



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Crim Appli 269 of 2006**

**GATHERU GATHEMIA.....**

**APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**TERRY WANJIRU KARIUKI.....INTERESTED PARTY**

**RULING**

This is the Application dated 20<sup>th</sup> June 2006 in which the Applicant seeks leave of this court to bring contempt proceedings against the Respondents, namely; Terry Wanjiku Kariuki, G.J. Kahuthu Advocate and Inspector Matheri and that the Respondents be restrained from prosecuting any other Application in this matter pending the hearing and determination of the contempt proceedings.

The Application is premised on grounds found on the face of the Application and the affidavit of the Applicants, Mr. Gatheru Gathemia G. Kahuthu and Terry Wanjiru swore Affidavits dated 23<sup>rd</sup> August 2006 and another by Inspector Elijah Matheru dated 16<sup>th</sup> November 2006 in opposing the Application for leave.

The Applicant filed a Judicial Review Application on 3<sup>rd</sup> August 2001 for orders of prohibition to stop the Chief Magistrate Nairobi or any other court from conducting the Criminal trial in Chief Magistrate’s Case 472 of 2001, Rep v Gatheru Gathemia. The Application was heard in Chambers by Justice Mitey who gave his ruling on 22<sup>nd</sup> August 2001 (GG 1) giving the Applicant leave and the said leave was to operate as stay of the Criminal proceedings in the Chief Magistrate’s Court (GG 2). That the order with Notice of Penal consequences was effected on the Respondent’s as per Affidavit of Service (GG 3). That the 2<sup>nd</sup> Respondents were personally served with the court order and knew of its existence but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents wrote to and appeared before the Chief Magistrate in May 2006 and made false misrepresentations to the Magistrate that caused the court to issue a warrant of arrest against the Applicant in Criminal Case 472/01. That the Respondents appeared before the Magistrate in absence of any prosecutor and made the false representations and thereafter colluded with the police who arrested the Applicant on 16<sup>th</sup> May 2006 and that on 16<sup>th</sup> May 2006 he personally served the 3<sup>rd</sup> intended Respondent, Inspector Matheri, with a certified copy of the court order with a penal notice before the Inspector booked him at Kileleshwa Police Station between 16<sup>th</sup> to 18<sup>th</sup> May 2006 and appeared before Mrs. Mutoka and Mrs. Muigai who called for the file and upon ascertaining the existence of the court order, lifted the warrant of arrest. It is then the Applicant served the intended contemnors with notice of intention to file these proceedings.

In opposing the Application on behalf of Mr. Kahuthu and Terry Wanjiru, it was denied that either of the two were ever served with the order of the court staying the Criminal proceedings in CRC 472/01 as deponed to in the Affidavit of Service of Ephantus Kabere dated 15<sup>th</sup> October 2001. In respect of Mr. Kahuthu, it was submitted that Mr. Kahuthu was very busy with hearings in Nakuru Court on the alleged date that he could not have been found in the office at 12.00 noon on that day. He exhibited a copy of his diary for that day. It was also submitted that the Penal Notice annexed to the Affidavit of Service of the process server is defective in that it is signed by the Applicant and yet he had Mr. Nyakundi Advocate as Counsel on record at the time who should have signed the Penal Notice. Mr. Kahuthu claims to be conversant with the Applicant's signature having dealt with him for long.

In respect to Terry, it was deponed that she became aware of this matter when she perused this court's file in HCC 568/01 and paid 1,000/= for the proceedings and that she wrote to the Registrar complaining about CRC 472/01 which had not been revived even after dismissal of HCC 568/01. Further that this Judicial Review Application was dismissed on 9<sup>th</sup> May 2003 and that the order for stay was never reinstated on 3<sup>rd</sup> June 2003 and therefore there are no subsisting orders of stay. Terry denies that she was ever served with the court's orders. In respect of her Service it was argued that the affidavit of service does not indicate at what time she was served, 10.30 a.m. or 10.30 p.m. It was not specified.

Inspector Matheri, deponed that he took over investigations of CRC 472/01 on 10<sup>th</sup> April 2006 and that on 16<sup>th</sup> May 2006 the Applicant was arrested and escorted to their offices at their Shell House Offices by PC Daudi of Provincial Criminal Investigation Office Nairobi Area, pursuant to a Warrant of Arrest issued by Chief Magistrate's Court on 15<sup>th</sup> May 2006 and that he only facilitated in arraigning the Applicant in court. He went to court on 16<sup>th</sup> May 2006 and established that the warrant of arrest was regularly issued by the Chief Magistrate's Court Nairobi and he escorted the Applicant to court on 17<sup>th</sup> May 2006. That the Magistrate called for the file and indicated that there were Judicial Review orders staying the Criminal proceedings after which the warrant of arrest was lifted. Inspector Matheri denied having been served with any order before he bonded the Applicant at Keleleshwa Police station.

At the core of any Application for leave to bring contempt proceeding order is the issue of service of the Court's order. In this case the question is whether this court's order staying the Criminal proceedings in CRC 472/01 was served on the intended contemnors.

The said order was issued by Justice Mitey on 22<sup>nd</sup> August 2001. As per the order annexed to the Affidavit of the Applicant, it was extracted on 23<sup>rd</sup> August 2001. It is alleged to have been served on 28<sup>th</sup> September 2001.

I have seen the Affidavit of service now filed with the Affidavit in support of this Application. The Affidavit of service, serving the order, does not bear the stamp of the court as to when it was filed in court. It would be expected that the Affidavit of service of the order would be filed with the court immediately after the service thereof, on the Respondents for future reference in the event that service is challenged later. The purpose of filing of Affidavit of Service is to prove service of the court order. It seems that no Affidavit of Service had ever been filed with the court from 2001 till 2006 when this Application came up. The alleged Affidavit of Service is only annexed to the affidavit of the Applicant, it was never filed in this court. Its authenticity automatically comes into question. Before any leave can be granted in this case, it is upto the Applicant to demonstrate that the order of the court allegedly disobeyed had been served on the intended contemnors soon after its issue by the court to demonstrate that they were aware of the court's order all along but ignored or disobeyed it. As it is, there is no Affidavit of Service filed in court as evidence of service of the court order of 22<sup>nd</sup> August 2001, on the intended contemnors.

In respect of Inspector Matheri, again there is no Affidavit of Service filed in respect of the alleged order. It is the Applicant's averments in the Affidavit in support of this Application as a by the way on how he met the police officer and served him. The said Inspector Matheri has explained how he came into contact with the Applicant. The Applicant was already arrested. Inspector, Matheri could only

release the applicant after he verified from the court why the Applicant was arrested which he did when he took him to court the next day. I find thereto be no reason to grant leave to the Applicant to bring contempt proceedings against Inspector Matheri.

Service of process is governed by order V of the Civil Procedure Rules. Order V Rule 15 provides for what the process server should include in the Return of Service filed after service of process and they are as follows; that the serving officer must state the time when and the manner the Summons was served, the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.

At paragraph 3 of the Affidavit of Service the serving officer depones that he served Terry Kariuki at 10.30. That is not sufficient identification of the time. Time should have been specified whether it was 10.30 a.m. or 10.30 p.m. A Return of Service needs to be specific so that the court need not look at the next paragraph which talks of service to another at 12.00 noon. Going by the Affidavit of Service, the service on Terry is in doubt.

Mr. Kahuthu also alleged that the Penal Notice is signed by the Applicant yet at the time the orders were obtained, the Applicant had Counsel on record i.e. the firm of Nyakundi Advocate. The order shows that Counsel was represented. The allegation by Mr. Kahuthu was not controverted. The question is why would the Applicant sign the Penal Notice when he was not Counsel on record? The Penal Notice raises doubt as to its authenticity and is therefore unreliable.

The Applicant alleges that it is the intended contemnors who instigated the issuance of the warrant for his arrest by the Chief Magistrate Court in May 2006. The Applicant has described how the Respondents appeared before the Magistrate in absence of a prosecutor to get the warrant of arrest. However, there is no shred of evidence of that incident as the proceedings before the Magistrate to ascertain whether indeed it is the Respondents who appeared before the Magistrate and instigated the Applicant's arrest are missing. It was upon the Applicant to demonstrate that there is some evidence against the Respondents or some arguable case to warrant this court to grant leave as prayed. The Applicant should have endeavoured to exhibit the proceedings before the Chief Magistrate where the Warrant of Arrest was issued. In absence of that record, there would be no basis for granting leave to bring contempt proceedings against the Respondents as no arguable case is established.

For all the reasons considered above, service of the court order being in doubt, the Affidavit of Service also raising doubts, there being no Affidavit of Service having been filed, and there being no evidence of the Respondents flouting the stay order by seeking arrest of the Applicant, the Application is refused and dismissed with costs being in the cause.

Dated and delivered this 17<sup>th</sup> day of October 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of:-

Court Clerk: Daniel

Mr. Kiura holding brief for Mr. Mbugua for the Applicant