



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT NO. 604 OF 2003

ANNE MUTHONI WAMBAA.....PLAINTIFF

Versus

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT
MOSES NDUNGU MUNGAI.....2ND DEFENDANT

RULING

Vide Chamber Summons dated 23rd February 2009 the plaintiff in this case sought an order that the second defendant be committed to civil jail for a period not exceeding six months for disobeying and/or disregarding the orders of this court dated 9th April 2008.

The application is strongly opposed. In the grounds of opposition filed by counsel for the 2nd defendant it is averred that the application is incompetent for failure to obtain leave to commence contempt proceedings as required by the **Judicature Act** (Cap 8 of the Laws of Kenya) and for the same having been brought by Chamber Summons instead of Notice of Motion.

The submissions by counsel for the parties were based on the above points. On the competence of the application, I agree with counsel for the plaintiff that leave is not required to commence contempt proceedings in respect of an order of injunction issued under **Order 39** of the **Civil Procedure Rules**. Leave is required in respect of alleged disobedience of orders made under other provisions or court decrees.

Order 39 of the **Civil Procedure Rules**, does not require that applications for contempt of court be brought by way of Notice of Motion. In the circumstances I hold that this application is competent and accordingly dismiss the 2nd defendant's contention in that regard.

As is clear from paragraph six of the plaint, as at 3rd June 1997, the 2nd defendant had trespassed on to the suit land and started construction on it. In the affidavit in support of this application, the plaintiff again simply alleged that the second defendant had, in disobedience of this court's order of 9th April 2008,

commenced construction on the suit land. She did not give particulars of the further construction on the suit land.

Though the 2nd defendant did not swear any affidavit in opposition to this application, in his affidavit sworn on 3rd April 2008 in response to the plaintiff's application dated 18th July 2006 he said that he had at that time spent over Kshs.1.5 million in constructing a building on the suit land.

For a party to be entitled to a committal order for contempt of court, the party must prove his or her claim of disobedience beyond reasonable doubt. From the facts as stated above and the material on record in this matter, it is not clear whether or not the 2nd defendant indeed disobeyed the court order by continuing with the construction on the suit land. Consequently I find that the plaintiff has failed to establish his claim that the 2nd defendant disobeyed the court order and I accordingly dismiss this application with costs.

DATED and delivered this 19th day of July 2011.

**D.K. MARAGA
JUDGE**