



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CIVIL APPLICATION NO.41 OF 2010

MOSES GITONGA

T/A RECTRON INNOVATORS.....1ST APPLICANT
JOSEPH GITHITU WANGAI.....2ND APPLICANT
CHEBET KIBET.....3RD APPLICANT

VERSUS

COUNTY COUNCIL OF NAKURU..... 1ST RESPONDENT
JOSEPH MARIGI..... 2ND RESPONDENT
JOHN TSUMA..... 3RD RESPONDENT
DANSON MAINA.....4TH RESPONDENT

RULING

On 1st October, 2009, this court made the following order:

“(b) THAT pending the hearing and determination of the application dated 8th day of September, 2009, this Honourable court be and is hereby pleased to issue an order of injunction restraining the 2nd to 4th defendants, by themselves, their agents, their servants and/or representatives from disposing off or in any manner interfering with the plaintiff’s parcel of land to wit, GILGIL UNSURVEYED COMMERCIAL PLOT NO. C, D, A.....”

The applicant now claims in the instant application that the 2nd to 4th respondents have violated the above order and consequently seeks to have them committed to civil jail for contempt of court.

The applicant has averred that the 2nd to 4th respondents were served with the order in question; that the 2nd to 4th respondents held a meeting in which they sanctioned that members of JUA KALI COOPERATIVE SOCIETY (the company) to take over the suit premises; that the 2nd to 4th respondents have been writing letters to comment or/and complain to various Government departments when the outcome of the dispute was pending in court; that the letters are defamatory of the applicant; that the 2nd to 4th respondents have vowed to reclaim the suit property and referred to the applicant as a land grabber.

The 1st respondent has denied acting in breach of the court orders and that all he did as the chairman of the company was to invite members to a Special General Meeting; that the letters in question

do not amount to disobedience of the court order; that the minutes of the alleged meeting relied on by the applicant are not authentic; that the meeting only resolved to settle members of the company in the portion not in dispute. The 3rd respondent has similarly denied violating the court order. The 2nd respondent passed away.

I have considered these arguments as well as the written submissions on behalf of both sides. It is common ground that the court issued orders restraining the respondents from:

“i) disposing of parcel of land GILGIL UNSURVEYED COMMERCIAL PLOT NO. C, D, A, or in any manner

ii) interfering with that parcel of land.”

The two broad questions to be determined are whether the correct procedure for the institution and prosecution of contempt proceedings have been complied with and whether the respondents were in contempt of court.

The procedure in contempt of court proceedings has eluded both the court and practitioners. This can only be attributed to the requirement of **Section 5(1)** of the **Judicature Act** which stipulates that:

“5(1). 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.”

This means that each time a court is seized of an application for contempt of court it must ascertain the state of the law of contempt in England. The law of contempt in England is for the time being contained in the Rules of Supreme Court, providing for the following procedure;

- i) an application for contempt must be preceded by an application for leave by way of chamber summons;
- ii) the application for leave (by chamber summons) must be supported by a statement setting out the names and description of the applicant and those of the contemnor, including his address;
- iii) the chamber summons must also be supported by an affidavit verifying the facts relied on;
- iv) the applicant must give notice of the application for leave not later than the preceding day to the Attorney General together with copies of the statement and affidavit;
- v) when leave has been granted to apply for an order of committal, application for such an order (of committal) must be brought by way of a notice of motion;
- vi) there must be at least 8 clear days between the date of the service of the motion and the day named for the hearing unless the court otherwise directs;
- vii) leave will lapse if within 14 days of such leave the motion is not entered for hearing;
- viii) the notice of motion accompanied by a copy of the statement and affidavit in support of the application for leave must be served personally on the contemnor unless such service is dispensed with by court.

The application before me is a complete muddle. Leave was sought by way of a motion instead of chamber summons, while the substantive application brought by chamber summons and not a motion.

The application for leave was not supported by a statement or a verifying affidavit. Notice to the

Attorney General was given after the application for leave had been filed. Indeed, all the steps set out in the foregoing paragraphs were not adhered to. Because contempt of court proceedings are by nature criminal, the procedure for instituting and prosecuting such application must be observed scrupulously.

Now, did the respondents disobey/violate the orders issued on 1st October, 2009? I reiterate for the final time that the respondents were restrained from disposing of or interfering in any manner with the suit property. The respondents are accused of convening a meeting of the members of the company where it was resolved that the members would take over their property.

I have perused the minutes of the alleged meeting filed with this application. The minutes are not signed. Secondly, none of the six resolutions passed concern the order in question. As a matter of fact, resolution No.(ii) is only to the effect that members would support the officials involved in the case before the court. Perhaps the applicant was irked by resolution (i) which directed that he be barred from the society as a member. None of these, I reiterate, constitutes a violation of the order of injunction in question.

For these reasons, the application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 24th day of February, 2011.

**W. OUKO
JUDGE**