REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 2 of 1990

JOSEPH MWANGI IRUNGU ……..……. PLAINTIFF

VERSUS

GEOFFREY MWANGI WACHIRA ……..…….. DEFENDANT

RULING

The plaintiff has brought an application by notice of motion dated 7th February 2008 seeking the detention of the defendant in prison for disobeying the order of this court of 7th November 2007 by returning on the plaintiff's land after being evicted on 7th January 2003. In support of that application the plaintiff stated that judgment was entered on 16th June 1994 in favour of the plaintiff to the effect that the parcel No. IRIAINI/GATUNDU/119 belonged to the plaintiff. Although the defendant was given time to vacate the land he did not do so and following an order of this court he was evicted by the auctioneers and the court bailiff on 7th January 2003. The defendant complained to the police of damage to his property which resulted in the arrest of the plaintiff, her children and the auctioneer. They were charged with malicious damage to property. The court later acquitted them of those charges. The defendant used the opportunity of their arrest to return to the land. He has remained on that land to date and has put up structures and intends to put up more structures. The defendant filed an appeal against the judgment in favour of the plaintiff but the court of appeal declined to hear him so long as he was in contempt of the court order. The plaintiff therefore sought for orders of committal to prison of the defendant. The application was opposed by the defendant. The broad opposition of the defendant falls into three categories. Firstly the defendant argued that the plaintiff had failed to follow the correct procedure in obtaining leave to apply for contempt and even in the main contempt application. Secondly the defendant argued that he order allegedly defied by the defendant had a problem in its date for it did not correspond with the hand written proceedings. The defendant finally argued that the applicant is a stranger in these proceedings. For those reasons the defendant argued that the application must fail. I will begin by considering the third argument. The present application is brought by the widow of the plaintiff. Before instituting the present application the widow had obtained letters of administration over her husband's estate. She later applied to be substituted in these proceedings. That application for substitution was brought after judgment had been entered in favour of her late husband. The court made a finding that her application for substitution could not be made in view of order XXIII rule 11. That rule relates to substitution on the death of either the plaintiff or the defendant. That Rule provides:-

"***Nothing in rules 3, 4, and 8 shall apply to proceedings in execution of a degree or order.***"

It is clear that order XXIII does not cover a case where judgment had been entered and where execution is proceeding. Order XXIII provides that where substitution in a suit is not made within a year of the death

of the plaintiff or defendant such a suit would abate. The word 'abate' is defined in the Black's Law Dictionary as, "*The act of eliminating or nullifying."* From that definition it is clear that it is only a suit which is not yet to be determined that can abate. In the present case judgment had been entered and therefore the suit had been determined. In this case the suit was incapable of abating. It therefore follows once the widow obtained letters of administration she was capable of proceeding with the execution of the judgment in favour of her late husband. By all means and in view of the provisions of Order XXIII the applicant cannot be described as a stranger. That argument by the defendant is rejected. The defendant also argued that the extracted order of the court made on 7th November 2002 had a problem. Looking at that order it is dated 7th November 2002. It was issued by the Deputy Registrar on 21st March 2003. The date which ought to be considered is the date that the order was granted by the court. The fact that the order was issued by the Deputy Registrar on a date later than when the judge gave the order does not create a problem on reliance of that order. It is pertinent to note that it is the plaintiff's advocate who intimated on 30th January 2003 to the court that that order had a problem. On making that statement before the judge on that day, the judge proceeded to mark the matter as stood over generally. The second argument therefore raised by the defendant is also therefore rejected. The first argument however does find favour with me. The order which is the subject of this application was not as a result of an application under Order XXXIX of the civil procedure rules. Had it been it would not have been caught by the provisions of section 5 of the Judicature Act. the order that the plaintiff relies upon in this contempt proceedings that was granted on 7th November 2002 can only be enforced under contempt proceedings as provided by section 5 (1) of the judicature act. That section provides;-

"***The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."***

The High Court of Justice in England follow Order 52 rule 2 in such applications. That rule provides as follows:-

"***2. – (1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.***

(2) An application for such leave must be made *exparte* ***to a Divisional court, expect in vacation when it may be made to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.***

(3) The applicant must give notice of the application for leave not latter than the preceding day to the Crown Office and must at the same time lodge in that office copies of the statement and affidavit.

(4) Where an application for leave under this rule is refused by a judge in chambers, the applicant may make a fresh application for such leave to a Divisional court.

(5) An application made to a Divisional Court by virtue of paragraph (4) must be made within 8 days after the Judge's refusal to give leave or, if a Divisional court does not sit within that period, on the first day on which it sits thereafter."

Rule 3 of Order 52 further provides;

3 – (1) when leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to a Divisional Court and, unless the court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be <u>served personally</u> on the person sought to be committed.

(4) Without prejudice to the powers of the court or judge under Order 65 rule 4, the court or judge <u>may dispense with service</u> of the notice of motion under this rule if it or he thinks it just to do so."

As can be seen from that rule the plaintiff at the stage of obtaining leave should have filed a statement and an affidavit and should also have given notice to the crown office in our case that the Attorney General's office. The plaintiff did not follow the procedure as laid out herein before. The plaintiff also failed to prove service of the order of 7th November 2002 on the defendant together with a penal notice. The case of *Ochino & another v Okombo & 4 others [1989] KLR* the court of appeal set out what an applicant ought to do in case of such an application. It held that;-

1. 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.

2. The copy of the order served 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.

3. The court will only punish as a contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

4. That the defendant has proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.

5. Since the correct procedure was not followed in bringing the application for contempt, there was no contempt application before the learned judge and consequently no basis upon which the committal of the 1st appellant could be sustained.

The plaintiff's application is therefore defeated by failure to abide by the laid down procedure as provided in section 5(1). In my view this does not mean the end of the plaintiff coming before court. There would be no reason why the plaintiff cannot approach the court with a view to seeking fresh orders for eviction of the defendant since the defendant has returned to the land. The end of the matter is that the plaintiff's notice of motion dated 7th February 2008 is hereby dismissed with costs to the defendant.

Dated and delivered at Nyeri this 16th day of October 2008.

MARY KASANGO

<u>JUDGE</u>