



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 367 OF 2010

**ERERI COMPANY.....PLAINTIFF/
APPLICANT**

VERSUS

**GEORGE ANYONA.....1ST
DEFENDANT/RESPONDENT**

**PAUL KARANJA.....2ND
DEFENDANT/RESPONDENT**

**HARUN KAMAU.....3RD
DEFENDANT/RESPONDENT**

**SAMUEL GATHERU.....4TH
DEFENDANT/RESPONDENT**

AND

**J. KAMAU MURIGU.....1ST
CONTEMNOR**

**GEORGE KAMAU NJOROGE.....2ND
CONTEMNOR**

**JAMES MBUGUA KAROBA.....3RD
CONTEMNOR**

**JOSEPH MOKO KAHUNYURO.....4TH
CONTEMNOR**

RULING

On 23/12/2010, Eleri Company Ltd, the plaintiff herein, filed a Chamber Summons dated 22/12/2010 seeking a temporary injunction to restrain the defendants and its agents from entering, occupying, or in any way interfering with all the entire parcel of land known as L.R. No.8622 situate at Kijabe, Longonot. On 29/12/2010, counsel for the plaintiff appeared before J. Ouko under certificate of urgency and the Judge granted a temporary injunction in terms of prayer 2 of the Chamber Summons, granting the temporary injunction pending hearing of the application inter partes on 12/11/2011.

On 24/1/2011, the plaintiff/applicant filed a Notice of Motion pursuant to **Order 40 Rule 3** of the **Civil Procedure Rules** in which he seeks to have the 2nd, 3rd and 4th defendants, **Paul Karanja, Harun Kamau and Samuel Gatheru** and the 1st to 4th contemnors namely **J. Kamau Murigu, George Kamau Njoroge, James Mbugua Karoba and Joseph Moko Kahunyuro** to be committed to civil jail for a period of 6 months and their properties attached for being in contempt of the court order made on 29/12/2010. The application was based on grounds found in the body of the application and an affidavit sworn by Njuguna M. Kungu, the chairman of the Board of Directors of the plaintiff. He deponed that on 29/12/2010, this court issued an order restraining the defendants and contemnors from interfering with L.R. NO.8622 and the order was duly served as evidenced by an affidavit of service filed and on record. He deponed that on 8/1/2011, the 1st contemnor, J. Kamau Murigu, a former employee of the plaintiff convened a meeting at the plaintiff's former offices at Longonot which resulted in the formation of ERERI DEVELOPMENT GROUP and the 2nd to 4th defendants were appointed as officials i.e. chairman, Secretary and Treasurer respectively. The new group convened a meeting on 12/1/2011 and declared that they would continue harvesting sand from the suit land and take over from the plaintiff's Board of Directors, the management of the water supply services from the suit land. It is denied that the plaintiff company ever asked J. Kamau Murigu to convene a meeting on the suit land Plot No.8622 in contravention of a court order. It was also deponed that the 2nd to 4th respondents and the contemnors have continued with the acts of harvesting sand on the suit land leading to degradation of the land. The police and the Chief of the area were not aware of the meeting of 12/1/2011 and have not assisted to stop the disobedience of the court order. Mr. Wachira, the applicants' counsel urged that this application is brought under **Order 40 Rule 3** of the **Civil Procedure Rules** and it is properly before this court; that he was not required to come under **Section 50** of the **Judicature Act** and **Order 52** of the **Supreme Court Practice Rules** of England.

Ms. Ateya appeared on behalf of both the defendants and the contemnors. She opposed the application based on a preliminary objection and grounds of objection filed by the 2nd to 4th defendants/respondents to the effect that the application is incompetent in that it violates the **Supreme Court Practice Rules of England**; it is brought in bad faith since there has been concealment of material facts and amounts to an abuse of the court process. Ms Ateya submitted that the applicant had not complied with the law on how an application for contempt should have been commenced, by first seeking leave, followed by a substantive Notice of Motion in accordance with **Order 52** of the **Supreme Court Practices of England**. She relied on the cases of:-

1. AWADH V MARUMBU (2004)1 KLR 454;

2. SHER KARUTURI LTD V BERG ROSES (K) LTD HCC 347/2008;

3. JOSEPH GICHOYA MBOGO V PATRICK DENNIS O'KEEFFEE & ANOTHER;

4. DUNCAN MAMUEL MURIGI V KENYA RAILWAYS CORPORATION (2008) eKLR.

The contemnors filed a notice of Motion dated 2/2/2011, seeking to stay the contempt proceedings in the application dated 24/1/2011. They sought to be heard and in the alternative, the application dated 24/1/2011 be struck out. The application was supported by the affidavit of Kamau Murigu. The contemnors claim to be total strangers to the issues before the court, that they are not agents of the defendants named in this suit, they have not been served with any court orders nor were they aware of the court orders.

I have considered the submissions by both counsel, the affidavits on record and the case law that was cited in support. I think that the issue I need to resolve first is whether the application before the court is competent. The applicant purported to bring this application under **Order 40 Rule 3** of the **Civil**

Procedure Rules, (2010). The rule reads as follows:-

“3(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

The above rule only deals with the consequences of disobedience of an injunction order. In all the 4 authorities cited Ms. Ateya, counsel for the defendants and contemnors, the courts have held that the jurisdiction of the court to maintain an application for contempt and punish for contempt is **Section 5** of the **Judicature Act**. That **Section** provides that the power to punish for contempt is that possessed by the High Court of Justice in England. **Section 5** reads as hereunder:-

“(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.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

In England the procedure for bringing an application for contempt and punishing for contempt is that prescribed under **Order 52** of the **Supreme Court Practice Rules**. It reads as follows:-

“1.- (1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.

(2) Where contempt of court –

(i) any proceedings before a Divisional Court of the Queen’s Bench Division, or

(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, or.....”

“2.- (1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to a Divisional Court, except in vacation when it may be made to a 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.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office and must at the same time lodge in that office copies of the statement and affidavit.

(4) Where an application for leave under this rule is refused by a judge in chambers, the applicant may make a fresh application for such leave to a Divisional Court.

(5) An application made to a Divisional Court by virtue of paragraph 4 must be made within 8 days after the judge's refusal to give leave or, if a Divisional court does not sit within that period, on the first day on which it sits thereafter."

"3.- (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to a Divisional Court and, unless the court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under Rule 2 must be served personally on the person sought to be committed.

(4) Without prejudice to powers of the court or judge under Order 65 rule 4, the court or judge may dispense with service of the notice of motion under this rule if it or he thinks just to do so."

My understanding is that the application has to be commenced by a Chamber Summons seeking leave of the court, supported by a statement of facts and a verifying affidavit. The Attorney General has to be notified the proceedings. Once leave is granted, the applicant then files a Notice of Motion. The applicant has done none of the above. As I have noted earlier **Order 40 Rule 3** only provides for the consequences of disobedience but both the substantive law and procedure are found in **Section 5 of the Judicature Act** and **Order 52 of Rules Supreme Court of England** respectively. I find that the applicant did not move the court in the proper manner and in my view the application is incompetent and cannot be sustained.

Order 52 Rule 3(3) of the Supreme Court Practice Rules requires that a contemnor be served personally with the Notice of Motion, statement and affidavit. The contemnors deny being served with both the order of court and the Notice of Motion. The cited contemnors deny that they were ever served with the order of the consent dated 29/12/2010. They were not parties to the suit and should have been served. No affidavit has been filed showing/demonstrating how the cited persons were served with the order and the penal consequences. There is totally no evidence of service on the contemnors at all.

Further, for a party to be held to be in contempt of a court order, the applicant should have demonstrated the nexus of the contemnors with this matter. The same has not been shown. The cited parties claim to be strangers to the whole application.

In respect of the defendants, an affidavit of service was filed in court on 12/1/2011 by Daniel Kuria, a process server. He deponed that he had served the defendants with the court order on different dates spelt out in the affidavit. The said process server did not however, exhibit the copy of the application that was served and acknowledged. The process server never disclosed how he knew the defendants before he could serve them neither did the process server disclose who identified the defendants before service. Contempt proceedings being quasi criminal in nature, the standard of proof is higher than in civil matters. The applicants should demonstrate that they served the parties cited with the court order but they willingly and flagrantly disobeyed. In **RE BRAMBLEVALE LTD [1970] CH 128 at p 137**, Lord Denning MR stated as follows:-

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. It is not proved by showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."

I find that the plaintiffs have not demonstrated that they served the defendants and the cited parties with the court order.

In sum, the court finds the Notice of Motion dated 24/1/2011 to be incompetent, it is also unmerited and is hereby dismissed with costs to the defendants and cited parties.

DATED and DELIVERED this 13th day of March 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the plaintiff.

Ms Ateya for the defendants.

Ms Ateya for the cited parties.

Kennedy – Court Clerk.