



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA
Misc Appli 53 of 2004

MOHAMMED YESLAM AWADH.....APPLICANT

VS

DR. PETER WILBUR MARUMBU.....RESPONDENT

R U L I N G

Dr. Peter Wilbur Marumbu the respondent in this matter was committed to serve 30 days in jail for contempt of court on 28th May 2004 by this court on the instance of Mohammed Yeslam Awadh the applicant. He has now filed a motion pursuant to order XLIV rule 3 (1) and (2) of the Civil Procedure rules and under Section 3, 3A and 80 of the Civil Procedure Act to have the committal order reviewed and set aside. The applicant swore a replying affidavit to oppose the motion.

The history of the dispute between the applicant and the Respondent began way back on the 31st day of May 1988 when the Respondent leased to the applicant space situated in plot No. 499 of Bungoma to run a hotel. The applicant leased the premises at a monthly rent of Ksh.5,000/- and he traded in the name and style of New Bungoma Hotel. On 27.5.2003 the Respondent served a notice to quit the premises upon the applicant. The applicant challenged the notice by filing a reference at the business premises Rent Tribunal. The dispute is still pending before the aforesaid Tribunal.

On 1st March 2004, Dr. Peter Marumbu physically locked the hotel premises which action prompted Mohammed Awadh to file Bungoma H.C. Civil suit No. 30 of 2004 against him. He obtained temporary orders of injunction to compel the Respondent to reopen the premises. The orders were served but he failed to comply with them. The applicant then prosecuted an application seeking to commit the Respondent for contempt of court. The Respondent was then committed to serve 30 days in jail for contempt of court on 28th day of May 2004. These are the orders, the Respondent now seeks to set aside.

The Respondent argues on his first ground that he was misguided by his previous advocate who gave him faulty legal advise to outrightly disobey the court orders. He annexed to his affidavit he swore on 2.6.2004 in support of the motion hand written letters given to him by his erstwhile advocate Mr. Wabwile Waswa advising him not to let the applicant or his agents into the suit premises. The aforesaid advocate expressed his views regarding the applicant's pending application. In his letter dated 5.3.2004 Mr. Waswa said:

“My counsel to you now is to wait let us say up to 11.3.2004 if he shall not have come back then it is settled but if he comes back then let us know otherwise maintain that no body else enters your premises without your clearance.”

The same advocate on 13.4.2004 also wrote to the Respondent in part as follows:

“This latest application is hopeless nevertheless we have to tackle it in court. Let me prepare a rejoinder to quash it.”

I have perused the letters annexed to Dr. Marumbu's affidavit, it is clear that he was given legal advise which he must have taken to be the legal position. He admits that he disobeyed the court orders served upon him due to the faulty advise given to him. His act of disobedience landed him in trouble. The applicant further says that he got the correct legal advise over the issue upon seeking a second legal opinion from his current advocate. He further says that he has purged the contempt by complying with the court order and by going further to tender a written apology to this court. The Respondent further argued that his Judgment over the court order was also impaired by the fact that during that period he lost his wife. He also pointed out that within the same period he was given notice by the public health officials to carry out major repairs in his premises to abate nuisance.

The applicant opposed the motion and urged this court to dismiss it because the Respondent had flagrantly disobeyed a court order. He dismissed the argument that the public health officials had given notice to the Respondent. The applicant argued that the notice given by the public health office did not concern the Hotel.

After considering these rivaling submissions I am convinced that the Respondent was misguided and misled by his erstwhile advocate in the first instance therefore I do not think the Respondent flagrantly disobeyed the court order. I also agree with the arguments given by the applicant that the notice given by the Public Health Office is not an excuse to enable the Respondent disobey this court's order. At this stage I wish to point out that it is not the responsibility of litigants or their legal advisers to decide on their own whether the court had jurisdiction or not and then proceed to disobey court orders with impunity. They should obey the orders and then challenge the orders in court. In this regard I wish to adopt the statement of Lord Gotten ham L.C. in the case of **CHUCK VS CREMES (1846) 1 COOP. TEMP. COTT 338 AT P. 885** where the learned Judge said:

“A party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it It would be most dangerous to hold that the suitor, or their solicitors could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.”

The Respondent has demonstrated to the satisfaction of this court that he has purged the contempt. The applicant has confirmed to this court that he has been put into occupation of the suit premises. The Respondent has also tendered a written apology which this court has accepted as genuine. It should be made clear to the parties that an apology alone is not acceptable substitute for compliance with a court order and will not in any circumstances be regarded in itself as a purging of contempt.

The upshot therefore is that I am convinced that the Respondent has satisfied the necessary conditions in law to enable this court review and set aside its committal order. Consequently, the order committing the Respondent to jail for contempt of court given on 28/5/2004 is hereby set aside.

The Respondent shall meet the costs of the motion in any event.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE