



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. 827 OF 2007

HENRY OKUM FWAYA.....PLAINTIFF

VERSUS

JOSEPH D.K. KIMANI

t/a

ROSAM ENTERPRISES LTD.....DEFENDANT

RULING

A perusal of the record herein reveals that there exist proceedings which had been instituted in the lower court vide Milimani commercial court CMCC 44 of 2003. The parties to these proceedings were indicated as Henry Okumu Fwaya as the plaintiff and Buneel Direnity Ltd and another as the defendant. It's on record that orders leading to the current proceedings in the high court were granted by N.A. Owino (Mrs.) as she then was (now judge) to the effect that:-

(1) That the case against the 1st defendant be and is hereby dismisses.

(2) That the said motor vehicle registration no KAK 483Q be relieved to the plaintiff immediately. The user is awarded Ksh. 355,000.00 for loss and cost of the suit interest be paid in this suit for delay of judgement in full.

The said orders were issued on the 10th day of June 2007.

Apparently the court orders were not obeyed this forcing the current applicant Henry Okumu Fwaya who was the plaintiff in the lower court, to move to the high court vide Misc application no 927 of 2007 seeking orders against the Respondent Joseph D.K. Kimani t/g Rosam Enterprises the application is by way of notice of motion brought under section 3 of the CPA it sought 3 orders;-

“(a) that this application be heard in procedure of any other application before court.

(b) That this Honourable court be plead to grant leave to the applicant to institute contempt proceedings herein against the respondent who is in contempt of the orders of the subordinate court dated 10th June 2004.

(c) that the cost of this application be granted to the applicant in any event . The application for leave is dated 16th November 2007 and filed on 4th December 2007.

The applications come before this court on 29/2/2008 when Kihara J. ordered that it be saved on to the Respondent. In the supporting affidavit for leave as well as the grounds it was stated that upon issuance of the said lower court orders, the Respondent became a grieved and he appealed to the high court vide HCC A No 9179 2004 on 26th October 2004 which appeal had been dismissed by justice Mitingi on 19th July 2007.

Need on record is an affidavit of service sworn by one Daniel Mutheka on the 16th day of November 2007 and filed on 29th February 2008. Paragraph 3 and 4 there of is of importance to the proceedings. In it the process server depones that on the 17th September 2007 he made his way to the respondent's premises to effect penal service of the order on arrival he met the respondent who contacted his lawyer in phone and it was agreed between the respondent and his lawyer that the lawyer be served. Where paid the process server proceeded to serve the counsel who stumped on the copy of the order dated 17th 9/2007 with remarks that the order cannot be complied with because there is a pending appeal.

On the same record there is a return of service sworn by the same Daniel Mutheka on 6th March 2008 and filed on 7th March 2008 paragraph 2, 3,4,5,6 and 7 are materials to the application. In sum total the said process server proceeded to serve the order penal notice, application for leave on the respondent in issuance of Kihara JS orders of 29/2/2008. He depones that he moved to Chai house the 3rd floor where the process server knew that the respondent came on his business. He found the place and open in queries for the security guards he was directed to Soliton house 2nd floor next to Kobil Petrol station opposite Geserone Road junction. He went to the premises on 3/3/2008 at 9.00 a.m. but missed the respondent. He went back at 2.35 p.m. and affected service of the order and application for leave which was accepted but the respondent decision to sign for the same.

The application for leave was granted by this court on 10/3/2008. The substantive application is dated 9th April 2008 and filed on 8th May 2008. It seeks 3 prayers:-

- a. That the respondent Joseph D.K. Kimani be committed to court jail for such term as this Honourable court may deem fit but not exceeding six months for contempt of court order dated 10th June 2004 in Milimani CMCC 4422 of 2003 for release of motor vehicle registration number KAK 4839 to the Applicant.
- b. That this Honourable do make such other orders to compel the respondent to comply with the orders made by the chief magistrate in CMCC 4422 of 2003 on 10th June 2004 for the purpose of protecting and upholding integrity and authority of the honourable court.
- c. That the respondents do pay cost of this application.

There is a return of service sworn by the same Daniel Mutheka on 16th July 2008. The sum total of paragraph 2,3,4,5,6 and 7 which are relevant to the effect that we relived the substantive application with institution to serve the respondent which he did on 19th May 2008, and on 11th day of July 2008 he served the same documents on to the Attorney general. The respondent declined to acknowledge receipt by signing but the Attorney General acknowledges the documents by stamping and signing the substantive application was heard on amount on 17/7/2008. The applicant counsel relied on the documentation annexed to the supporting affidavit and case law namely the case of Mutitika versus Baharini Farm limited (1985) KCR 227 where it was held by the court of appeal in for alia that:-

- a. A person one who, knowing of an injunction or an order as stay willfully does something or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such of person has by his conduct abstracted justice.
- b. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubts as its not safe to extend the latter standard to an offence which is quasi criminal in nature. The quantity of a contemnor has to be proved with such

strictness of proof as in content with the gravity of the charge.

3. The principle must be born in mind that the jurisdiction to commit for contempt should be carefully examined 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.

On the court assessment of the facts herein that the applicant indeed moved to the lower court and filed suit against the respondent and another seeking various relief. The cause of action is contained in paragraph 4, 5, 6,7,8,9 of the plaint which is to the effect that the applicant who was the plaintiff was the registered owner of motor vehicle Registration number KAKA 483Q Toyota which had allegedly been wrongfully distrained for rent arrears for one Leonard Mahiu in favour of the 1st defendant of landlord of the said Leonard Mahiu. The applicant duly signed a dedication under the relevant Act as regard annexures of the annex of the said motor vehicle on relation to the distress for rent which declaration was not weeded by the Respondent and his against seeing the applicant to move to court. The stand of the applicant was that the motor vehicle had wrongfully been distrained and the same should be released to him.

The 1st defendant in the lower court put in a defence to the effect that:-

- He was a landlord of Leonard Mahilo.
- The said Leonard had rent arrears.
- The land lord duly instituted the second defendant to levy duties for rent
- Distress for rent was duly carried and the said Leonard Mahilu is the one who handed over the said motor vehicle to the belief the second defendant also filed a defence whose salient features that the second defendant claimed that he was handed the suit motor vehicle by one Leonard Okumu Mahilu in replacement for house hold goods that had been attached for rent arrears.
- He denied ownership of the said motor vehicle as claimed by the applicant parties were heard and judgement delivered on 10/6/2004 giving rise to the orders sought to be enforced.

The net result of the above assessment is that the applicant emerged the winner in the lower court. Efforts to realize the suit of the judgement came to court. He has come to this court seeking enforcement of this judgment in his favour through contempt of court proceedings. This court has judicial notice to the fact that the law of enforcement of court orders has crystalized and in summary it is to the effect that:-

(i). Court orders must be observed in obculenious and not in breach.

(ii). The addressee of a court orders has no alternative built to not only obey, but to perform it carry on its stand.

(iii). Any addressee aggrieved by such an order can only obtain repair for such requirement as to obtain once upon applying for they stay or setting a side of the said order.

(iv). It is imperative on the court to ensure that its court orders are obeyed at all time and this is so because if not obeyed litigant will loose confidence in the court system and which of impurity will resign as against the dignity and integrity of the court as well as the rule of law. It will also render the court process not only nigetory but meaning less because the sole purpose if litigation is to render justice to litigants by handing out to their through the court process meaningful and effective remedies to their grievances . Anything short of that will lead to the loss of confidence in the court system and may even usher in the rule of the jungle. There are new a wealth of judicial decision on the subject and that is why this court said earlier on that the law was crystalized. This court had owes to rule on a similar matter in own ruling delivered on 3rd day of October of 2008 in the case of image Aparalised versus Freight in time limited Nairobi HCC Misc application no 1023 of 2005. Case law on the subject is discussed at

pages 30-33, 44-45. the salient features of the relevant principles are as follows;-

(1) It is the duty of everyone in respect of whom a court order is made to obey such an order, in less and until it is dismerged and disobedience of such an order result in the person disobeying it being in contempt. (see the case of Hadkimson versus Hadkimson (1952) 2AER 567).

(2) A litigant might have a replace for disobedience where he demonstrates that the orders alleged to have been disobeyed should not have been made by the court (see the case of Gordon versus Gordon (1940-7) AIIER 707).

(3) (i) Unless and until a court order is disclosed it ought to be obeyed.

(ii) As long as the orders are not discharged they are valid.

(iii) Since they are valid they should be obeyed in obedience and not in breach.

(iv) The only way in which a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay.

(v) as long as orders is not stayed and it is not yet disclosed then a litigant who disobeys it does so it the palm of committing a corrupt of court (see the case of Ramesh Popettal and another versus KDC Milimani HCCC no 575 of 2003 delivered by Njagi J.

Herein order were in place and still are but have not been obeyed. In the applicant opinion this is a proper case where this court can demonstrate that it has fact that can bite and effective tools to ensure that the bites are not in vain. One of its effective tools is the ability to promise for Kentanpt. The only letter is that it has to be examined within certain principles.

(1) That a valid order exists and it has been disobeyed. This has been proved.

(2) Proof that the same together with band notice were extricated and herein the court has set out above content of R/S do show that the order was extracted twice upon issuance of the order and after appeal and served on both the Respondent and his advocate on record.

(3) When contempt of court proceedings were command the court ordered the respondent to be served even with the application for leave which is clear would exparte. But the respondent action respondent to the application for leave or the substantive application. In the premises the respondent is therefore a proper candidate to be proceeded a against in this manner sought for contempt of court orders when determining the penalty the court is called upon were regard to all the surrounding circumstances relating to the breach. Herein there is name presented by the respondent. Al that the court has a demonstration of flagrant disobedience of a court order by the respondent. His conduct of not even bothering to courts the contempt proceedings as from the evidence of impurity to court as well as the court process which deserves punishment. The suit punishment in the circumstance of this case is none other than on order for committed to civil suit in condition the court funds meant in the applicant application dated 9th April 2008 and filed on 5th may 2008. The same is allowed on the following terms.

1. the respondent herein namely Joseph D.K. Kimani t/g Rosem enterprises limited been and is hereby ordered to be arrested and committed to civil suit for a period of 6 months from the date of arrest and such committed for disobeying the court order issued 10th June 2004 in Milimani CMCC 4422 of 2003.

2. Alternatively the committal period be determined by the period taken by the said respondent to page the content of less than 6 months.

3. The applicant is at liberty to execute against the respondent for the release of the said motor vehicle.

4. The applicant will have costs of there proceedings.

Dated, Read and Delivered at Nairobi this 24th day of October 2008.

R.N. NAMBUYE

JUDGE