pending the hearing and final determination of the suit.

3. The parties appeared before the Learned Senior Principal Magistrate, J.K. Ng’eno on 08/09/2011 and, after the rare act of listening to *viva voce* evidence at the interlocutory stage, the Court issued a pithy order: That the *status quo* as of 04/08/2011 be maintained.

4. So what was the *status quo*? The Appellants have drawn attention to the description of the *status quo* by the 1st Respondent who in cross-examination during the *viva voce* hearing stated (at page 14 of photocopied proceedings):

Our church has 150 members. We worship outside the church house as the [Appellants] worship inside the church. It is on one Sunday when we entered the church to worship when Police came to chase us

away. That is why we came to court to seek redress. We entered the church last Sunday to pray without a court order. Chaos broke out.

5. As per the 1st Respondent's own words, the *status quo* prior to the important date of 04/08/2011 was that the Respondent's group was worshipping outside the church while the Appellants' group was worshipping inside the church.

6. However, according to the Appellants, on 11/09/2011, the Respondents locked the church, and when the Appellants cut the padlocks used to gain entry into the church, the Respondents forced entry into the church hence disrupting the church worship. It was this altercation that led to an application by the Appellants dated 20/09/2011 seeking to commit the Respondents to civil jail for contempt of court for disobeying the Court orders to maintain the *status quo*.

7. The Application to cite the Respondents for contempt of Court and then commit them to civil jail came before the Learned Resident Magistrate S.N. Mwangi on 02/02/2012. Ms. Madahana urged the application on behalf of the Appellants and made the case for the Court to cite the Respondents for contempt and condemn them to prison for disobeying the Court orders. She relied on a supporting affidavit filed which had enumerated the instances of disobedience of the Court orders and illustrated it with pictures.

8. The Respondents opposed the application and urged two points. They denied they were in contempt of Court in the first instance. In the second instance, they urged a technicality: their position was that the application was incompetently before the Court because no leave had been obtained as required by the terms of the law. The Learned Magistrate accepted the second prong of the submissions by Mr. Mutunga for the Respondents and dismissed the application with costs. In reaching that conclusion, the Learned Magistrate relied on the provisions of section 5(1) of the Judicature Act which reads that:

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.

9. The Learned Magistrate also relied on section 63 of the Civil Procedure Code which reads:

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed;-

(a)

(b)

(c) Grant a temporary injunction and in case of disobedience convict the person guilty thereof to prison and order that his property be attached and sold.

10. The Learned Magistrate then reasoned that the section 5(1) of the Judicature Act refers the local courts to the powers of the High Court of Justice of England in the exercise of the power to punish for contempt of Court. To that extent, further reasoned the Learned Magistrate, the procedure to be followed is that applicable at the High Court of Justice in England. That procedure, for woe or weal, includes the requirement that a person bringing an application to cite another one for contempt must, first, seek the leave of the Court. It is a procedure that is rigidly adhered to in England.

11. Although many of our judges have strongly objected to the rigid technicality (see, for example, the strong statement by Ojwang' J. (as he then was) in **Abdullahi Dadacha Dima V Arid Lands Resource Exploitation & Development, H.C.C.C. No.1322 of 2003**), many courts have concluded that they are bound by this requirement and so did the Learned Magistrate here.

12. Naturally, the Appellants were aggrieved and they appealed to this Court. However, pending the hearing and determination of their appeal, they filed the current application. The instant Application seeks

for orders that:

2) THAT the Honourable Court do enforce the Court

Order made on 8th day of September, 2011 against the Respondents pending the hearing and determination of this appeal.

3) THAT there be a stay of the proceedings in SPMCC 56/2011 until the hearing and determination of the Appeal

13. Before me, the learned counsels for the parties rehearsed the arguments they had raised in the Courts below. Ms. Madahana insisted that it was proper and necessary for this Court to act to restore its dignity. Mr. Kimathi, appearing for the Respondents, insisted that leave is required to apply to cite anyone for contempt in civil proceedings. In any event, he argued that the present Application is *res judicata* having already been dealt with by the lower court.

14. In my view, there is an easy way to resolve this matter even as the parties prepare to slog through the main appeal. The present order simply asks the Court to “enforce” an existing Court order. I am happy to do so. There is an order dated 04/08/2011. It is still subsisting. It requires the parties to maintain the *status quo*. They are hereby ordered to do so. And they are each warned that failure to adhere to the terms of the Court order will bear serious consequences which could include committal to civil jail and/or attachment of property. Keen observers will notice that I have done nothing more than state the law: parties are expected to obey Court orders at the pain of being found in contempt of the Court.

15. I think it imperative to give the parties guidance as to the attitudes of the Court towards the question of the requirement to seek leave first in applications of this kind. I am persuaded by the approach taken by Visram J. (as he then was) in *Fidelity Commercial Bank Ltd v Shamsherali Karim Kurji* [2006] eKLR that even before the new Civil Procedure Rules 2010 and the New Constitution came into power, there was no need to seek leave for applications of this kind. I think both the new Civil Procedure Rules, 2010 in its rewording of Order 40, Rule 3 makes it clear that disobedience of courts’ injunctive orders will no longer be constrained by the rigid rules obtaining in England. The specificity of the rule, in my view, makes it clear that it is meant to give the courts the power to punish disobedience without further reference to any other procedural requirements. If we consider the transcendental Constitutional Command to do justice without undue regard to technicality, it is easy to come to the conclusion that the requirement for leave in the face of Order 40, Rule 3, and in the face of the much animadversion of the technical requirement for leave is outdated, unnecessary, unduly technical, and, therefore unwarranted. Let the Respondents be duly warned.

DATED and SIGNED this 5TH day of JULY 2012.

J.M. NGUGI
JUDGE

DELIVERED and SIGNED in open court at MACHAKOS this 27th day of JULY, 2012.

GEORGE DULU
JUDGE