



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 45 of 2008

PAUL MUNYAO

KIVILA.....PLAINTIFF

VERSUS

ANNE NDELEVE

MUNYAO.....DEFENDANT

RULING

1. On 26th November 2009 this court (Lenaola, J) found the Defendant to have been in contempt of the order made in this suit on 1st August 2008. That order was a temporary injunction restraining the Defendant-

“...from interfering with, harassing or threatening the Plaintiff’s tenants or demanding or receiving or collecting rental income from the said tenants occupying *L.R. Nos 337/1970 and 337/1971, ATHI RIVER and Plot NO. 55, MLOLONGO*, or trespassing into the said premises, pending the hearing and final determination of this suit.”

2. The court sentenced the Defendant to serve six (6) months in civil jail but suspended the sentence pending hearing and determination of the Defendant’s application by **notice of motion dated 14th December 2009**. By that application the Defendant sought an order to review and set aside her conviction and sentence for contempt of court. The application was brought under **Order XLIV, rule 1(1)** of the then **Civil Procedure Rules** (the **Rules**). It is the subject of this ruling.

3. The grounds for the application as set out on the face thereof are, in effect-

- (i) That the notice to tenants, annexed to the Plaintiffs contempt application, and upon which the court’s finding of contempt and the sentence imposed were founded, was a forgery and was not authorized or signed by the Defendant.
- (ii) That the Plaintiff did not clearly tell the court how he came by the said notice to tenants.
- (iii) That the contempt was not proved against the Defendant to the “required standard of proof beyond reasonable doubt”.
- (iv) That the Plaintiff’s application upon which the contempt findings were made was incompetent and untenable.

4. There is a supporting affidavit sworn by the Defendant. I have read the same.

5. The Plaintiff has opposed the application by replying affidavit filed on 17th December 2009. Grounds of opposition emerging therefrom include-

- (i) That the grounds for the application are “frivolous, baseless and outrageous”.
- (ii) That the allegation of forgery is mischievous and an after-thought.
- (iii) That there are no proper grounds upon which the order for review sought can be granted.

6. I have considered the oral submissions of the learned counsels appearing. In addition the Plaintiff had filed written submissions on 9th June 2010 (pursuant to an order of the court) which I have also considered. No authorities were cited.

7. Under Order XLIV, rule 1(1) of the Rules under which the application is brought, an order for review can be made only if-

- (a) the party applying has discovered a new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order sought to be reviewed was made; or
- (b) on account of some mistake or error apparent on the face of the record; or
- (c) for any other sufficient reason.

8. The contempt application was heard *inter partes* and a considered, reserved ruling was delivered.

9. The Defendant does not state in her supporting affidavit whether the alleged forgery of the notice to tenants is a new discovery, and if so when she discovered the same. All that she states is the tenuous argument that because the Plaintiff was overseas and the affidavit he swore in support of his contempt application was made in the United States of America, he ought to have shown clearly how and when he came by the notice alleged to have been authored by the Defendant. Not once does the Defendant state that when the contempt application was heard *inter partes* she did not know, despite exercise of due diligence, that the notice to tenants alleged against her, and which was clearly in contempt of the court order, was a forgery, or when she discovered it was a forgery. The Defendant cannot therefore claim discovery of a new and important matter or evidence which, after exercise of due diligence, was not within her knowledge, or could not be produced by her, at the time the contempt application was made.

10. The Defendant has also not alleged any mistake or error apparent on the face of the record.

11. Is there any other sufficient reason shown for the review sought? I am afraid not. The other issues she has raised, that is that the contempt was not proved against her to the required standard, and that the contempt application was incompetent, were matters that were canvassed, or ought to have been canvassed, at the hearing of the application. The Defendant is merely trying to litigate again what has already been litigated. This cannot be permitted. She ought to have appealed.

12. In the circumstances, I find not merit in the application. It is hereby dismissed with costs. The Defendant shall be arrested and committed to civil jail forthwith to serve the sentence imposed upon her on 26th November 2009. It is so ordered.

13. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thanks God I have now regained my full health.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER
2012**

ASIKE-MAKHANDIA
.....
JUDGE