REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 169 of 1993

DAVID KINYAMBU MBILI …….....PLAINTIFF/RESPONDENT

VERSUS

TITO KINYAMBU ……...DEFENDANT/APPLICANT

RULING

1. This suit was filed on 7.9.1993 and the simple order sought is that the Plaintiff be declared the owner of land parcel no. Mbitini/Mutyambua/ 969 and that the Defendant be evicted therefrom. Sixteen years later, that small matter has not been settled but the Defendant by a Chamber Summons dated 9.2.2009 and premised on the provisions of Order XXXIX Rule 2A (2) of the Civil Procedure Rules and section 63(C) and section 3A of the Civil Procedure Act seeks orders that the Plaintiff be committed to civil jail for 6 months for contempt of court.
2. It is the Defendant's case that on 3.6.1994, an order was issued which order has been breached by the Defendant who has trespassed into the suit land, grazed cattle thereon, cut down trees and bushes and has even rented it out to third parties.
3. Before going further, I should revisit the order dated 3.6.1994. I have looked at the old record in this matter and the order is worded thus:

"*That status quo be maintained until this case is heard and determined and by consent none of the parties to interfere with the disputed land (sic).*"

4. It is now argued that the Defendant has breached that order and has interfered with the disputed land.
5. I will dismiss the Application for the following reasons:

Firstly, it is ridiculous and a complete abuse of court process for the Defendant to wait for 16 years to come and claim that the Plaintiff has breached the order. He and the Defendant are brothers and if there was breach of the order in 1994, he should have pursued the issue then.

6. Secondly, and irrespective of my comments about the conduct of the parties, it is the law as I know it that contempt of court is akin to a criminal offence as a jail term may be meted out if the contempt is proved. In Mutitika vs Baharini Farm Ltd (1985) KLR 227 it was held as follows:-

"*i. …..*

(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.

(iii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor."

7. That being the case, the law also expects two things:

    i. that the order should be served personally on the alleged contempt and

    ii. a penal notice should be served alongside the order.

8. In this case, the order was neither served on the Plaintiff nor was a penal notice extracted and served on him to warn him of the consequences of his actions. Without those two issues being addressed, contempt of court cannot be said to have been committed. In any event, the order as recorded by consent of parties was ambiguous and in my view the words "*status quo"* could be interpreted in more ways than one and similarly the words, "*interfere with"* are unclear. In the end therefore, whatever the Plaintiff did on the suit land, whether admitted or not, may or may not be in breach of the court order. Without certainty, contempt cannot be properly proved.
9. In the end, the Application before me is lacking in merit and is hereby dismissed with costs to the Plaintiff.
10. Parties should now take a date for hearing and disposal of the suit.
11. Orders accordingly.

Dated and delivered at Machakos this 9th day of November 2009.

Isaac Lenaola

Judge

In the presence of: Mrs Isika for Respondent

No appearance for Applicant

Isaac Lenaola

Judge