



No. 2806

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 63 OF 2009

JACOB NYAOSO MAERA.....APPLICANT

-VERSUS-

JOSEPH NYAKUNDI MOMANYI.....RESPONDENT

RULING

By a Notice of Motion dated 24th December, 2009, **Jacob Nyaosa Maera**, hereinafter “*the applicant*” sought as against **Joseph Nyakundi Momanyi** hereinafter “*the respondent*” orders that, he be committed to prison for a period of six (6) months, for deliberately disobeying this court’s order of 1st April, 2009, that he be ordered to purge his contempt by reinstating the applicant to full occupation of the suit premises and finally, that the respondent be condemned to pay the costs of the application.

The application was made pursuant to the leave granted by this court on 14th December, 2005 and was expressed to be brought under section 5 of the **Judicature Act**, order 52 Rule 3 of the **Supreme Court Rules**, 1999 and sections 3 and 3A of the **Civil Procedure Act**.

The grounds in support of the application were that on 1st April, 2009, this court granted a mandatory injunction compelling the respondent to reinstate the applicant into the suit premises. The applicant extracted the order with a penal notice endorsed thereon and had it served upon the respondent. Despite such service, he had nonetheless refused to obey or comply with the same totally. Court orders are not made in vain, and the dignity of the court had to be maintained at all costs.

In support of the application, the applicant swore an affidavit in which he deponed in pertinent paragraphs that the court order of 1st April, 2009 was duly served upon the respondent on 9th April, 2009. However, the respondent had refused to open the suit premises to enable the applicant be reinstated therein in terms of the court order and continues to do so to date. That the respondent had brazenly ignored the court orders and refused to open the premises for the applicant, hence he deserved to be punished for contempt. Indeed the respondent had since taken over all the properties of the applicant and converted them to his personal use without the consent of the applicant. The court order was quite clear and unambiguous and no reason so far had been given for the respondent's refusal to comply with the same.

In response, the respondent filed an affidavit in reply opposing the application. He deponed that he was not in a position to comply with the order because he was not the registered proprietor of land parcel **No. Bomatara/833, "the suit premises"** nor does it exist. That though the order was obtained on 1st April, 2009 it was not until 9th April, 2009 that it was served on him. That on 16th April, 2006 he had filed an affidavit in reply explaining his inability to carry out the order. In that affidavit he had deponed in pertinent paragraphs that, the suit premises were non-existent, the applicant was not and had never been his tenant, the applicant was guilty of bad faith in that he had not disclosed to the court, the true facts obtaining as regards the suit premises, that the lodgings section, that the applicant alleges to have been evicted from, were expressly excluded from the lease agreement as from 1st January, 2009. The applicant therefore voluntarily surrendered the suit premises to the respondent which did not form part of the premises he occupies as per the lease agreement. He was the registered proprietor of land parcel **West Kitutu/Bomatara/1810** whereas the applicant was a tenant in the premises known as **West Kitutu/Bomatara/1808** registered in the name **John B. Momanyi**. The respondent therefore claimed that he was not at all in contempt of any court order.

Before the application could come up for interpartes hearing, **Mr. Mokuu** and **Mr. Masese**, learned counsels for both the applicant and respondent filed written submissions to the application. Their intention was therefore clear. They wished to canvass the application by way of written submissions. This court therefore granted their wish. I have carefully read and considered the written submissions and authorities cited.

The main issues to be determined herein as far as I can see, are:

- i. Whether indeed this honourable court issued a court order on 1st April, 2009.***
- ii. Whether the court order was extracted and the same contained a Penal Notice.***
- iii. Whether the said court order was personally served on the respondent.***
- iv. Whether the respondent has actually disobeyed the court order...".***

On the first issue, I have perused the court record and I am fully satisfied that **Hon. Justice Musinga** did issue an order of mandatory injunction on 1st April, 2009. It was in these terms: ***"...(i) That there be a mandatory injunction compelling the defendant to reinstate the plaintiff to full occupation of the suit premises..."***. The respondent in his pleadings has not denied knowledge of the said order. Infact he confirms that he is aware of the same in his replying affidavit. He could not have pleaded inability to comply with the same for various reasons unless he was aware that the court order existed. I therefore find and hold that a court order was issued in this court on 1st April, 2009 and is still in force.

Regarding the second issue as to whether the order was extracted and whether the same contained a Penal Notice, I have seen the original order extracted on 3rd April, 2009 based on the ruling delivered on 1st April, 2009 as aforesaid. The said order has been attached as annexure JNMI in the verifying affidavit of the applicant. The extracted order has a Penal notice at the bottom. I therefore find that a proper order was extracted and the same did contain a Penal notice in the following words:-

“... PENAL NOTICE

Any party served with this order but does not comply with the said order will be cited for contempt of court order and shall be liable to a fine or jail term not exceeding six (6) months...”.

For this court to cite any party for contempt of court, the order allegedly disobeyed must have been personally served upon those to be cited. The applicant has annexed an affidavit of service by **Isaac Nyangena Kemari**, a process server as annexure JNM2. The process server has deponed that on 9th April, 2009 at about 3.00p.m he served the respondent with the court order, Notice of Motion together with the supporting affidavit. He accepted service by signing on the original. Again in his replying affidavit to the application, the respondent has acknowledged receipt of the court order. I am therefore on the whole satisfied that the respondent was personally served with the court order with a penal notice endorsed thereon.

Lastly, this court has to be satisfied that the respondent has indeed breached the terms of the court order for it to cite and punish him for contempt. The applicant has submitted that the order issued was clear and unambiguous and was served on the respondent personally. Save the bare denial that he is unable to comply with the order, the respondent nonetheless acknowledges that he was duly served with the order. It was clear from the lease agreement that the suit premises belonged to the respondent. It was the respondent who handed over vacant possession of the suit premises to the applicant and it is him who had dispossessed him of the same. It will be a mockery and indeed travesty of justice for the respondent to now turn around and claim that he is unable to comply with the order when it was him who voluntarily executed the lease agreement and put the applicant into quiet possession of the suit premises until he intentionally and unlawfully dispossessed him of the same. In my view the respondent has brazenly disobeyed the order and deserves to be punished and made to purge the contempt by complying with the same.

The respondent has argued is that the order which the applicant seeks to have him punished for breaching it is flawed. It is not consonant with the prayers in the application. That reinstatement could not have been ordered without according to him opportunity to be heard, that the applicant was seeking to be mandatorily reinstated without disclosing when he was evicted, the court was misled at the interlocutory stage to craft an order that is permanent in nature and which order could only issue after interpartes hearing, the exparte order ought to have been served within 3 days and that the respondent had no legal or contractual relationship with the applicant. Though this court had power to punish for contempt, it would be a travesty of justice to punish a party for an order that has been irregularly obtained and which expired before it was served. Finally, he submitted that the order obtained was incapable of enforcement as the suit premises are non-existent. When the applicant filed the suit in March, 2009 land parcel No. **West Kitutu/Bomatara/833** did not exist, the same having been subdivided as pleaded.

As I understand it, citing and punishing a party for contempt is one way of ensuring that court orders must be obeyed by all and sundry. For the rule of law and good order to prevail, it is essential that the authority and dignity of the court be upheld at all times. Contemnors undermine the authority and dignity of the courts and must be dealt with firmly so that the court's authority is not brought into disrepute. It is not for the court to allow a party to steal a match on it and obtain undeserved forensic advantage by willfully and flagrantly disobeying court orders. It is the unqualified obligation of every person against whom an order has been made by court of competent jurisdiction to obey it unless and until that order is discharged. It matters not that the order may be irregular, illegal, unlawful or even made without jurisdiction. As long as such order has not been reviewed, varied or set aside, it is the duty of the person against whom it is issued

to comply and perhaps complain later. Such person has no right to disobey the order in the knowledge that it is illegal and or irregular. He is not at liberty to misinterpret or interpret the order so as to satisfy his selfish interest. He must comply with the order first and complain later and put mechanisms in place to have it set aside or varied.

Of course it is the responsibility of the person seeking the order of contempt to show that there has been wilful disobedience of the order by the contemnor since the jurisdiction is practically arbitrary and unlimited and should be most jealously and carefully invoked. It must be exercised cautiously to avoid cases of overzealous applicants abusing the process of the court. Proof of contempt as we all know is a level above proof on a balance of probabilities and below proof beyond reasonable doubt.

See generally: **Commercial Bank of Africa Ltd –vs- Isaac Kamau Ndirangu Civil Appeal No. 137 of 1995 (UR)**, **Refrigeration and Kitchen Utensils Ltd –vs- Gulabchand Popattal Shah and Others, civil application number Nai 39 of 1990 (UR)**, **Gordhan Karsan and Company –vs- Paramount Engineering Works Ltd, Ksm HCCC No. 371 of 1995 (UR)**, **Hadkinson –vs- Hadkinson (1952) PD 285**, **Sean Francis Jones –vs- Cedar Rutakyamirwa Morgan and Another HCMC App. No. 152 of 2004 (UR)** and **Margaret Ogwenko Okoth –vs- Gabriel Onyango Wade and Another KSM HCCC No. 44 of 2003 (UR)**.

Applying the above considerations to the circumstances of this case, it is not in doubt that the order issued by this court was clear and unambiguous. It simply called upon the respondent to reinstate the applicant to full occupation of the suit premises the subject of the lease agreement between them. The respondent knew what was meant by the suit premises in the order since he had entered into a lease agreement with the applicant. There was only one such lease agreement between the parties and one suit premises. He cannot therefore hide behind the fact that the suit premises in which he had been ordered to reinstate the applicant does not exist. The two had been in a tenant/landlord relationship over the suit premises for a while going by the lease agreement exhibited. Accordingly the respondent cannot be heard to say that the applicant came to court to sue for the premises which did not exist. If he misrepresented to the applicant that the suit premises existed and on that basis got the applicant to enter into a lease agreement with him, he cannot turn around and plead non-existence of the suit premises. He cannot be allowed to benefit from his own mischief.

The respondent has raised the issue that the order was flawed in that the prayer as per the Notice of motion was for temporary injunction to restrain the respondent from further evicting the applicant from the suit premises. However the order that came out was as if the parties were heard and mandatory injunction issued. I do think that this submission was made with the benefit of the judge's ruling in mind. In his ruling dated 1st April, 2009, the **Musinga J.** concluded by saying “...***Consequently, I grant a mandatory injunction compelling the defendant to reinstate the plaintiff to full occupation of the suit premises...***”. In any event, even if the order was at variance with prayers in the application, it was still the duty of the respondent to comply with the same and complain later. It was not upon him to examine the order vis a vis the pleadings and choose whether or not to obey the same.

The order may have been drastic and presupposed that the applicant had been evicted. Therefore the order which effectively meant reinstatement of the applicant into the suit premises should not have been made without first according the respondent an opportunity to be heard. This is all fine as submitted by the respondent. However, a careful appreciation of Judge's ruling shows that he was alive to the principles that guide courts in granting mandatory injunction on an interlocutory application. He made reference to the case of **Kenya Breweries Ltd & Anor –vs- Washington O. Okeyo, C. A No. 332 of 2000 (UR)**. In the circumstances I do not think that the respondent is right in thinking or submitting that such a draconian order could not have been issued without him being accorded an opportunity to be heard.

Whether or not a party can come to court to seek reinstatement without disclosing when he was evicted is non issue to my mind. An illegal act does not all of sudden become legal with the passage or effluxion of time. It matters not therefore that the applicant could have come to court to claim reinstatement when he had been out of the suit premises for three or so months.

It appears that the respondent also refused to comply with the order because it was not served on him

within 3 days as per order XXXIX rule 3(3) of the then **Civil Procedure Rules** since it had been obtained ex parte. This may well be true. However, where was the respondent to be served within the three days? The affidavit of service on record and which has not been challenged at all by the respondent is to the effect that at the time he ought to have been served, he was away in Nairobi, and was only expected back on 9th April, 2009. This is the information the process server obtained from the respondent's employees at Nyamataro Trinity Bar and Restaurant. The respondent did not expect the process server to follow him to Nairobi in order to serve upon him the order when in the first place he did not even know where in Nairobi he was. It is also possible that the respondent perhaps left for Nairobi to avoid such service. He cannot now turn round and blame the applicant for not serving him on time.

Finally, the respondent submits that he had no contractual relationship with the applicant. I do not think that the respondent is serious when he makes this submission. The documents speak for themselves. Indeed even in his own papers filed in court, he acknowledges the existence of the contractual relationship. To my mind, this is a classic case where the respondent chose to willfully, flagrantly and blatantly disobey a court order which was clear and unambiguous. In so doing he brought the dignity of the court into disrepute. He chose to interpret the court order in a manner favourable or that pleased him. He will have to leave with or bear the consequences. If he had any misgivings about the order, it was not open to him to show his disapproval by ignoring it. He should have complied and complained later. It was also still open to him to subsequently seek that the order be varied and or vacated for the reasons he has set out in the replying affidavit and in his written submissions. All said and done, I am satisfied that the contempt committed by the respondent has been proved as required. I do proceed to cite him accordingly. I now wait the respondent to show cause why he should not be punished as appropriate. The respondent is otherwise condemned to pay the costs of these proceedings.

Ruling dated, signed and delivered at Kisii this 30th day of May, 2011,

ASIKE-MAKHANDIA

JUDGE