



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Misc Appli 129 of 2007

JESSE WARUI CHEGE.....APPLICANT

VERSUS

SIMON NJOROGE KARIUKI.....RESPONDENT

RULING

On the 25th April, 2007, the applicant Jesse Warui Chege sought and was granted leave by this Court to file contempt of Civil proceeding against the respondent, Simon Njoroge Kariuki. On the 9th May, 2007, the applicant filed an application under **Order XXXIX Rule 2(3) and 9** of the **Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking for the following order of this Court:

“That the honourable court do order Simon Njoroge Kariuki to be committed to civil jail for the disobedience of the orders of the lower court dated 26th August 2004 thereby acting in contempt of this court to such a records (sic) as this court would deem necessary and or until he purges his contempt”.

The grounds in support of the application are on the face of the record. The application is supported by the annexed affidavit of Jessee Warui Chege. In the said affidavit, the applicant has deponed that on the 20th August, 2004, the subordinate at Nakuru issued order of injunction restraining the respondent from interfering with the applicant’s 1½ acre land which is part of **LR. No. 6746/15** pending the hearing and determination of the suit or until further orders of the court. The applicant deponed that in breach of the said order, the respondent and his agents, particularly his children, had disobeyed the said order of the court by entering and preventing the applicant from having quiet enjoyment of the said parcel of land. The applicant further deponed that as a result of the respondent’s act, he had made several reports to the police resulting in the respondent and his children being charged with various criminal offences including malicious damage to property. Despite the said criminal charges, the respondent had continued to render the applicant’s peaceful utilization of the said parcel of land impossible. He therefore urged the court to cite the respondent for contempt of court so that the dignity of this court could be upheld.

The respondent filed a replying affidavit. He opposed the application that sought to have him cited for contempt of court. He denied having been served with the order that he is alleged to be in contempt of. He averred that he was not aware of that an order of injunction had been issued against him by the subordinate court. He admitted that he had indeed sold the said 1½ acre parcel of land to the applicant but could not transfer the same to him since the members of his family had opposed the said land transaction. He deponed that due to resistance by the members of his family to the said sale, he was

willing to refund the entire purchase consideration to the applicant. He denied he had incited the members of his family to maliciously damage the applicant's maize crop. He averred that the applicant was motivated by vendetta in filing the present application. He explained that the applicant had instituted more than seven criminal cases against the members of his family, including himself. Respondent averred that the applicant had obtained the said order of injunction by concealing material facts from the court, which included the fact that the agreement which the applicant was relying on in support of his case was null and void as it could not confer proprietary rights. He therefore urged the court to disallow the application.

At the hearing of the application, I heard the submission made by Miss Njoroge on behalf of the applicant and the response thereto made by Mr. Munene on behalf of the respondent. Both counsel reiterated the contents of the application and the replying affidavit filed respectively by the applicant and the respondent. Both counsel relied on decided cases in support of their respective submissions. This court read the said authorities and shall refer to them where appropriate. The issues for determination by this court are as follows:

(i) *whether this court's jurisdiction to cite the respondent for contempt of court was properly invoked.*

(ii) *whether the applicant has established that there indeed existed an order which was issued by the subordinate court and which was served upon the respondent together with a notice of penal consequences.*

On the first issue, this court's power to punish for contempt of court is provided for under **Section 5 (3)** of the Judicature Act which states;

“(i) 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 powers shall extend to upholding the authority and dignity of subordinate courts.

(iii) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original Criminal Jurisdiction of the High Court.”

Order XXXIX Rule 2(3) of the **Civil Procedure Rules** grants this court power to punish where an order issued by the court is disobeyed. Before this court can cite a respondent for contempt of court, the applicant must establish that he served the said order with a notice of penal consequences. I agree with the decision of Lenaola J, in **Kariuki & 2 Others Vs Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] IKLR 588** where it was held that before an order for contempt of court is issued, it must be established that the order in question was served to the person it was directed to either abstain or to do a particular act. The order must be served with an endorsement informing that person the consequences that would follow if he disobeys the order in question.

It follows therefore that in determining whether the person cited has been in contempt of court, the merits or otherwise of the case, will of necessity not be delved into. The issue that the court will be concerned with is whether an order issued by a court of competent jurisdiction has been disobeyed. In the instant application, the applicant has established that an order was issued by the Senior Resident Magistrate's Court, Nakuru restraining the respondent from “*whatsoever wasting, alienating, transferring, selling disposing off or dealing with the disputed parcel of land*” being 1½ acres excised from **LR. No. 8746/15 Bahati** pending the hearing and determination of the case. The applicant established that the said order was served upon the respondent. An affidavit of service was duly filed. The said order contained a notice of penal consequences.

It is apparent that the respondent did not obey the said order of the subordinate court resulting in several criminal cases being instituted against him and the members of his family. The respondent explained in his replying affidavit that he has rescinded the sale of the suit parcel of land to the applicant. It is the view of this court that the issue as to whether the respondent has or has not abided by the terms of the sale agreement, is not a matter for determination by this court. The only issue that this court will determine this application is whether the applicant has established that the respondent has been in contempt of the orders of the subordinate court.

I have carefully evaluated the facts of this case as deponed in the affidavits filed by the parties to this application, and it is clear to this court that indeed the applicant has established to the required standard that the respondent has been in breach of the order of the subordinate court by deliberately disobeying the order that forbid him from interfering with the applicant's quiet possession of the suit land.

This court finds the respondent in contempt of the court order issued by the Senior Resident Magistrate on the 20th of August, 2004. The respondent is ordered to appear before this court on the 26th October, 2007 at 9.00 a.m. to show cause why he should not be committed to civil jail for contempt of court. The applicant is hereby ordered to personally serve the respondent with the order of this court. The applicant shall have the costs of the application.

DATED at NAKURU this 18th day of October, 2007

L. KIMARU

JUDGE