



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Misc Civil Appli 176 of 2006

IN THE MATTER OF CONTEMPT OF COURT PROCEEDINGS

AND

IN THE MATTER OF EMBU SENIOR PRINCIPAL MAGISTRATE'S COURT

CIVIL CASE NO. 46 OF 2006

BETWEEN

MARGARET WAMBOGO NYAGA.....PLAINTIFF

AND

THE COUNTY COUNCIL OF EMBU.....DEFENDANT

MARGARET WAMBOGO NYAGA.....APPLICANT

VERSUS

THE CLERK EMBU COUNTY COUNCIL.....1ST RESPONDENT

J. G. GITHAKA.....2ND RESPONDENT

THE COUNTY COUNCIL OF EMBU.....3RD RESPONDENT

RULING

Notice of Motion brought under Section 5 Judicature Act and Order XXXIX rule 2 A of Civil Procedure Rules.

The applicant seeks to cite named person for contempt and that they be committed to civil jail for a term of upwards of 6 months. Application is dated 21/12/2006. The application is opposed and grounds of opposition have been filed by the Respondent's Counsel. In addition a Notice of Preliminary Objection has been filed having 2 grounds namely that the application was filed without leave and that the orders alleged to have been breached were not served. There was no leave obtained to file the Notice of Motion. In the case of *Awadh vs Marumba 2004 1 KLR* it was held that an applicant in contempt of

court proceedings must seek leave by making an ex parte application for leave which must be supported by a statement setting out the name and description of the applicant and comply with requirements as set out under the Supreme Court Rules of England Order 52. In the case of **Andalo and another vs James Green Russel Ltd 1990 KLR holding 3** again a High Court decision the court held that the substantive law that governs the applications relating to the contempt proceedings is that applied in England and similarly the procedural law is as contained under Supreme Court Rules Order 52. Mr. Okwaro for Applicant relied on the High Court decision in HCC No. 515 of 2003 also High Court decision which to me appears to deal in situations where a court order has not been issued. It is contained in that decision a quotation “A party, who knows of an order, whether null and valid regular or irregular cannot be permitted to disobey it”. It would be most dangerous to hold that the suitors or their solicitors could themselves Judge whether and order was null or valid whether it was regular or irregular. I agree with the general principle as stated there.

On the issue of service Mr. Njagi submits that there was no evidence of service. In reply Mr. Okwaro submitted that leave was granted on 7/12/2006 and orders were served. It is noted that the orders breached must be served with Penal Notice endorsed thereon, and must be annexed to the Notice of Motion. It is not so here. Orders carrying penal consequences must be served personally. The court cannot punish a party on presumption that the order was served.

Upon perusing the record it is clear that on 7/12/2006 the counsel for applicant appeared before this court and applied for leave to file contempt proceedings. The leave was granted for Notice of Motion to be filed within 14 days which was done on 21/12/2006. Therefore the Preliminary Objection numbered one is overruled.

On the issue of service it is proper that a party who knows of the existence of an order to be obeyed he must obey it. In this case Mr. Okwaro says the respondents were in court when the orders were made and should not have breached the same. However the Respondents may not have known that the disobedience would lead to punishment for contempt because the penal notice was not read to them. I therefore hold the opinion that service of a formal order endorsed with Penal Notice is vital.

Upon perusing the record, I find formal order with Penal Notice endorsed thereon dated 23/3/2006 was served on an officer of the Defendant who acknowledge service and affixed office stamp. Also there is order dated 11/10/2006 was served and affidavit of service filed. It is my finding that acceptance service of orders complained was made. I therefore do overrule both ground of the Preliminary Objection.

Dated this 22nd of February, 2008.

J. N. KHAMINWA

JUDGE

22/2/2008

Khaminwa – Judge

Njue – Clerk

Ms Mercy HB for Okwaro

Read in open court.

J. N. KHAMINWA

JUDGE