



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Miscellaneous Civil Application 176 of 2006

MARGARET WAMBOGO NYAGA.....APPLICANT

VERSUS

THE CLERK TO EMBU COUNTY COUNCIL.....1ST RESPONDENT

J.G. GITHAKA.....2ND RESPONDENT

THE COUNTY COUNCIL OF EMBU.....3RD RESPONDENT

R U L I N G

The Application at bar arises from **SRMCC NO. 46/2006**. The Applicant herein is the plaintiff in that suit. She filed a suit seeking injunctive orders against the 1st Respondent herein. Along with the main suit, she filed a chamber summons dated 23.3.06 seeking interim orders of injunction against the defendant.

Ex-parte orders were issued on 28.3.06 with orders that the same be served on the Defendant/Respondent for hearing inter-partes on 5.4.2006. From the record of the lower court, the inter partes hearing of the said application was stood over severally due to the absence or other indisposition of the Respondents counsel.

I would therefore like to point out at this stage that the interim orders were not extended ex-parte. Once ex-parte orders are extended by consent of both parties, then they cease to be ex-parte orders. 'Ex-parte' basically means in the absence of the other party. Once the absent party is brought on board by way of service of the order and accedes to the extension of the ex-parte orders, then the said orders acquire the status of inter-parte orders. I can therefore say at this stage that the said orders were not contrary to Order XXXIX Rule 3(2) of the Civil Procedure Rules. Counsel for the Respondent was party to the said extension and he cannot now turn back and claim that the said orders were illegal. The order stated as follows inter alia

“The defendant by itself, its agent, servants or anybody acting under the defendants instructions be restrained from demolishing the building on Plot Number 32 at Kianjokoma market, cutting down and destroying the Napier grass and other crops on Plot No. KAGAARI/KIANJOKOMA/T.22 and/or in any other manner interfering with the Plaintiff’s peaceful use and occupation of the said plots pending the hearing and determination of this application.”

According to the applicant, the said order was served on the Respondent but they went ahead and demolished the said building – hence the filing of this application for contempt.

In his replying affidavit dated 12.03.07, one Jacob M. Mutonga the Chief Legal Officer of the County Council of Embu, the said orders that are said to have been breached were never served on the council (see paragraphs 6, 7, 8, 9 & 10) of his replying affidavit. The issue of service of the said orders was nonetheless raised earlier by way of a preliminary objection which was overruled by the court. In her informed **ruling dated 22/02/08, Hon. Judge Khaminwa** held

“Upon reading the record, I find formal order (sic) with penal notice endorsed thereon dated 23/3/06 was served on an officer of the defendant who acknowledge (sic) service and affixed office stamp... Also there is order dated 11/10/06 was served and affidavit of service filed. It is my finding that acceptance of service of order complained was made”.

With that ruling, the issue of service or lack of it was settled and I need not therefore revisit it. I am satisfied that the orders in question along with the penal notice was properly served on the Respondents as by law required.

The Respondents do not deny that they demolished the building belonging to the Applicant in spite of having received another order in **SPM CR. MISC. NO. 18 OF 2006** in which the same court ordered the Respondents to demolish the unplanned and temporary kiosks within the market. (Paragraph 12-18 of replying affidavit). Mr. Mutonga therefore maintains that the Respondents cannot be blamed for the demolish of the illegal structures at Kianjokoma.

I have carefully considered the written submissions filed by both counsel herein. I have also been duly informed by the authorities filed. Counsel for the Respondents has dwelt at length with the issue of non-compliance with the Rules when applying for leave to file the motion for contempt of court. I note however that Hon. Judge Khaminwa in her earlier cited ruling made a finding that the necessary leave to file this application had been sought and granted on 7/12/06. I have no reason to revisit that issue either.

There was also raised by counsel for the Respondent the issue of the application being brought before the wrong court.

Whereas I agree that an application under order XXXIX 2A of the Civil Procedure Rules should be made before the court that issued the said injunction, the Application has also invoked the powers of this court under Section 5 of the Judicature Act. I would not therefore say that the application is fatally flawed. Section 5(1) of the Judicature Act provides:-

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court ... and that power shall extend to upholding the authority of subordinate courts”.

This provision does not therefore contradict order XXXIX Rule 2A of the Civil Procedure Rules. In my considered view, it encompasses the same. It’s main aim or objective being to ensure that the dignity of the court is jealously upheld and safeguarded. An aggrieved party does in my considered view have an option either to move the court issuing the order under Order 39 Rule 2A of the Civil Procedure Rules or still come to this court under the provisions of the Judicature Act.

Application is therefore in my considered view properly before this court. The only remaining issue for determination at this point is whether the conduct of the Respondents amounted to a contempt of court which would call for punishment from this court. As stated earlier on, the order was succinct, it was properly served on the Respondent and the same was not illegal. Even if one was to argue (for the sake of argument) that the order was not properly extended, the law of contempt still demands compliance. As was held in the celebrated case of **HADKINSON VS HADKINSON (1952) AER 567**

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of

this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

The words of LORD COTTENHAM I.C. in CHUCK VS CREMER in 1846 to the effect that

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed.”

are as relevant today as they were in 1846. The same have been cited with approval in several of our local cases dealing with contempt of court. The Respondents herein had no capacity to determine that the court order in question was illegal and thus opt to disobey it. Indeed such an option was not available to them. If there was a subsequent court order for demolition of the same premises, the only option open to the Respondents was to move to the same court with haste and apply to that court to discharge the earlier order. It was not up to them to decide which order to comply with and which one to disobey. In failing to do so and by arrogantly tearing up a copy of the court order and tramping on it, they displayed utter contempt of the court.

I am aware that these being proceedings of a quasi criminal nature, the contempt must be proved to a standard higher than a balance of probabilities. My finding is that the contempt herein has been proved beyond a preponderance of probabilities. The Respondents were clearly way out of line and in clear and unmitigated contempt of court when they demolished the Applicants buildings. The Clerk to Embu County Council - 1st Respondent and 2nd Respondent are in my considered view guilty of contempt of the court and they deserve to be punished. The 3rd Respondent was represented by the 1st Respondent and they cannot both be found guilty of the said contempt. I hold the 1st and 2nd Respondents in contempt of court and order that Warrants of Arrest be issued against them forthwith so that they can be brought to this court for the appropriate sentence to be meted out. I also order that the costs of this application be and are hereby awarded to the Applicant. The Respondents shall not be heard in any application whatsoever before the said contempt is purged.

**W. KARANJA
JUDGE**

Delivered, signed and dated at Embu this 28th day of September

2010.

In presence of :- Applicant & Mr. Njage for Respondents.