



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI MILIMANI LAW COURTS

Civil Appeal 93 of 1998

MICHAEL OGOLA AWUOR.....APPELLANT

VERSUS

FLORA NYAMBURA.....RESPONDENT

R U L I N G

1. By a notice of motion filed on 3rd May, 2000, Michael Ogola Awuor (hereinafter referred to as the applicant), sought leave of this court to commence contempt of court proceedings against Flora Nyambura (hereinafter referred to as the respondent), for disobedience of the order of the High Court dated 14th July, 1999 in Civil Appeal No.93 of 1998.
2. The application was supported by an affidavit sworn by the applicant. The applicant deponed that contrary to an order issued by the court on 14th July, 1999, that his goods which were then being held by an auctioneer in destraint for rent be released to him, the goods had not been released to him despite the order and a notice of penal consequences being served on the respondent.
3. Mr. Kwengu who argued the application before me submitted that the respondent was in contempt of court as the auctioneer who was holding the goods is an agent of the respondent who is a disclosed principal. He therefore blamed the respondent for the disobedience of the court order and urged court to grant leave for contempt proceedings.
4. In her grounds of opposition filed on 15th May, 2002, the respondent objected to the application on the following grounds: -
 - (i) That the application is frivolous, vexatious and an abuse of the process of the court.
 - (ii) That the order dated 14th July, 1999 was directed to the auctioneers and not to the respondent, and the respondent cannot therefore be cited for contempt of court.
 - (iii) That contempt proceedings being criminal proceedings cannot attract vicarious liability.
5. Mr. Njenga who appeared for the respondent maintained that the order was not directed to the respondent. He submitted that contempt of court being a jurisdiction that has a criminal element, the principal of agency cannot apply. He maintained that the order ought to have been obeyed by the auctioneer to whom it was directed. Mr. Njenga further faulted the application for failing to comply with the procedure in that the Attorney General was not enjoined as an amicus Curie. In support of his

submissions Mr. Njenga relied on the following:

- ***Andalo & Another vs James Gleen Russel Ltd [1990] KLR 54.***
- ***Misc. Civil Application No.245 of 2004 Republic vs Nakuru District Works Officer & Others.***

The court was therefore urged to dismiss the application.

6. I have considered the application, the affidavit in support and annexures thereto, as well as the submissions made by counsel. The applicant's contention that the goods were being held by Metropolitan General Merchants pursuant to a distress for rent has not been denied. The distress for rent was levied by the auctioneer pursuant to instructions of the respondent. The order made by the court on 14th July, 1999 effectively lifted the distress and directed that the goods be released to the applicant. Although the order of the court was not specifically addressed to the respondent, it is evident that the goods were being detained on her instruction by the auctioneer. Moreover, the auctioneer was not a party to the proceedings nor was he executing court orders.

7. In my view therefore the orders were properly served on the respondent although extra caution ought to have been taken in having service also effected upon the auctioneer. The question is should leave be granted for contempt proceedings to issue against the respondent? The applicant has moved this court for leave under Section 5 of the Judicature Act and Section 3A of the Civil Procedure Act. As was observed by Aluoch J in ***Andalo & Another vs James Gleen Russel Ltd*** (supra), under that section, the powers of this court to punish for contempt is same as that of the High Court of Justice in England and therefore the English substantive law and procedural rules must apply. In other words the applicant had to comply with order 52 rule 2 of the Supreme Court Practice Rules which required that an application for leave be served on the Attorney General who is to be enjoined in the suit as *amicus curie*. In this case this was not done and that rendered the application incompetent.

8. I would therefore reject the application for leave to file contempt proceedings on the grounds that the same is incompetent. I make no orders as to costs.

Dated and delivered this 30th day of April, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Mwasama for the appellant

Advocate for the respondent absent

Erick – Court clerk