

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS CIVIL CASE 22 OF 2008

OLIVIA MARIGU.....APPLICANT

VERSUS

MWANIKI WAMICI.....1ST RESPONDENT

NYAGA NYAKI.....2ND RESPONDENT

MWANIKI GICHONI.....3RD RESPONDENT

RULING

The application before me is for committal to civil jail of the respondents for disobeying the courts orders. The court order said to have been disobeyed is actually not annexed to the notice of motion. That is a serious omission on the part of the applicants counsel. It should have been annexed along with the affidavit of service notwithstanding the fact that the same had been annexed during the application for leave. I have nonetheless considered the application along with the grounds on its face and the rival affidavits. I have also considered both counsel’s submissions in court. First and foremost, it must be appreciated that committal proceedings are serious proceedings. They are quasi-criminal proceedings as they can lead to deprivation of a person’s liberty. It is for that reason that the law requires that the burden of proof in the same be slightly higher than a balance of probability, though slightly below the onus of proof in criminal cases. That therefore imposes on the court the duty to ensure that the order said to have been disobeyed was a proper court order, and that the same was properly served personally on the purported contemnors. In this case, Mr Gitonga has submitted that the order in question was an Ex-parte order which was not supposed to last more than the mandatory 14 days. Although Miss Thungu for the applicant denied this, she did not tell the court when the order after the hearing of the application for injunction inter-parties was granted. A cursory look at the copy of the order annexed to the application for leave shows that same was heard “*in absence of the respondent.*)

Indeed, the said order reads.

“ That pending the hearing and determination of this application, a temporary injunction is hereby issued against the first, second and 3rd respondents.....”

This clearly supports Mr. Gitonga’s contention that the order was exparte. If the order was ever confirmed, then the confirmed order is what the applicant herein should have annexed to the application for leave. Mr Gitonga is right in the proposition of law that an ex-parte order under Order XXXIX Rule 3 (2) has a life of 14 days. There is no indication that the application was ever heard inter partes or that the order was extended by consent of both parties. Contempt proceedings do not lie in this matter. There is not even a prima facie case for contempt here let alone proof beyond a balance of probabilities. This application is clearly an abuse of the process of the court. The same is hereby dismissed with costs to the respondents.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 30th day of June 2009.

In presence of:-Mr. Kariithi for the Ms Thungu.

W. KARANJA

JUDGE

30/6/2009