



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 1202 of 2005

VERONICA WANGECI WARUHI. APPLICANT

VERSUS

SAMUEL MWANGI NG'ANG'A. RESPONDENT

RULING

The background information gathered from the record is that the applicant moved to the lower court and filed a suit in Milimani Commercial Court's, Chief Magistrates Commercial Courts' Case Number 3161 of 2002 against the respondent Samuel M Ng'ang'a. The pleadings are not annexed but there is an order annexed to the application for leave to file contempt proceedings as annexure VWI. A perusal of the same indicates that the orders had been made on the 11th day of February, 2003 and issued on 19th day of March 2004.

The order reads: -

- 1) That the defendant be and is hereby permanently restrained by himself, servants, agents or otherwise howsoever from interfering, harassing and or/in timid a ting the plaintiff.
- 2) That parties to bear their costs

It is the stand of the applicant that the respondent breached the said order. This forced the applicant to file a notice of motion brought in pursuance to order VI rule 9A of the Civil Procedure Rules, section 5 (1) of the Judicature Act and Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law. the said application dated 14th day of June 2005 and filed on 9th June 2005 sought leave to be granted to the applicant to file contempt proceedings.

The said application came before Kubo J, on 14th October, 2005 and the order for leave was granted. Armed with the order for leave to apply for contempt of court, order, proceedings against the respondent,

the applicant filed the application under consideration by way of a notice of motion dated 29th day of December, 2006 and filed the same date. The prayer sought are: -

- 1) That the defendant herein Samuel Mwangi Ng'ang'a be arrested and committed to civil jail for contempt of court order.
- 2) That the costs of this application be provided for.

The grounds are set out in the body of the said application, further affidavit, annexures and oral submissions in court.

The grounds put forward by the applicant are: -

- 1) That she applicant was granted orders directed at the respondents requiring him respondent to stop harassing the applicant.
- 2) That despite the said order being in force the respondent has continued harassing the applicant by invading the applicants home, kicked her out of her home, they have destroyed her properties, her home and family.
- 3) That, she has suffered for the last 26 years and has been trotting to and from various government offices without help.
- 4) That the applicant has been defamed by the respondent.
- 5) All that the respondent aims to achieve. Using the harassment is to get the land.

In response, counsel, for the respondent has opposed the application on the grounds that: -

- 1) The application is defective and incompetent as it does not state the provision of law under which the application has been brought.
- 2) The complaint raised borders on criminality and yet there is nothing, which the applicant has demonstrated to show that she has made efforts to report to police.
- 3) There is complaint of encroachment on the applicants land but there is no proof.
- 4) Turning to the merits of the application, they contend that there is nothing to show that the applicant extracted the order allegedly, infringed, and served on to the applicant. on that account they urge the court to dismiss the application.

In reply applicant simply stated that she has documents to prove her case.

On the courts assessment of the facts herein, it is clear that the respondents attack on the applicant's application is on two fronts. They technical front and the merit front.

The technical front is based on the respondent's assertion that the application is incompetent because the provision of law under which the application is brought is not indicated. To resolve this, the court has to turn to the rules for assistance. Order 50 rule 12 Civil Procedure Rules reads: -

“ Every order rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reasons of failure to comply with this rule”

“Further order 6 rule 12 civil procedure rules reads in No. Technical objection may be raised to any pleadings, on the ground of any want of form.”

These two provisions operate to shield the applicant's application from being faulted on the technical ground of want of form. This being the case the court makes findings that the same qualities for being disposed off on merit.

On the merits of the case, although neither side cited case law to the court, this court, has judicial notice of the applicable principles. These are to the effect that in order for an aggrieved party to benefit from a plea of contempt of court orders, in his/her favour he/she has to demonstrate the following: -

- 1) That she extracted the order that was granted in his/her favour.
- 2) The said extracted order was served personally on to the breaching party.
- 3) A return of serve has to be filed evidencing proof of personal service on the contemnor.

In the absence of such compliance contempt proceedings cannot hold. This court has applied the above principles to the facts displayed herein, and finds that although the applicant may be having a genuine complaint, she has not demonstrated that: -

- a) She extracted the order and personally had it served on to the respondent which order was disobeyed and a return of service to that effect filed, evidencing of personal service. Since there is non-compliance or lack of proof of compliance with the pre-requisite, before seeking redress for contempt by the applicant, this court has no alternative but to rule that the application is premature. It is struck out.

The applicant is advised to extract the said order and have it served personally on to the respondent. After effecting the said personal service she would then file a return of service in court evidencing personal service. Thereafter is when she can commence contempt proceedings in the event of any breach.

For the reasons given the applicants application dated 29th December 2006 is hereby struck out for being premature.

- 3) The respondent will have costs of the application.

Dated, read and delivered at Nairobi this 6th day of June 2008.

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R NAMBUYE

JUDGE