



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

Misc Civil Appli 943 of 2006

IN THE MATTER OF: AN APPLICATION FOR COMMITAL TO

CIVIL JAIL FOR CONTEMPT OF COURT

AND

IN THE MATTER OF: MOMBASA H.C.C.C. NO. 228 OF 2005

MWATARARE WA MWARABU & ANOTHER.APPLICANTS

VERSUS

RAIYA S. SEIF1ST RESPONDENT

ESRI STAR TRANSPORT CO. LTD.2ND RESPONDENT

R U L I N G

In a Notice of Motion dated 6th November 2006, Mwararare wa Mwarabu and Babu Ramadhan the appellants sought to have Raiya S. Seif and the Director of Esri Star Transport Co. Ltd the Respondents herein, committed to Civil jail for contempt of the court order made on 19th July 2006. The motion is supported by the supporting affidavit of Babu Ramadhan sworn on 17th November 2006.

When served with the motion, the Respondents filed the replying affidavit of Raiya Seif Soud to oppose the same.

The applicants' argument is to the effect that the Respondents have continued to flagrantly disobey the consent order of 19.7.2006 by refusing and neglecting to allow to the applicants, their children, employees, servants and agents into or out of their house standing on plot No. 832/VI/M.N. It is alleged that Raiya Seif Soud is unable to get out of the aforesaid premises because the Respondents have instructed their security men strict instruction not to allow any person going in and out of the 1st Respondent's house, thus rendering the consent order of 19th July 2006 useless.

The Respondents strongly opposed the motion on the ground that they have complied with and continue to comply with the aforesaid consent order. It is the understanding of the Respondent that the consent was in respect of a small gate which is part of the big gate in the sense that the small gate is an opening provided for in the main gate. The Respondents were taken by surprise by the application because they have always seen the applicants come out and into the house hence none of their freedoms have been curtailed as alleged.

I have considered the able submissions tendered learned counsels on both sides. I have further perused the material placed before this court. It is agreed that the parties recorded a consent order dated 19th July 2006 which was to the effect that the applicants do allow the Respondent and their families ingress and egress through the small entrance next to the house located once on plot No. 832/IV/M.N. at all times pending the hearing and determination of this suit. In the case of **Mwangi H.C. Wang'ondu =vs= Nairobi City commission C.A. No. 95 of 1995** the court of Appeal stated as follows:

“... As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed 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. This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction been proved beyond reasonable doubt.”

In the matter now before court, there is no dispute that there is a consent order which is directed against the respondents to allow the applicants free access to their house through the small entrance next to the house located on plot No. 832/VI/M.N. Raiya Seif Soud averred in paragraphs 3 and 4 of the replying affidavit as follows:

“3 That the defendants have indeed complied and continue to comply with the said order and needed no reminder as alleged or at all.

4. That the consent was in respect of a small gate and the small gate is part of the big gate in the sense that the small gate is an opening provided for in the main gate and is not an independent gate.”

The above averments have not been controverted or challenged by another affidavit. This means the applicants admit the facts to be true position on the ground. The standard of proof in contempt cases is said to be that of beyond reasonable doubt. In the circumstances of this case there is doubt as to whether the Respondents are actually in breach of the consent order. The applicants in my view have failed to discharge this burden to the required standards. In the end I find that the allegations of contempt have not been satisfactorily proved. A fair order in the circumstances is to dismiss the motion.

Consequently the motion dated 6th November 2006 is ordered dismissed with costs to the Respondents.

Dated and delivered at Mombasa this 30th day of March 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Okoth holding brief for Mr. Khatib for Applicant

N/A for Miss Ngetich.