



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Application 30 of 2005

JOSEPH KWERI MBURU.....PLAINTIFF

VERSUS

COLLINS MUTURI MWAI.....DEFENDANT

RULING

The Applicant herein Joseph Kweri Muturi has applied for an order for committal to civil jail against the Respondent, Collins Muturi Mwai for contempt of Court. In his Notice of Motion dated 13th January, 2005 the Applicant contends that the Defendant has disobeyed an order of the Principal Magistrate, Chief Magistrates' Court, Milimani Commercial Court of the 5th of November 2004 which in its operative part reads as follows:

“IT IS ORDERED THAT:

1. THAT the 1st Defendant return to the Plaintiff Motor Vehicle Registration No. KAL 666M forthwith and also bear the costs of this application.

GIVEN UNDER my hand and seal of this court on 5th day of November 2004”

The Applicant was the Plaintiff and the Respondent was the 1st Defendant in the Principal Magistrate's suit. The Penal Notice relied on in support of the present contempt proceedings was drawn on the same day the order was issued, that is, the 8th of November 2004. On 26th November 2004, the Respondent, through his advocate informed the Applicant herein that he had no problem with releasing the motor vehicle to the Applicant and invited him to collect the same from the Respondent's garage. This was communicated to the Applicant's advocates by a letter from the Respondent's advocate dated 26th November 2004 annexed to the supporting Affidavit as “*JMK 3*” The Applicant has told the court that he proceeded to collect the vehicle but found that the vehicle bearing the subject number plate was different. In paragraph 7 of the Statement of Facts filed with these proceedings he states as follows:

“9. Further to the aforesaid the defendants/Respondents refused to obey the aforesaid order without giving any just and/or reasonable excuse to the applicant whatsoever for such disobedience and have further tried to defeat the said court order by giving the Plaintiff a vehicle other than the one ordered which is wrecked the engine and body parts vandalized (?) and further changing the particulars of the said vehicle.”

In paragraphs 6 of the applicants supporting affidavit of 12th January 2005 the applicant depones:

“THAT on visiting the garage I found a totally different vehicle that the numbers plates to my vehicle had been put”

In paragraph 9 and 10 of the same affidavit the applicant depones:

“9. THAT the purported vehicle at the garage was certainly not the one that was taken from me

10. THAT the Defendants has refused and or declined to obey the said orders made by the Principal Magistrate Hon. Miss Maina .. on 5th November 2004 and has (continued to)

(i) illegally detained motor vehicle registration number KAL 666M

(ii) Refused to return the said Motor vehicle to the Plaintiff

(iii) Purported to give the Plaintiff a vehicle other than the one ordered by the court

(iv) Purported to give the Plaintiff a vehicle aforesaid without the engine, tyres, that had been vandalized and that is in a dilapidated state...”

The Respondent has denied that he is in contempt and cites his advocates’ letter of 26th November 2004 inviting the Applicant to collect the motor vehicle. He says he has never at any time after the subject order was made refused to hand over the vehicle to the applicant and also denies that the vehicle has been tampered with as alleged. He contends, and I would agree with him that the allegation concerning the state of the vehicle are side issues which ought to be proved by evidence. He also says that if indeed the vehicle has been tampered with as alleged, then the applicants redress is in damages, not an order for committal. I do agree with the Respondent on this point as well particularly noting that the

Applicant has not complained to the Police about the conversion and change of the particulars of the motor vehicle which are serious criminal offences. I have no doubt in my mind that the acts complained of, if true would attract a charge of malicious damage to property in addition to the conversion and change of particulars.

It would be an abuse of the process for this court to commit to jail a litigant who has given up possession of that which the court has ordered simply because the successful litigant claims, without proof, that the property ordered to be surrendered appears to have been tampered with, unless of course it was proved that such tampering was actually done and done with a view to defeating the ends of justice through disobedience. The applicant has not proven that that is the case. The lower court ordered only that the 1st Defendant (Respondent) ***“return to the plaintiff motor vehicle Registration No KAL 666 M forthwith.”*** The Respondent invited the Applicant to collect the vehicle. The Applicant went to collect the vehicle but changed his mind being of the opinion that the vehicle shown to him was the wrong one. The allegations made against the Respondent’s tampering with the vehicle and the alleged conversion are matters subject to proof and which call for expert evidence. The Respondent has not in my view disobeyed the lower court’s orders and has not been proved to have done the acts complained of with a view to defeating the order of the court. I see no basis to commit him to jail and find that these proceedings fail. I disallow the application and dismiss the same with costs to the Respondent.

Dated and Delivered at Nairobi this 24th day of May, 2006

M. G. Mugo

JUDGE

Delivered in the presence of:

Mr. Olonde for the Applicant

No appearance for Respondent