



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 26 of 2008

JUMA RAJAB

YAHYA HUSSEIN

RAMADHAN RAJAB

Suing as Members of

PUMWANI RIYADHA MOSQUE..... PLAINTIFFS

VERSUS

ATHMANI MPONDA

MOHAMED SAID

JUMA ABDALLA

ADNAN RUSHTANA

MAULID ABDALLA MTHUI

SALIM IBRAHIM NYAMBU

Sued as outgoing Committee of

PUMWANI RIYADHA MOSQUE..... DEFENDANTS

RULING

By chamber summons dated 18.02.08 stated to be brought under Order XXXIX rules 2A (2) and 9 of the Civil Procedure Rules and sections 3A and 63 (c) and (e) of the Civil Procedure Act, Cap.21, the plaintiffs applied for the following orders:-

1. THAT the honourable court be pleased to find the respondents herein guilty of disobeying a lawful order and/or for the arrest and detention of the defendants/respondents in prison for a term not exceeding six months for such disobedience.
2. THAT in the alternative the hounourable court be pleased to order the defendants/respondents properties to be attached forthwith for disobeying the court order issued on 15.02.08.

3. THAT the respondents be ordered NOT to continue with the demolition and such be supervised by the O.C.S. Pumwani.
4. THAT the respondents be barred by the honourable court from interfering with the day to day functions of the Mosque, and such be enforced by the O.C.S. Pumwani.
5. THAT the defendants/respondents do pay the costs of this application.

The grounds upon which the application is based are:-

- a) The respondents have adamantly refused to obey the court order issued on the 15.02.08.
- b) The respondents have commenced the demolition of the Mosque without legal authority in total violation of the court order.
- c) The power and authority of the honourable court is being undermined by the respondents' outright defiance of the court order.
- d) The respondents have no respect for the authority and due process of the honourable court.
- e) The respondents have interfered with the applicants' right to worship by demolishing part of the Mosque.

The application is supported by the affidavit of the 1st plaintiff Juma Rajab sworn on 18.02.08.

The plaintiffs/applicants were represented in these proceedings by learned counsel, Mr O. Bosire while the defendants/respondents were represented by learned counsel, Miss K.G. Njue.

At the resumed hearing of the application on 28.02.08, plaintiffs'/applicants' counsel said he relied on the affidavit of Juma Rajab sworn on 18.02.08. The said counsel urged the court to grant the orders sought in the application because the defendants/respondents had brought the court into disrepute and humiliation for disobeying its orders. He said that demolition of the Mosque was going on even as the court proceedings were in progress. Plaintiffs'/applicants' counsel *inter alia*, referred to photographs said to have been annexed as 'JR – 2' showing the demolition said to have been going on. This court pointed out to counsel that there was no annexure 'JR – 2' and he acknowledged that he had not placed the aforementioned annexure 'JR – 2' in the court file as he was still arranging the photographs comprising that annexure for ease of reference. He said he now had the photographs duly arranged and requested the court to admit the said photographs. This was objected to by defendants'/respondents' counsel but the court granted plaintiffs'/applicants' counsel leave to introduce the photographs by way of affidavit, he eventually did so and the photographs appear as annexure 'JR – 2' to the supplementary affidavit of the 1st plaintiff/applicant, Juma Rajab sworn on 29.02.08.

The plaintiffs/applicants were also granted leave to file and serve specific affidavit response to the replying affidavit of the 3rd defendant/respondent, Juma Abdalla sworn on 25.02.08. In exercise of the leave so granted, a 7 – paragraph affidavit bearing 1st plaintiff/applicant Juma Rajab's name at the end sworn on 29.02.08 was filed on 29.02.08. This affidavit was objected to by defendants'/respondents' counsel on the grounds that it does not disclose its deponent at the beginning, contrary to Order XVIII rule 4. I shall address this criticism later in this Ruling.

Plaintiffs'/applicants' counsel said annexure 'JR- 2' shows people at the suit site carrying out demolition of the Mosque in question. He accused defendants/respondents of falsehoods in averring that the Mosque had already been demolished by the time the plaintiffs came to court, arguing that the plaintiffs would not have come to court to seek *status quo* if the Mosque had already been demolished.

Plaintiff's/applicant's counsel submitted that on 16.02.08 the defendants/respondents hastened

demolition of the remains of the Mosque to defeat the purpose of the order of *status quo*. He (plaintiffs'/applicants' counsel) reiterated the prayers in the application under consideration.

On the other hand, defendants'/respondents' counsel opposed the application, relying on the replying affidavit of the 3rd defendant/respondent, Juma Abdalla sworn on 25.02.08. Defendants'/respondents' counsel also said she relied on the following authorities:-

a) Ochino & Another -vs- Okombo & 4 others [1989] KLR 165 where the Court of Appeal:-

i. Addressed and gave guidelines on the issue of personal service, on the person concerned, of the order directed at the said person required to comply therewith; and

ii. Addressed the issue of indorsement, on the said order, of notice of penal consequences (penal notice) if the order is disobeyed.

(b) Okoth -vs- Wade & Another [2005] IKLR 399 to highlight the basic points made by the High Court (Warsame, J) that it is the responsibility of the person seeking an order of contempt to show there has been willful disobedience of a court order properly served; that the jurisdiction of contempt is practically arbitrary and unlimited and should be most jealously and carefully invoked and exercised to avoid cases of overzealous applicants abusing the process of the court.

Defendants'/respondents' counsel said it was his clients' case that they were served with the plaintiffs' chamber summons dated 13.02.08 in the evening of 13.02.08 after the matter had been to court that day and certified urgent. He further said both parties had been summoned to Pumwani D.O.'s office for a meeting at 9.00 a.m. the same day in connection with construction of a new Mosque and that they were to take with them necessary documents of approval for reconstruction of the Mosque; that the defendants/respondents duly satisfied the D.O. that they had the necessary approvals and thereafter they went back on the same 13.02.08 to continue with demolition of the old Mosque which they had started earlier and that the demolition was finalized by 4.00 p.m. on 13.02.08. Defendants'/respondents' counsel pointed out that when this matter came before court on 14.02.08, the parties' advocates agreed that the *status quo* be maintained but that the court was not told what the position was on the ground. She said that the *status quo* was actually that the Mosque had been demolished and essentially that the plaintiffs/applicants misled the court in claiming otherwise.

With regard to Juma Rajab's affidavits sworn on 13.02.08 and 18.02.08, defendants'/respondents' counsel submitted that the two affidavits contradict each other in that whereas the affidavit sworn on 13.02.08 deponed at paragraph 7 that the defendants had demolished a section of the Mosque as at 13.02.08, paragraph 5 of the same deponent's affidavit sworn on 18.02.08 deponed that the respondents commenced demolition of the Mosque on 16.02.08. Defendants'/respondents' counsel contended that the plaintiffs'/applicants' interest was to disrupt the affairs as deponed by Juma Abdalla at paragraph 17 of his affidavit sworn on 25.02.08. Defendants'/respondents' counsel submitted that the plaintiffs' present application is an abuse of the court process in that it lacks merit and material facts.

Defendants'/respondents' counsel turned next to Juma Rajab's supplementary affidavits sworn on 29.02.08. With regard to the 7 – paragraph affidavit sworn on that date which states at the end to have been sworn by him while it does not state so at the beginning, defendants'/respondents' counsel contended that it is not a sworn statement as the deponent is not disclosed at the beginning neither does the deponent state at the opening that he was making the averments on oath. For this reason, defendants'/respondents' counsel submitted in essence that the so-called affidavit does not meet the requirements of order XVIII rule 4 and that it is invalid.

With regard to the other supplementary affidavit also sworn by Juma Rajab on 29.02.08 containing 6 paragraphs, defendants'/respondents' counsel referred to paragraph 5 which cites 11.02.08 as the date on which the plaintiffs/applicants appeared before court and faulted it by pointing out that the plaintiffs'/applicants' first appearance before court on this matter was actually on 13.02.08 but not on 11.02.08. Defendants'/respondents' counsel also referred to paragraph 4 of the same affidavit vide which

Juma Rajab stated that the defendants/respondents brought down a section of the Mosque on 13.02.08. Defendants'/respondents' counsel contended that the essence of Juma Rajab's averment at paragraph 4 of his aforesaid supplementary affidavit is the same as Juma Abdalla's averment in his replying affidavit sworn on 25.02.08, save that according to Juma Rajab only part of the Mosque was demolished on 13.02.08 while according to Juma Abdalla (vide paragraph 7 of his affidavit) the whole Mosque was demolished on 13.02.08.

The next point worthy of note in defendants'/respondents' counsel's submissions relates to paragraph 4 of Juma Rajab's affidavit sworn on 18.02.08 in support of the plaintiffs' present application. Counsel contended that while paragraph 4 of the affidavit avers that this court's order of *status quo* made on 14.02.08 was served on the respondents advocates and the respondents themselves, the date of service was not indicated. I interpose here to point out that a reading of paragraphs 3 and 4 together of Juma Rajab's affidavit sworn on 18.02.08 shows his position to be that the order of *status quo* was served on defendants/respondents on 15.02.08. Defendants'/respondents' counsel also contended that the order annexed to the plaintiffs' present chamber summons application dated 18.02.08 does not have, i.e. it is not indorsed with, notice of penal consequences, contrary to the decision in Ochino's case (*supra*).

Defendants'/respondents' counsel pointed out that the orders sought by the plaintiffs/applicants are serious, touching on the defendants'/respondents' liberty and that the order of *status quo* was not clear since it was not stated what the *status quo* was. Counsel urged that the plaintiffs' application dated 18.02.08 be dismissed with costs to the defendants/respondents.

In reply, plaintiffs'/applicants' counsel said that the reference at paragraph 5 of Juma Rahab's 6 – paragraph supplementary affidavit sworn on 29.02.08 citing 11.02.08 as the date the plaintiffs/applicants appeared before court was a typing error as it is on record that their first appearance in court was on 13.02.08. Plaintiffs'/applicants' counsel submitted that the authorities cited before court are irrelevant and a mere excuse for disobeying the court order of *status quo*. He reiterated the prayers in the chamber summons application dated 18.02.08 which he said was for purposes of giving respect to the court.

I have given due consideration to the application, the opposition thereto and the rival arguments of the parties.

The main issues or questions requiring to be addressed in determining the application at hand seem to be the following:-

1. What is the status of Juma Rajab's 7 – paragraph supplementary affidavit sworn on 29.02.08?
2. What is the effect of the citation by Juma Rajab at paragraph 5 of his 6 – paragraph supplementary affidavit sworn on 29.02.08 of 11.02.08 as the date of the plaintiffs'/applicants' first appearance before court over the dispute herein on the credibility of that supplementary affidavit?
3. When was the Mosque in question demolished?
4. What is the established mode of service of an order of contempt on the person required to obey the same and was such mode complied with?
5. Is indorsement on an order, requiring the person against whom it is directed, of notice of penal consequences if the order is disobeyed a mandatory requirement?
6. Was there requisite service of the order of *status quo* and was it indorsed with notice of requisite penal consequences if disobeyed?

I shall address the above issues in the order in which they are listed:-

1. Status of Juma Rajab's 7 – paragraph supplementary affidavit sworn on 29.02.08

Immediately after the heading 'SUPPLEMENTARY AFFIDAVIT', the said supplementary affidavit opens with paragraph 1 as under:

'1. THAT the replying affidavit by the one (sic) of the Respondents Juma Abdala dated the 25th February 2008 has been read to me by my Advocates on records (sic) and would like (sic) to reply as follows:'

And immediately after the last paragraph (7) of the said affidavit there appear the words:

'SWORN at Nairobi by the SAID JUMA RAJAB This 29th day of February 2008.'

It is to be noted that the affidavit does not state at the beginning who its maker is. Therefore the purported oath at the end of the affidavit ascribed to 'the SAID JUMA RAJAB' lacks parentage or anybody's ownership and hangs in the air. Order XVIII rule 4 provides:

'4. Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.'

The supplementary affidavit under discussion clearly does not comply with the mandatory requirements of Order XVIII rule 4. I find the said affidavit to be incurably defective, I declare it incompetent, strike it out and expunge it from the court record.

2. Effect of citation at paragraph 5 of Juma Rajab's 6 – paragraph supplementary affidavit sworn on 29.02.08 of 11.02.08 as the date of plaintiffs/applicants' first appearance before court on credibility of the affidavit.

The court record shows that the chamber summons application dated 13.02.08 and filed the same day went before P. Kihara Kariuki, J the same day *ex-parte*. Learned counsel, Mr Mitiambo appeared for the plaintiffs/applicants. The learned Judge fixed the application for *inter-partes* hearing on 14.02.08 and directed the plaintiffs/applicants to serve the defendants/respondents. The citation of 11.02.08 as the date of (first) appearance of plaintiffs/applicants before court vide paragraph 5 of Juma Rajab's 6 – paragraph supplementary affidavit sworn on 29.02.08 must be and I find it to be a clerical error, that the error *per se* does not affect the credibility of the affidavit and I ignore the said error.

3. Date of demolition of the Mosque in question Juma Rajab's affidavit sworn on 13.02.08 in support of the plaintiffs' initial chamber summons application dated 13.02.08 partly deponed at paragraph 7 as follows:

'7. THAT the defendants have demolished a section of the Mosque without any reason which act the members regard as an attempt to forcefully evict them'

However, at paragraph 5 of the affidavit of the same Juma Rajab sworn on 18.02.08 in support of the plaintiffs'/applicants' chamber summons application dated 18.02.08 now under consideration, it is partly deponed as under:

'5. THAT on the 16th February 2008, the Respondent (sic) commenced the demolition of the Mosque in full defiance of the court order'

Juma Rajab confirmed vide paragraph 4 of his 6 – paragraph supplementary affidavit sworn on 29.02.08 that the Mosque was partly demolished on 13.02.08. He also averred at paragraph 5 of the same affidavit that the defendants/respondents continued the demolition on 16.02.08. The question then arises as to whether demolition of the Mosque started on 13.02.08 and was completed on that date, or whether the demolition was continued on 16.02.08, or whether 16.02.08 was the commencement of the demolition!

Vide his affidavit sworn on 18.02.08 in reply to the plaintiffs' chamber summons application dated 13.02.08, Juma Abdalla gave the following background to the controversial demolition, namely, that he

and his co-defendants were elected into office by members of Pumwani Riyadha Mosque at an annual general meeting, that the Mosque was in a pathetic state and that he and his co-defendants agreed to demolish the Mosque and construct another. Juma Abdalla proceeded to partly depone in the undermentioned paragraphs as follows:

'12. THAT after putting all the system in place and reaching for demolition and subsequent reconstruction we called some of our members including the plaintiffs to our meetings to update them and get their comments on the development plan but for reasons not within my knowledge they failed to attend

13. THAT after failing to attend and seeing that all our efforts were geared towards implementing our plans which the plaintiffs had vowed will never succeed, they started involving the provincial administration in the wrangles.

14. THAT by a letter dated 12th February 2008 we were summoned by the District Officer Pumwani Division to his offices to go and satisfy him that we had acquired all the requisite authorization for reconstruction of the Mosque

15. THAT I and my co-defendants in compliance with the summons attended the District Officer in his office and showed him all the documents that we had and the said officer satisfied himself that what we were doing was within the law

16. THAT when we left the meeting of the District Officer we went and demolished the remaining part of the premises and as at the time the plaintiffs moved to court there is no single wall that was standing of that building

17. THAT by 14th February 2008 the contractor was on the site reconstructing the Mosque according to the terms of the contract

19. THAT ... the plaintiffs' application has been overtaken by events since the premises was already demolished and/or pulled down by the time the application came up for hearing on 14.2.08.'

The same Juma Abdalla swore another replying affidavit on 25.02.08 to the plaintiff's present chamber summons dated 18.02.08 in which the following paragraphs, among others, appear:

'4. THAT the demolition of the Mosque was a well planned affair which started late last year under the circumstance clearly indicated on my affidavit sworn on 18.2.2008 and filed in court on the same date.

5. THAT the said demolition then stopped after the country's general elections because we did not want the public to associate it with the civil unrest caused by the disputed elections.

6. THAT we commenced demolition in January this year (2008) and the plaintiffs then sought the intervention of the District Officer Pumwani who summoned us to his office on 13.12.2008 at 9.00 a.m. to go and satisfy him that we had sought the requisite approvals for reconstruction of the Mosque

7. THAT after satisfying the District Officer Pumwani that we had acquired the necessary approvals for reconstruction of the Mosque we went back to the site to continue with the demolitions and by 4.00 p.m. that day (13.2.2008) we had demolished the entire Mosque.

15. THAT the plaintiffs in this matter have misled the court on paragraph 5 (five) of the affidavit of Juma Rajab sworn on 18.2.2008 which states that the demolition of the Mosque was commenced on 16.2.2008.

16. THAT the affidavit of Juma Rajab is clearly a misrepresentation of facts as it contradicts his earlier affidavit sworn on 13.2.2008 (paragraph 7) in which he has clearly put it that we had demolished part of the Mosque by that date and they have also annexed photographs ('HS 3') showing of (sic) the Mosque that is demolished.

17. THAT all what the plaintiffs/applicants are interest in is disturbing the affairs of the Mosque and make it difficult for the intended development to take place.'

There was an attempt by Juma Rajab to reply vide his 7 – paragraph supplementary affidavit sworn on 29.02.08 to the above Juma Abdalla's affidavit sworn on 25.02.08. I have already found Juma Rajab's aforesaid supplementary affidavit incurably defective, struck it out and expunged it from the court record. The result is that there is no evidence at this interlocutory stage to counter Juma Abdalla's affidavit sworn on 25.02.08 and I accept the averments contained therein.

It appears from the affidavit evidence surveyed above that Juma Rajab could not make up his mind whether demolition of the Mosque had started by 13.02.08 or whether the demolition commenced on 16.02.08. Such ambivalence can only work against his affidavit evidence.

I find on the affidavit evidence available that demolition of the Mosque started early in January, 2008, was resumed on 13.02.08 and was completed by 4.00 p.m. that day as deponed by Juma Abdalla in his replying affidavit sworn on 25.02.08.

4. Established mode of service of an order of contempt on the person required to obey the same and whether such mode was complied with.

The present application was brought, *inter alia*, under section 63 (c) of the Civil Procedure Act, which provides as follows:-

'63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed –

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold'.

The power to punish for contempt is vested in the High Court by virtue of section 5(1) of the Judicature Act, Cap. 8. At the *inter-parties* hearing on 14.02.08 this court gave an interim order of *status quo* to be maintained until 19.02.08 when full hearing of the chamber summons application dated 18.02.08 essentially seeking committal of the defendants/respondents to prison for disobeying the order of *status quo* was expected to take place. It was the plaintiffs'/applicants' case that the defendants/respondents disobeyed the order of *status quo*, hence the application for the defendants/respondents to be punished, *inter alia*, by imprisonment for the alleged disobedience, which if proved would amount to contempt of court. The jurisdiction to punish for contempt is quasi-criminal and as such I hold that the standard of proof applicable thereto is the one applicable in criminal cases, i.e. beyond reasonable doubt. Upon the contempt being proved, the contemnor incurs the criminal sanction of loss of liberty, which is a fundamental right protected by the Constitution. As such it stands to reason that an application with such grave consequences must be drawn to the personal attention of the person accused of contempt as the criminal sanctions applicable are to be incurred personally. That must be the rationale for the Court of Appeal in Ochino & Another –vs- Okombo & 4 Others (*supra*) holding, *inter alia*:-

That as a general rule, no order of court requiring a

person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the

person required to do or abstain from doing the act in question.

I do, therefore, hold that in the present case it was a must for the order of status quo to be served on the defendants/respondents personally.

5. Whether indorsement, on an order requiring the person against whom it is directed, of notice of penal consequences if the order is disobeyed is a mandatory requirement

The Court of Appeal also held in Ochino's case (*supra*):-

That the copy of the order served (on the person required to obey it) must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

I do, therefore, hold that in the present case, and for reasons similar to those advanced when addressing issue number 4 above, it was mandatory for the order of *status quo* not only to be served on the defendants/respondents personally but also to be indorsed with notice of requisite penal consequences if it was disobeyed.

6. Whether there was personal service of the order of *status quo* and whether it was indorsed with notice of requisite penal consequences if disobeyed.

Regarding service of the order of *status quo*, Juma Rajab averred as follows at paragraphs 3 and 4 of his affidavit sworn on 18.02.08:

'3. THAT on the 15th day of February 2008, the Hon. Court issued an order that a *status quo* be maintained till the 19th February 2008, when the suit herein to be heard (sic) before the Honourable Court. Annexed herewith is the court order marked "JR 1."

4. THAT on the same date the order of the court was served on the Respondent Advocate and the Respondents themselves.'

The deponent, Juma Rajab did not indicate who served the respondents with the order of *status quo*, i.e. whether he is the one who served the respondents with the order and, if so, where and when, or whether somebody else did. There is no formal affidavit of service of the order in the court file.

Defendants'/respondents' counsel stated from the Bar while addressing this court on 20.02.08 that he personally did on 18.02.08 serve the chamber summons application dated 18.02.08, seeking committal of the defendants/respondents to prison, on the defendants/respondents. As already noted, there is no formal affidavit of service, in the court file, of the chamber summons application plus its supporting documents including the court order. No discourtesy to counsel is intended, but the foregoing omission means there is no actual evidence of service of the order in question. While there may be no absolute rule prohibiting counsel acting for a litigant getting involved in serving court process on the opposing litigant in the same case, note should be taken that such counsel puts himself in the awkward position of assuming the dual role of advocate and witness in the same case. This is undesirable and ought to be avoided, unless special circumstances obtain rendering such action absolutely necessary. No special circumstances have been brought to the court's attention in this case.

The court record shows the chamber summons application under consideration as being accompanied by Juma Rajab's affidavit sworn on 18.02.08 plus an extract of the order given on 14.02.08. The extracted order is NOT indorsed/endorsed with the requisite notice of penal consequences if the order was disobeyed.

The net result of the aforementioned shortcomings is that the plaintiffs/applicants have not proved to the required standard that the defendants/respondents were personally served with the order of *status quo* or that any order of *status quo* purportedly served on the defendants/respondents was indorsed with the requisite penal notice mandatorily required, as laid down by the Court of Appeal in Ochino's case (*supra*).

It is pertinent to observe, albeit in passing, that there seems to be bitter rivalry between the plaintiffs/applicants and the defendants/respondents over the leadership and running of Pumwani Riyadhha Mosque and that the two groups appear to be bent on outdoing each other. It is a pity that religious affairs should be subjected to the indignity of such bitter rivalry.

In view of the inadequacies of the chamber summons application dated 18.02.08 plus its supporting evidence set out above, the said application must fail and it is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 17th day of June 2008.

B.P. KUBO

J U D G E