



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Civil Misc Case 214 of 2004

PIUS WANJALA SAENYI.....APPLICANT

VS

1 ODHIAMBO MAYUNGA

2 WAMBANGO OJIAMBO.....RESPONDENTS

RULING

By an application by way of Notice of Motion, dated 30th July 2004, pursuant to the Provisions of section 5 of the Judicature Act, Cap 8 Laws of Kenya, the applicant seeks orders that:

1. *That this Honourable Court be pleased to mete out an appropriate punishment against the respondents who have defied the subordinate court order in Civil suit no.110 of 1993 issued on 6.3.2003.*
2. *Costs of this application be paid by the respondents.*

The application is based on the following grounds:

- (a) *On 6.3.2003, the respondents were served with an order of subordinate court dated 6.3.2003 restraining the respondents from burying the body of MAYUNGA OJIAMBO on title No. W. Bukusu/Khasoko/704 (A copy of the order is annexed hereto marked PS 1).*
- (b) *Upon being served the respondents defied the order stating that it was a mere letter from an advocate and they went ahead and interred the body of MAYUNGA OJIAMBO on the said title on 7.3.2003.*
- (c) *That this insolence on the part of the respondents amounts to defiance of this Honourable Court's authority.*

The application is predicated upon the annexed affidavit of Pius Wanjala Saenyi sworn on the 30th day of July, 2004.

For the applicant, it was argued that on the 6th day of March 2003, a process server Mr. Leonard Songoi accompanied the applicant to facilitate the service of the court order dated 6th March 2003. That the respondent was served but declined to acknowledge service on the basis that the order was a mere

letter from an advocate and could not bind him. That by reason of defying a lawful order the respondent ought to be punished appropriately to safe guard the integrity and dignity of the honourable court.

For the respondent, it was argued that Penal Notice was not served on the applicant. That in any case the order which was served was issued under the provision of Order XXXIX Rules 1, 2 and 3.

That under the Civil Procedure Rules, it is the court to issue an order of contempt. First, the application should have been filed before the Senior Resident Magistrate's Court so that the contempt is punished by the same court that issued the order.

This application is brought in the High Court as a Civil Miscellaneous Application. It arises from the proceedings in Senior Principal Magistrate's Court No.110 of 1993 PIUS WANJALA SAENYI VS OJIAMBO MAYUNGA & WAMBAGO OJIAMBO.

From the proceedings, I can discern that there is a burial saga. The Senior Resident Magistrate issued an order which was extracted and sealed by the court on 6th March 2003. The gist of the order is as follows:

"IT IS HEREBY ORDERED THAT:

1. *Service is hereby dispensed with.*
2. *The 1st defendant OJIAMBO MAYUNGA, the 2nd defendant WAMBANGO OJIAMBO are hereby restrained from burying the body of MAYUNGA OJIAMBO in title NO. W.BUKUSU/KHASOKO/704 belonging to the plaintiff.*
3. *The said OJIAMBO MAYUNGA and WAMBAGO OJIAMBO are hereby ordered to remove the body of MAYUNGA OJIAMBO from title NO.W.BUKUSU/KHASOKO/704 immediately.*
4. *The application to be heard ex-parte on 18.3.03."*

At the foot note to the order appears the following words:

"PS. Any person who disobeys this order will be in contempt of court and liable to imprisonment for a term not exceeding six (6) months."

The power to punish for contempt is donated by the dint of the provisions of section 5 of the Judicature Act (Cap 8) Laws of Kenya. By virtue of the said section the Supreme Court Practice Rules of England apply to Kenya.

Under Order 52 of the SUPREME COURT RULES 1997 the following are the requirements: 52/4/3.

"Where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that is a breach"

The Notice of Motion must state clearly that the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient *particularity* to enable him to meet the charge. The necessary information must be given in the notice itself, 52/4/4 on evidence states:-

"The appropriate standard of proof to be applied in committal proceedings, however is the criminal standard of proof (Dean -vs- Dean (1987) FLR 517 CA)"

The contempt was committed in the Magistrate's Court. However it may be punished by the High Court. I am fortified in this view by a passage from the text book, The English Legal System, 4th Edition by R. J. Walker, pp 153 – 169.

“..... the jurisdiction of inferior courts of record, such as county courts is genuinely limited to contempt committed in the face of the court. Whereas superior courts of record have wide powers to commit for contempt. Conduct which would amount to contempt if committed before a court of record but which is committed before a court which is not a court of record, a magistrate’s court for example, may be punished by the High Court as a contempt.....”

The Notice of Motion does state that the respondent defied the subordinate court order issued on 6th March 2003.

The court order has by way of a foot-note a warning that anybody who disobeys the court order will be in contempt of court and liable to imprisonment for a term not exceeding six (6) months.

However, there is no evidence of proper service of the order. What I have on the court file is a Return of Service by one *Leonard Songoi* as opposed to an affidavit of service. It is sworn on 6th March 2003. While an affidavit of service is supposed to be sworn, a return of service is never subjected to oath. Clearly, therefore, the service is defective.

In *MWANGI WANGODU –VS- NAIROBI CITY COUNCIL COMMISSION CIVIL APPEAL NO.95 OF 1998* the procedure to be followed in contempt application was laid down thus:

“..... No order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do so or to abstain from doing the act in question. The copy of the order must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

In this case, there is no order of service or proper service. On the premises, I find and hold that this application fails to meet the procedure laid down. Accordingly, I dismiss the application with no order as to costs.

DATED and DELIVERED at BUNGOMA this 14th day of June 2006.

N.R.O. OMBIJA

JUDGE

MR. KITUYI for the applicant.

MR. ONCHIRI for respondent.