



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 135 of 2009

GITHAMBO GENERAL CONTRACTORS.....APPLICANT

VERSUS

KAY CONSTRUCTION COMPANY LTD.....1ST RESPONDENT
ENGINEER DENNIS MAITHYA MWANGANGI.....2ND RESPONDENT
MR. KAMANDE.....3RD RESPONDENT
MR. C. MANI.....4TH RESPONDENT
HARJI MANJI HIRANI.....5TH RESPONDENT

RULING

GITHAMBO GENERAL CONTRACTORS, the Plaintiff/applicant herein, took out the Motion dated 17th March 2010 in which it applied for the following orders:

1. *“THAT this Honourable Court do order that Engineer Dennis Maithya Mwangangi, Mr. Kamande, Mr. C. Mani and Harji Manji Hirani be detained in prison for such term as this Honourable Court may deem fit for disobeying this Court’s orders of 13th October, 2009.*
2. *THAT this Honourable Court do order that the respondents do pay the Applicant a sum of Kshs.1,650,223.04 being the loss he incurred as a result of the Respondent’s disobedience of this Court’s order of 13th October, 2009.*
3. *Any other or further orders against the Respondents that this Honourable Court may deem fair to ensure compliance of it’s orders.”*

The Motion is supported by the affidavit of Andrew Githinji Mwihuri. **HARJI MANJI HIRAN** filed a replying affidavit he swore to oppose the Motion.

It is the averment of the Applicant that the persons cited for contempt had continued to hand pack stones on the road project despite the existence of the court order dated 13th October 2009. The Applicant further alleged that Kay Construction Company Limited, the 1st Respondent, failed to pay the Applicant the sum of Ksh.1,650,223/=. It is argued that the order was extracted and served upon DENNIS MAITHYA MWANGANGI and Mr. C. MANI on 16th October 2009 respectively. It is alleged that Mr. Kamande, Mr. Mani, Dennis

Maithya Mwangangi and Harji Manji Hirani have been supervising and co-ordinating the hand packing of stones from 19th October 2009 despite being aware of the court order.

MR. GICHERU, learned advocate for the Respondents urged this court to dismiss the Motion for various reasons. First, it is said that the Respondents were not served. It is pointed out that the Applicant did not file any affidavit of service neither did it annex to the affidavit of Andrew Githinji Mwihuri, the order allegedly breached. Mr. Gicheru further pointed out that this is the second application filed while the one filed on 3rd November 2009 was and is still pending. It is stated that this Applicant is seeking to be paid the outstanding debt using contempt of court proceedings yet the issue relating to the outstanding debt does not form part of the order allegedly breached.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavit filed for and against the Motion. I have further considered the oral submissions presented by both sides. It is not in dispute that this court issued an order coached in the following terms *inter alia* on 13th October 2009:

“THAT the Defendant/Respondent by itself, Agents or Servants be and it is hereby restrained by a temporary injunction from interfering with the Plaintiff subcontract of hand packing stones and or engaging other person(s) whatsoever in the subcontract of hand packing stones other than the Plaintiff/Applicant in the construction of ST. MARY’S – NYAKAHURA – KIAMARA – MURINGATO –IRIMA –GUTUGU ROAD (E540/E539/D427 – CONTRACT NO. ROD 0462) till the determination of this suit or further orders of the Court.

The Applicant has complained that the persons cited for contempt have breached the aforesaid order hence they should be punished. There are a number of authorities which have set out the principles which must be considered when dealing with an application for contempt. It suffices to cite **MWANGI WANG’ONDU =VS= NAIROBI CITY COMMISSION C.A. NO. 95 OF 1998** in which the Court of Appeal restated the principles *inter alia* as follows:

“No order of court requiring a person to do or abstain from doing any act may be endorsed unless a copy of the order has been served personally on the person required to do so or to abstain from doing the act in question. The copy of the order must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

It is obvious from the above authority that there must be evidence of personal service. In the Motion before me, there is no affidavit of service attached to the affidavit filed in support of the Motion to show who was served with what document. There is no evidence also as to how the order was served. For this reason alone I am convinced the Motion should be dismissed.

The second aspect which was argued against the Motion and conceded by the Applicant, is that the Motion is a second application filed by the Applicant yet the previous application dated 3rd November 2009 is still pending unprosecuted. The Applicant has not given any explanation as to why he had to file more than one application asking for similar orders. In the absence of any plausible explanation, the Applicant’s conduct amounts to an abuse of the court process. I so hold in this matter.

In the end the Motion dated 17th March 2010 and the other dated 3rd November 2009 are ordered struck out and dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 21st day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Gicheru for Respondent and Mr. Githinji representing the Applicant.

