



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 389 OF 2003

ATTORNEY GENERAL APPELLANT

VERSUS

NGURUMAN LIMITED RESPONDENT

JUDGMENT

(An appeal from the Order of Hon. P. Okile, RM
in Narok RMCC No 15 of 1991 delivered on 24th June, 2003).

In 1991, the Respondent to this appeal sued Shompole Group Ranch in the subordinate court and successfully obtained a favourable decree. The Decree, dated 25th November, 1991 among other things, restrained the Group Ranch and its members from trespassing on the Respondent's land. In August 2002, the Respondent successfully applied for an order directing the OCPD Narok to enforce the decree. From the material which was placed before the subordinate court, that order was first served upon the OCPD on 1st November, 2002. The process server who effected service of that order stated as follows in paragraph 4 of his affidavit of service:

“THAT the said Officer Commanding Police Division indicated that he does not have enough machinery and police to do the process of evicting the trespassing Maasais and said that the order would have been directed to the Provincial Police Officer who would mobilize the police force and provide machinery.”

Another order was also served upon the same OCPD accompanied with a letter dated 6th May, 2003 but nothing appears to have been done. The Respondent became frustrated and decided to bring contempt proceedings against the OCPD with the hope of effecting the decree in its favour. Those contempt proceedings were filed in the same action between the Respondent and the Group Ranch in the subordinate court. The record of the subordinate court indicates that on the day the contempt proceedings came up for hearing the OCPD who had been cited for the same was present in court and informed the court that a Representative from the Attorney General's office who was to represent him had called him and instructed him to seek an adjournment. The OCPD's request for adjournment was declined. The Respondent's Counsel was heard ex parte and a date for Ruling was set for 24th June, 2003. On the latter date the Magistrate who was seized of the matter found the OCPD guilty of the contempt and ordered for his arrest and committal to jail. In delivering himself, the Magistrate had this to say:

“The said OCPD Narok has not filed any Replying Affidavit to contravene the allegations (of contempt). Neither has his State Counsel who is supposed to represent (him) ... The application only has to show that the OCPD ... has been aware of the court's order and which

(sic) was required of him to do ...”

The OCPD was aggrieved by the order arising out of the contempt proceedings and through the Attorney General appealed to this court. The Appeal is based on 5 Grounds of Appeal as set out in the Memorandum of Appeal. These are:

“1. The Learned Magistrate erred in law and fact in usurping powers that are a preserve of the High Court and the Court of Appeal

2. The Learned Magistrate erred in law and in fact in granting orders which had not been prayed for in the application dated 28th May, 2003

3. The Learned Magistrate erred in law and in fact in proceeding to hear the application without satisfying himself whether the same had been served upon the Attorney General

4. The Learned Magistrate erred in law and in fact not appreciating all the facts of the case

5. The Learned Magistrate erred in law and in fact in mis - directing himself totally on the laws and procedure relating to contempt of court proceedings.”

The first point which was raised by Mr Kamau on behalf of the Attorney General was whether the subordinate court had power to deal with cases of contempt of court. Section 5 (1) of the Judicature Act (Cap 8) which deals with contempt of court empowers only the High Court and the Court of Appeal to punish one for contempt of court but no such power is conferred upon subordinate courts. However the same subsection provides that the power conferred in the High Court and the Court of Appeal shall be utilized to uphold the authority and dignity of subordinate courts. It is, therefore, obvious that subordinate courts do not have power to deal with contempt of court and the subordinate court in this case did not have authority to mete out punishment upon the OCPD as it purported to do. This finding would have been sufficient to dispose of the appeal but there are some things which went on before the subordinate court leading to the decision which is the subject of this appeal and which require some comment, at least to avoid a repeat of similar conduct.

It is plain that the magistrate who was seized of the contempt proceedings dealt with the same in a very casual manner. Contempt proceedings are very serious and should be treated as such. It has been seen that upon being served with the relevant court order, the OCPD immediately informed the process server of his inability to fulfill its requirements as he had no sufficient manpower and resources to do so. This was recorded by the process server in his return of service. The OCPD was very helpful when he advised that the assistance of the Provincial Police Officer be sought. As was pointed out in the Law of Contempt (3rd Edition) by Nigel Lowe and Another, contempt of court is a criminal matter and must be proved beyond reasonable doubt. It cannot be a matter conjecture nor surmise. A conviction can only be supported by proof (See generally *Re Bramblevale Ltd* (1970) Ch. 128).

Secondly, it was extremely unfair for the Magistrate to deny the OCPD an opportunity to be represented especially when his right to liberty was at jeopardy on account of a duty which came upon him only by virtue of his office. That duty could only be fulfilled by him if he was availed adequate public resources. In this case he had already recorded that he could not and if that was not enough, he sought time for the Attorney General who was responsible for his legal defence to come and do so. The Magistrate dismissed this request in a most casual manner and in the same vein could not shy from saying that neither the OCPD nor the State Counsel had filed a reply to the proceedings. I did not see any compelling reason why a request for more time was denied when there was no evidence of direct service upon the Attorney General in the first place. The application had only been filed less than a month before it came up for hearing and a little more time would not have caused undue prejudice any more than that which had already been endured if the OCPD had been allowed to contact the Attorney General’s representative as per his request.

In the result, I find that the Subordinate Court did not have legal authority to commit the OCPD for

contempt as it purported to do and I hereby allow the appeal and set aside the order of the subordinate court granting the Respondent leave to bring the application for contempt. I also set aside the order committing Mr J M Munyao, the OCPD to civil jail and lift the warrant which had been issued for his arrest. I, however, do not make any order as to costs.

Dated and delivered at Nairobi this 17th day of January, 2005.

ALNASHIR VISRAM

JUDGE