



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Case 218 of 2007

PHILIP MUGOYA OGILAPLAINTIFF

V E R S U S

THE BURU BURU POLICE STATION DTO.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

R U L I N G

On 27th March 2007 this court (Emukule, J.) in HC Miscellaneous Civil Case No. 294 of 2007 (Judicial Review) granted leave to the Applicant herein (who was the applicant in the said judicial review case) to seek judicial review by orders of prohibition. It also ordered that the leave so granted:-

“..... to operate as a stay of the 1st and 2nd Respondents’ demand that the Applicant complies with Legal Notice 161 of 2003 until the determination of the notice of motion application to be filed”

or as the court may direct.

In the judicial review matter the 2nd Respondent was named as

“THE BURU BURU POLICE STATION DTO”. At the hearing of this application it was understood that this is the Divisional Traffic

Officer, Buru Buru Police Division).

On 11th April 2007 in the present proceedings leave was granted to the Applicant to file contempt of court proceedings against the said Divisional Traffic Officer, Buru Buru Police Division, named as Inspector Nyaga. It turned out later that his correct rank is Chief Inspector of Police and his full name is SELESTINO NYAGA MUCHUNGU.

The necessary contempt of court proceedings were filed by notice of motion dated 11th April 2007. It seeks the main order that the Chief Inspector (hereinafter called the 1st Respondent) be committed to civil jail for a period not exceeding six months

“for having been in contempt of this court’s orderissued on 29th March 2007”.

This must be a typographical error because the order was given on 27th March 2007. There is a supporting affidavit sworn by the Applicant. To it is annexed the affidavit sworn in support of the application for leave to file the contempt proceedings. An issue regarding this was taken by learned counsel for the 1st Respondent. As the said earlier affidavit is only an annexure to the affidavit sworn

in support of the present application, I see nothing wrong with the court looking at and considering the contents of that annexure.

The 1st Respondent has opposed the application as set out in his replying affidavit sworn and filed in court on 17th April 2007. His case is that he has not been in contempt of the court order of 27th March 2007.

I have read the supporting and opposing affidavits. I have also carefully considered the submissions of the learned counsels appearing, including the cases cited. There is no dispute that the 1st Respondent was duly and personally served with the order together with the requisite penal notice. What is in dispute is whether he was in contempt of the order.

The applicant’s case is that by refusing to release the Applicant’s motor vehicle Registration No. KAW 698X immediately and continuing to hold it the 1st Respondent was in contempt of the order of 27th March 2007. It is his further case that when served with the order the 1st Respondent openly and verbally treated it with contempt and declared that he would not obey it. It is also the

Applicant’s case that in having the motor vehicle inspected and in charging the Applicant and his driver with various offences, the 1st Respondent was actually demanding that the Applicant comply with Legal Notice No. 161 of 2003 contrary to the court order of 27th March 2007.

The Respondent’s case on the other hand is that the Applicant’s motor vehicle, among other vehicles, was impounded by traffic police on 7th April 2007 for being in violation of provisions of the Traffic Act, Cap. 403; that on the same day at about 6.30 p.m. he was served with the court order of 27th March 2007, and he read and understood it; that the said order did not direct that the Applicant’s motor vehicle be released to him; that he never demanded nor directed nor insisted nor ordered the Applicant to comply with any aspect of Legal Notice No. 161 of 2003; and that the Traffic Department charged the Applicant with flouting the provisions of the Traffic Act. He also denies acting, either verbally or otherwise, in any derogatory manner towards the court order.

It is necessary at this juncture to reproduce the order in question in full (as extracted and issued). It is in the following words:-

“4. That the leave so granted to operate as a stay of the 1st and 2nd Respondents’ demand that the Applicant complies with Legal Notice 161 of 2003 until the determination of the notice of motion application to be filed hereafter, or as this Honourable Court may direct.”

This is the order that was served upon the Respondent. To be in contempt of it he would have to have demanded that the Applicant comply with Legal Notice No. 161 of 2003. Such demand could of course be by conduct; it need not be verbal. But is there evidence of such demand? It must be remembered that the order did not require the Respondent to release the Applicant’s motor vehicle. Nor did it forbid the Respondent to enforce the provisions of the Traffic Act, Cap. 403. It may be true that it was the Respondent who caused the Applicant’s motor vehicle to be inspected for defects by the Motor Vehicle Inspectorate. But the Applicant was then charged with offences under the Traffic Act, not under Legal Notice No. 161 of 2003.

So, I do not find that the Respondent was in contempt of the order of 27th March 2007. But having so

found, I must state that if indeed he verbally or by other conduct treated the order with disdain as alleged when served upon him, this was conduct thoroughly unbecoming of a senior police officer and must be frowned upon. However, such conduct would not be of any consequence so long as the order itself has not been disobeyed in its terms. Such conduct, though reprehensible, would not amount to contempt unless there is disobedience of the order in its terms.

In the result I will refuse the application. It is hereby dismissed. Regarding costs, I hold that the ends of justice will be best served by the parties meeting their own costs of the application. There will be orders accordingly.

DATED AT NAIROBI THIS 7TH JUNE 2007

H. P. G. WAWERU

J U D G E