REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 26 of 2012

SIMON BARTOCHO.....INTERESTED PARTY

VERSUS

KIPROP KIPTOO.....RESPONDENT

RULING:

The Application is brought by way of Notice of Motion under the provisions Section 5 of the Judicature Act and Order 52 of the Supreme Court of England and Sections 3 and 3A of the Civil Procedure Act. The Applicant is seeking that an order of committal be made against the Respondent for contempt of court orders.

The Applicant relies on the grounds on the face of the Application and on the Supporting Affidavit made by the Applicant on the 28th May, 2012. There are also photographs of the suit land annexed to the Affidavit.

The Applicant avers that there is an existing order dated the 12th March, 2012 that restrains the Respondent from entering the suit land namely parcel **NO. 177/MOSOP/KAPCHORUA**

The order further barred the Respondent from erecting structures and running an educational facility on the land.

The Order was purportedly served on the Respondent on the 17th March (a year not included) together with the Penal Notice by the process server, by the name David Kipyegon.

In cross examination the process server confirmed having served the Respondent with both the order and Penal Notice before the Respondents advocate, but the Respondent refused to endorse his signature on the documents in acknowledgment of service.

The Applicant avers that despite having been served with the Order the Respondent chose to disregard the Order.

Counsel for the Applicant urged the court to find the Respondent in contempt of court orders and to proceed to commit him to civil jail for a period of six (6) months.

The Application was opposed by Counsel for the Respondent who submitted that the procedural requirements were not adhered to. That no notice was given to the Attorney General and also to the Registrar of the Supreme Court, thus rendering the application fatally defective. That the Applicant

omitted to file a Verifying Affidavit and that the Penal Notice endorsed on the court order was not in the prescribed form thus rendering the order defective.

Counsel submitted that the Affidavit of Service was defective in that it did not include the year in which the order was served.

The Respondents Counsel further submitted that the order was misplaced and misconceived as the order sought to restrain the Respondent from entering upon the suit land yet he had all along been in possession of the suit land.

Counsel urged the court to dismiss the application with costs to the Respondent.

Upon hearing the arguments and submissions of both Counsel for the Applicant and the Respondent this court finds the following issues for determination;

i. Compliance with mandatory provisions of Sec 5(i) of the Judicature Act and Order 52 Supreme Court of England Rules.

ii. Contempt of court orders

iii. Committal to civil jail.

On the first issue, this court concurs with the submissions of Counsel for the Respondent, that the procedural requirements of the Judicature Act were not adhered to by the Applicant.

The Applicant has not produced a copy of any Notice of Intention to institute the contempt proceedings issued to the Attorney General. The Applicant has also not produced a Notice to the Registrar.

The Application is brought under and invokes the provisions of Section 5 of the Judicature Act and Order 52 of the Supreme Court of England Rules, therefore the Applicant must strictly adhere to the procedural requirements.

Refer to the case of **JOHN MUGO GACHUKI -VS- NEW NYAMAKIMA LTD HCC NO. 456 OF 201**1 where Odenga J held that failure to notify the Attorney General was not;

".....a mere procedural technicality but a matter of substance....."

This court, therefore finds that failure to adhere to the procedure set down in law renders the application incompetent.

On the second issue, the Applicant has annexed photographs that are dated 23rd March, 2012 and relies on these photographs to prove the alleged encroachments and developments that constitute the unlawful acts committed by the Respondent in disobedience of the court order.

In contempt of court proceedings are quasi-criminal in nature and the threshold of proof is a bar higher than a mere balance of probabilities as required in civil matters. See case of **KENYA REVENUE AUTHORITY v DEVJI MEGHJI & BROTHERS LTD (2009) eKLR**

This court is of the opinion that from the photographs annexed, it is not possible for this court to determine whether the structures and developments were placed on the suit land before or after the order was served upon the Respondent.

The Applicant ought to have annexed a series of photographs showing the progressive developments on the suit land before and after service of the order.

The Applicant has not satisfactorily demonstrated to the court that the Respondent has flagrantly and willing disobeyed the court order.

CONCLUSION:

For the reasons stated above this court finds that the Application is incompetent and also lacks merit and it is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED and DELIVERED at Eldoret this 17Th day of December 2012

A.MSHILA
JUDGE