



**CATHERINE MUTHONI IRERI ..... PLAINTIFF**

**VERSUS**

**GEORGE MWAURA KIBUI ..... DEFENDANT**

**RULING**

After leave to apply for an order that the Defendant herein be committed to jail for contempt of the court order dated 5<sup>th</sup> February, 2004, was granted on 24<sup>th</sup> November, 2005, a Notice of Motion dated 29<sup>th</sup> November, 2005 was filed to seek the order that the Defendant be committed to jail for contempt of the orders of this court issued on 31<sup>st</sup> December, 2004.

There is also a prayer that the Defendant with his family be ordered to vacate the suit premises forthwith. This prayer definitely is improper even in view of the consent order dated 5<sup>th</sup> February, 2004 and moreover it is seeking mandatory orders in an interlocutory application, leave whereof was given specifically to commence proceedings to commit the Defendant for contempt of the court order.

I also state that it was rightly not further pressed by the counsel for the Plaintiff and thus I reject prayer No.3 of the application dated 29<sup>th</sup> November, 2005 at the out set.

In her affidavit in support sworn on 29<sup>th</sup> November, 2005 the Plaintiff/Applicant has averred that sometimes in October, 2003 the defendant commenced construction works where he started putting up a permanent building on the said piece of land. (See paragraph 7). Then she avers that her pleas to stop and vacate the suit land was not heeded and thus she instructed her advocate to file the present suit.

Despite these averments, she has averred that on 13<sup>th</sup> October, 2003, when she accompanied the process server to serve the Defendant with injunction order to continuing with construction amongst other restraints, she found the workmen digging a foundation for the permanent structure (see paragraph 7 of the supplementary affidavit sworn on 1<sup>st</sup> March, 2006).

She has annexed a letter dated 15<sup>th</sup> November, 2005 from the Assistant Chief of Kamwangi Sub-location to show that the Defendant is continuing with construction despite the orders issued on 31<sup>st</sup> December, 2004.

The Defendant/Respondent in his replying affidavit sworn on 14<sup>th</sup> December 2005, has annexed a letter dated 14<sup>th</sup> December 2005 from the same Assistant Chief wherein he has stated that the construction had been done before the orders.

I also note that the service of the court order with Notice of Penal consequences dated 18<sup>th</sup> January, 2005 also have been annexed in the said supplementary affidavit showing some signature and date of 19<sup>th</sup> January, 2005 at its back side. The Plaintiff/Applicant has not filed any affidavit of service to confirm the said service. From the court record I have seen that the earlier court order issued on 31<sup>st</sup> October, 2003 was acknowledged by the Defendant with his full names and Identity card number written. I also notice

paragraph 7 of his affidavit sworn on 3<sup>rd</sup> February, 2004 and annexed as CMI 3 in the supporting affidavit of the Plaintiff/Applicant. It specifically mentions that he signed at the back with his Identification number as he suspected that someone could have forged his signature.

I may also note that the Defendant/Respondent has not denied the service of the Notice of Penal consequences and the order and hence, with due hesitation, I accept that there was a service of Court with Notice of Penal Consequences.

The Defendant in short has denied that he has committed any contempt and asserted that the incomplete construction was due to the service of order. According to him he had constructed the house earlier and have moved with the family but the Plaintiff moved the court after she obtained the title deed by fraud and wants him to vacate the land for which he has already paid her.

This in short, is the case before me.

Before me is an application to commit the Defendant to civil imprisonment for contempt of the court order. This is a serious matter and I adopt the observations made by Lord Denning MR in the case of **Re Bramblevale (1970) 1 Ch.1 128 or (1969) 3 All.E.R. 1062** namely:

**“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt”.**

In other case of **Re B. (FA) an infant (1965) Ch.112 at 1117** – Cross J. observed:

**“Committal is a serious matter. The court must proceed very carefully before they make an order to commit to prison.....”**

I also note that all individuals and institutions need to uphold the rule of law and due administration of justice and the court shall be vigilant that its orders are not made in vain and are flouted without any deterrence.

But on the other hand, court has to administer justice and protect the rule of law considering the interest of both sides.

The onus is on the applicant to prove that the Defendant has committed this serious offence and is culpable to receive the punishment for sacrilegising the dignity of the temple of justice.

I have made observations on the seemingly contradictory averments made by the applicant in two affidavits sworn by her in support of this application.

From the photographs annexed by the applicant, it does not come out clear that the construction is very new as alleged by her. The incomplete home has grown plants near the house, which do not seem to be freshly planted.

On the other side I have two contradictory letters (diametrically opposing each other) from the same Assistant chief.

In my humble opinion, I am not satisfied that the applicant has proved with required standards that the Defendant has committed the offence of contempt of court order as alleged.

I thus dismiss the application dated 29<sup>th</sup> November, 2005.

This case really should be heard on priority instead of entangled in interlocutory applications.

I direct that the case be fixed for hearing on urgent basis.

Costs of this application to the Defendant.

Dated and signed at Nairobi this 24<sup>th</sup> day of May, 2007.

**K.H. RAWAL**

**JUDGE**

**24.5.07**