



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 324 OF 2012

JANE NDUTA

MAINA.....APPLICANT

VERSUS

MUTHONI (WA

MONICA).....RESPONDENT

R U L I N G

Before me is a Motion on Notice dated 21st June 2012 expressed to be brought under the provisions of Section 5(i) of the Judicature Act Cap 8 Laws of Kenya, Rule 52 of the Rules of the Supreme Court of England and section 3A of the Civil Procedure Act and all other relevant provisions of the law.

By the said motion, the applicant herein seeks the following orders:

- 1. That this matter be certified urgent, service dispensed with and heard ex parte in the first instance.**
- 2. That the respondent be committed to Jail for contempt of Court and the OCPD Kinangop Police Division do see to the compliance thereof.**
- 3. That costs do be provided by the defendant/respondent in any event.**

The Motion is based on the following grounds:

- (i) The applicant will continue to suffer irreparable damage and loss unless the delinquent Respondent is ordered punished for contempt of court.**
- (ii) The Mesne profits continue to accrue against the Respondent and the current loss of user of the usufruct of the suit land by the plaintiff is a persistent discomfort.**
- (iii) The suit land belongs to the Applicant and there is need to obtain vacant possession of the said land in favour of the plaintiff.**
- (iv) The Respondent has committed the offence of Forcible Detainer by occupying the Applicant's land contrary to the Provisions of the Penal Code Cap 63 of the Laws of Kenya.**
- (v) The jurisdiction to punish the Respondent (Contemnor)s for contempt of court for disobeying the two orders of the court in CMCC number 406 of 2012 per Hon. R.A Oganyo (Mrs) SPM of the**

2nd day of March and 25th day of April, 2012 is vested in the High Court of Kenya.

(vi) It is in the interests of substantive to punish the Respondent by a jail term for contempt since it is the way of upholding the dignity and authority of the court.

The application is supported by an affidavit sworn by **Jane Nduta Maina**, the applicant herein. In the said affidavit, the applicant deposes that she was bequeathed the suit plot no. 79 Murungaru Squatters Area in Nyandarua District by her late father Macharia Mwangi before his demise. According to her the father had been allotted the suit plot by the Government on 30th June 2006. However, the respondent has been residing therein and unlawfully using the same has without colour of right According to the deponent, on 2nd March 2012 an order of injunction was granted to the Applicant who was the plaintiff in CMCC No. 406 of 2012 restraining the respondent from unlawful utilisation of the suit land which the respondent disobeyed despite being served. On 25th April 2012, according to the applicant a further order was issued by the same court ordering the respondent to vacate the suit premises pending the hearing and determination of the same case and the OCS Kinangop Police Station was directed to ensure compliance threat. However, despite the foregoing the respondent has continuously been in contempt. This application was filed pursuant to leave of the Court granted on 12th June 2012 by **Hon. Mr. Justice Waweru**.

To the said affidavit the applicant has annexed copies of various documents through which she claims her entitlement to the said land. She has also exhibited copies of the orders issued on 22nd March 2012 and 17th May 2012 to which penal notices are endorsed as well as the order granting leave issued on 20th June 2012.

At this juncture, it is important to revisit the law of contempt in our jurisdiction. It has now been settled that, by dint of Section 5 of the Judicature Act, the High Court and the Court of Appeal in Kenya exercise the same power to punish for contempt of court as that exercised (for the time being) by the High Court of Justice in England. Section 5 of the Judicature Act provides 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 the subordinate courts. Our Judicature Act does not therefore itself expressly provide any substantive law governing contempt of court nor is it self sufficient. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England, is that the court comprises three (3) divisions – the Chancery, the Queens Bench and the Family Division. The jurisdiction of the High Court of Justice in England in matters of contempt of court is provided for in the Rules of the Supreme Court. Order 52 rule 2 of these Rules provides an elaborate procedure for the institution and prosecution of contempt of court applications. Under rule 2 subrule (3) of the Order 52 of the Rules of the Supreme Court, it is stated, in mandatory language, that the notice of the application for leave is to be given to the Crown Office not later than the preceding day and must at the same time lodge in that office copies of the statement and affidavit. It is settled that the equivalent of the Crown Office in Kenya is the Office of the Attorney General. Order 52 rule 2(1) of the Rules of the Supreme Court of England provides that no application to a Divisional Court for an order of committal against any person may be made unless permission to make such an application has been granted in accordance with the rule. Subrule (2) provides that an application for such permission must be made *ex parte* to a Divisional Court except in vacation when it may be made to Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and by an affidavit to be filed before the application is made verifying the facts relied on.

As the applicant's application has invoked both Section 5(1) of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, she bound herself to the procedure provided for contempt proceedings both under section 5 of the Judicature Act and Order 52 of the Supreme Court of England and that means the applicant must first seek leave to institute the proceedings, which in this case she has done. The application itself should also provide for the name, description and address of the person

sought to be committed. Once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. Under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity having been made without jurisdiction since the subrule states that “unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse”. See **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**

The law on the issue of service of the order stresses the necessity of personal service that as a general rule, no order of court requiring 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. Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order. Keeping the importance of personal service of the order in mind service on the advocates does not constitute personal service since it is the personal service on each of the contemnor that is required to be effected. See **National Hospital Insurance Fund Board of Management vs. Boya Rural Nursing Home Ltd Civil Appeal No. 46 of 2005.**

The person sought to be committed to jail has to be specified in the application, that is the name, description and address, together with the grounds on which his committal is sought. 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 do it. This requirement is important because the court will only punish as a contempt, a breach of injunction, if satisfied that the terms of injunction are clear and unambiguous, that the Defendant has a proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt.

Once a contemnor has been committed for contempt Order 52 rule 8(1) of the Rules of the Supreme Court of England states that the Court may, on application of any person committed to prison for contempt, discharge him. This means that a contemnor may, in suitable circumstances proved to the court, be discharged whether it arose from or in civil or criminal proceedings. The issue therefore is left at the discretion of the court which discretion will be exercised judicially taking into account the circumstances of the case. Where committal to jail is to enforce obedience to an order of the court, it will not in every case be continued until the order is obeyed and the contemnor may be released if it is clear that further imprisonment will not secure compliance provided that he has sufficiently been punished for his disobedience. The application to discharge should if possible, be made to the court which made the order of committal by a notice of motion but there are no hard and fast rules about it. It can therefore be dealt with by any Judge of the High Court in which the order was made if the Judge who made it is not available. Such motion takes precedence over all other applications in the relevant file at a given time. The contempt proceedings are intended to uphold the authority and dignity of the courts. It follows, therefore that if the court is satisfied that the contemnor’s conduct has been genuinely reformed to the extent once more fully recognising the authority, the court may, in its discretion, revise the punishment earlier meted against the contemnor. Such power and authority of the court is not donated under Order 45 Civil Procedure Rules, but under the English Order 52 rule 8 of the Supreme Court Rules and imported to our jurisdiction by section 5 of the Judicature Act (Cap 8). The exercise of such jurisdiction and discretion, is not intended to reverse the contempt order made on the ground that such order is in any way wrong or contrary to the law but the court discharges the contemnor on the basis that the conduct of the contemnor which threatened or stood to undermine the integrity, dignity, honour and authority of the court has been purged to the satisfaction of the court and that the contemnor has satisfactorily undertaken not to repeat such conduct. The court would even have authority and power under the circumstances, to take a different course other than discharging the contemnor. For example the court may in suitable case, substitute the imprisonment term, not with a discharge from prison *per se* but with a fine or taking of security for good future conduct or behaviour, or even grant an injunction against the repetition of the act of contempt. The conclusion, therefore, is that the only limitation is that such discretion must be exercised carefully and judicially. See **Re Barrell Enterprises [1972] 3 All ER 631; Yager vs. Musa [1961] 2 QB**

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I have looked at the application which gave rise to the grant of leave. The application was correctly brought by way of Originating Notice of Motion dated 8th June 2012. It was supported by an affidavit by the applicant sworn on 11th June 2012. However, there was no statement filed together with the said application. In **Republic vs. The Attorney General Ex Parte Bindi A. Gadhia Kisumu HCMA No. 124 of 2005 Mwera, J** held *inter alia*:

“It cannot be in dispute that section 5(1) of the Judicature Act does import into our jurisdiction the application/procedure for the time being in use in the United Kingdom as regards committal for those in disobedience of the court orders and the provision of law in England which up to this time the courts in Kenya should invoke to commit for contempt is Order 52 of the Supreme Court Practice Rules and the latest book in which that is traced is the SCPR, 1997...The applicant having admitted that he did not file the application for leave along with the statement and the verifying affidavit, both mandatory features of such move, then the application is fatally flawed from the beginning...The application for leave which should precede the substantive motion fell foul of the law when that application was not notified to the registrar a day before its hearing. All the above proceeds on the basis that the Divisional Court in England has its counterpart in the High Court here while the Crown Office should be equated to the registrar’s office...Failure to do what the law requires cannot be described as slight procedural mis-steps. There were/are fundamental in the sense that committal proceedings are about a person’s liberty”.

Save for equating the Crown Office to the Registrar’s Office, I associate myself with the learned Judge’s holding on the other issues. In my considered view, the Crown Office in this country is the Attorney General’s office. Whereas I was prepared to accept the supporting affidavit *in lieu* of the verifying affidavit, I am not prepared to excuse the omission of the statement. The failure to comply with the foregoing therefore renders the committal proceedings incompetent. Having so found and in order not to prejudice any competent application which the application may be minded to bring in future, I am not prepared to go into the merits of the application.

It follows that the Notice of Motion dated 21st June 2012 is struck out but with no order as to costs.

Ruling read and delivered in court this 24th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of Mr. P N Mbugua for the applicant