



REPUBLIC OF KENYA

HIGH COURT NAKURU

CIVIL CASE 42 OF 2005

BENSON MUCHIRI MUTHOKA.....1ST PLAINTIFF

ESTHER TAPNYABII SIGILAI.....2ND PLAINTIFF

VERSUS

KELLEN WAITHERERO GICHIMU.....DEFENDANT

RULING

On 25th March, 2009 the plaintiffs/applicants obtained leave to take out contempt proceedings against the defendant herein. He did so under a Chamber Summons dated 30th March, 2009 said to have been brought under Order **XXXIX rule 2 (3)** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law.

The applicants' pray that the respondent be found in contempt of this court's orders of 21st September, 2005 and be committed to civil jail as a punishment. The application is premised on the grounds that the conduct of the respondent in disobeying the said orders has undermined the dignity of the court whose orders must be respected by all persons.

The orders said to have been breached were to the effect that;

“The defendant by herself, her servants, or agents are.....restrained from ploughing, planting transferring or in any other way interfering with the suit land (and the titles that have been subdivided therefrom) pending the hearing and determination of the main suit.

The application is supported by the 1st applicant's affidavit sworn on 30th March, 2009. The applicants accuse the respondent of having gone into the land as from 2nd March, 2009, cultivating the same and felling trees. They also accuse her of mobilizing villagers to terrorize the 1st applicant's wife and forcing her to vacate the suit land.

Citing the authorities of **MUTITIKA -VS- BAHARINI FARM LTD [1985] KLR 227** and **REFRIGERATOR & KITCHEN UTENSILS LTD –VS- GULABCHAND POPATLAL SHAH & OTHERS**, counsel for the applicants, Madam Njoroge, submitted that this court should invoke its powers under **Section 5(1)** of the **Judicature Act** and commit the Respondent to jail as a means of upholding its dignity. She asked the court to find that the Respondent has, by her conduct, obstructed justice.

The application is opposed on the strength of a Replying Affidavit sworn by the Respondent on 25th March, 2009 in which she depones that she is well aware of the injunction said to have been disobeyed but denies the applicants' allegations that she has acted in violation of this court's orders.

Submitting on behalf of the Respondent Mr. Gakinya, advocate, challenged the application as being fatally defective for citing the wrong provisions of the law. The objection is well founded since **Order XXXIX rule 2** deals with injunctions. Counsel submitted further that the alleged contempt has not been proved to the required standard as spelt out in the **MUTITIKA** case where the Court of Appeal held that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost beyond reasonable doubt.

The only evidence placed before court to support the applicant's claim is photocopies of certain photographs the contents of which I am unable to decipher. In paragraph 6 of her affidavit, the Respondent has stated that she resides in one of the subdivisions which she occupied prior to the death of her husband, the person said to have defrauded the applicants of the land. This presumes, therefore, that the Respondent was in occupation of the said portion even at the time the injunction said to have been breached was granted. That being the case, it is quite doubtful that this court would have intended that the respondent desists from enjoying her possession and use of the portion occupied by herself while the issue of fraud is yet to be determined.

The respondent avers in paragraph 7 of her affidavit, that it is the applicants who have destroyed her trees on the suit land. The proceedings herein rest with what the warring parties have stated in their respective affidavits. In the absence of any supplementary affidavit by the applicants to counter what the Respondent has deponed in the Replying Affidavit, I am led to find that the Respondents' word carries the day. The annexures to the supporting affidavit are of no persuasive value. For these reasons I find that the applicants have not proved the respondent's alleged contempt to the required standard and the application fails.

In passing I consider it appropriate to cite for the benefit of the parties herein the English case of **Republic -VS- COMMISSIONER OF POLICE OF THE METROPOLIS (1968) 2QB 150** where, it was held inter lia that a court should be slow to invoke contempt proceedings as a means of upholding its own dignity. Lord Denning had the following to say in the said case:

“This is the first case, as far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise; more particularly as we ourselves have an interest in the matter.

Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. This must rest on surer foundations.”

I am of the view that for the court to punish a person for obstructing justice, the act complained about must be one that clearly falls within ambit of **Section 121(1)(c) of the Penal Code**. Such was the case in a recent suit before this court where the court, having called upon an alleged contemnor to show cause, the court had no option but to commit him to civil jail, the contemnor having stated quite categorically and strongly that, even if he was jailed for contempt, he would repeat the actions complained about once he was freed, as a means of exerting his perceived rights and claim against his contestant in the suit.

Having found that the present application fails, the same is dismissed with costs in the cause.

Dated signed and delivered at Nakuru this 18th day of September 2009.

M. G. MUGO

JUDGE