REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Suit 124 of 2003

GIBSON KARIUKI ……..……. PLAINTIFF

VERSUS

MUGO MBACHO ……..……...…….. 1ST DEFENDANT

ELLIS MBACHO ……..…… 2ND DEFENDANT

GITONGA MBACHO ……..……. 3RD DEFENDANT

NYAGA MBACHO ……..…….. 4TH DEFENDANT

MBAABU MBACHO …… 5TH DEFENDANT

RULING

The present application by way of chamber summons dated 3rd October 2007 seeks that the respondents be cited for contempt of court order and their committal to civil jail for a period of six (6) months.

The applicant in his affidavit in support of the application has averred that the parties recorded a consent on 13th June 2006 allowing the respondents to occupy only one (1) acre of L.R. No. Magumoni/Mwonga/25 (the suit land).

The consent order was duly served upon the respondents together with the penal notice. The applicant further avers that in breach of the said consent order the respondents have invaded the entire 15 acres of the suit land and commenced acts of destruction of property, cutting down trees and carting away the applicant's building material while threatening the applicant with violence. He now seeks in this application that the respondents be punished for disregarding a court order.

The application having been duly served upon the respondents and the hearing date taken by consent, there was no reply to it and on the hearing date only two respondents, (1st and 2nd), were in attendance. Their counsel also failed to attend.

However, the two respondents urged the court to dismiss the application on the grounds that they have not committed any of the acts complained of and also that they were not aware of the consent order. These were the rival arguments before me. The consent in question recorded on 13th June 2006 states:-

"***By consent,***

(i) The respondent continues to occupy one acre of land out of L.R. No. Magumoni/Mwonga/25.

(ii) Both parties to maintain status quo pending the hearing and determination of this suit, i.e. no party should put any property on the land to waste and/or destruction.

(iii) The application dated 15.7.2004 is thus determined in terms of orders (1) and (2) above.

(iv) Parties to fix hearing dates for the main suit in the registry."

In an application for contempt of an order of the court, it is imperative to show that the order was brought to the personal attention of the contemnor and that despite that the contemnor has ignored the order and proceeded to go against the order. The order alleged to have been breached must be clear and capable of being obeyed.

The other aspect of this kind of application is that the procedure of bringing an application for contempt must be strictly followed. This is so because of the resultant implications of a contempt trial which may have the effect of deprivation of a citizen's personal liberty.

Starting with the question of service, the applicant has deposed that the consent was recorded by the respondents' and his counsel in court. That thereafter the respondents were served with the order which had a penal notice. The respondents, at least the 1st and 2nd respondents, have maintained that they were not aware of the existence of the consent and further that the same was never served upon them.

Contempt of court proceedings being quasi-criminal proceedings in nature, it is imperative to show that the contemnors were personally served with the orders in question. Personal service on the alleged contemnor is a must even where as here, he has counsel.

There is an affidavit of service sworn by Stanley Mworia M'Mbui on 29th July 2006. That affidavit is explicit that the five respondents who were identified to the deponent by the applicant were served with the order in question on 28th July (the year is not indicated). The year is however shown as 2006 on a certificate endorsed at the back of the documents which were purportedly served on the respondents.

These averments have not been challenged. The burden was on the respondents to show that indeed they were not served. This they have failed to discharge. I find that they were duly served.

Regarding the respondents' argument that they were not aware of the consent, I am satisfied that their advocate was before the court on 13th June 2006 when the consent was recorded. Indeed their advocate, Miss J. Bii appended her signature on the consent order.

Parties are at liberty by dint of order 24 Rule 6 of the Civil Procedure Rules to compromise a suit either wholly or in part in such terms as they may agree. Where a consent is entered by counsel representing parties to a suit, the presumption is that counsel had authority to commit the parties unless the parties can show that there was no such authority.

I find in this matter that counsel for the respondents had their authority to record the consent in question. According to that consent order, the respondents, it was agreed, would be confined to the one acre of the suit property which was occupied by them. It was also agreed that no party should put the suit property to waste or destruction. It is the applicant's case that the respondents have violated the consent order by moving out of the one acre agreed upon and invading the entire suit property. That they have cut down trees and carted away the applicant's building material.

This has been denied by the 1st and 2nd respondents. As was observed by Lord Denning MR. (as he then was),

"***A contempt of court is an offence of criminal character. A man may be sent to prison. It must be satisfactorily proved."***

See ***Re Breamblevale Ltd (1969) ALL ER in Mutitika V. Baharimi Farm Ltd,*** (1985), KLR 227, it was held that the standard of proof in a contempt of court application must be higher than proof on a balance of probabilities and almost, but not exactly beyond reasonable doubt. The court also held that the jurisdiction to convict for contempt should be carefully exercised.

From the facts deposed in the affidavit in support of the applicant's application and in view of the denial by the 1st and 2nd respondents, I am unable to find that the applicant has discharged the burden imposed on him to show that the acts complained of have indeed been committed by the respondents. I have doubt in my mind which must be resolved in favour of the respondents.

Turning to the question of procedure, I find that the application has not complied with the procedure for bringing an application for contempt. For instance, in terms of Order 52 of the Rules of Supreme Court of England, no leave was obtained to bring the application. The application ought to have been brought by way of Notice of Motion and not chamber summons as in this case. The application ought to have been accompanied by a copy of the statement and affidavit in support and the application ought also to have been served an the office of the Attorney General. See ***Gofer Kilatya Kituku & 6 others V. Malindi Municipal Council, HCC – Malindi No. 45 of 2005***

These are deliberate steps that must be followed scrupulously if an applicant hopes to have the alleged contemnors punished for disobeying an order of the court. They are intended to provide safeguards to ensure compliance with due process of the law.

The applicant failed to follow any of the steps required in bringing an application for contempt of court.

For all the reasons stated, this application fails and is dismissed with costs to the 1st and 2nd respondents.

Dated and delivered at Meru this 27thday of February 2008.

W. OUKO

JUDGE