



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 326 of 2001

IN THE MATTER OF THE ESTATE OF AMBUTU MBOGORI (DECEASED)

ERASTUS GITONGA PETITIONER/APPLICANT

VERSUS

DAVID KIMATHI OBJECTOR/RESPONDENT

RULING OF THE COURT

On the 21st June 2004, this court made an order (which I shall hereafter refer to as the order) requiring the respondent to restore the applicant to his (applicant's) home on the deceased's land and secondly for the respondent to allow the applicant to peaceably enjoy the same until the hearing and final determination of the objection herein.

The applicant herein has filed objection proceedings to the granting of Letters of Administration Intestate of the estate of Ambutu Mbogori to the petitioner/respondent herein on the ground that there was fraud in the filing of the application for grant of Letters of Administration whose purpose is to lock out the applicant from a share in the deceased's estate.

The application for contempt filed on 13.7.2004 seeks the following main orders:-

1. That this honourable court be pleased to punish the petitioner/respondent herein ERASTUS GITONGA for contempt of court for a jail term not exceeding 6 months for disobedience of this honourable court's orders dated 21.6.2004.
2. That this honourable court be pleased to issue such further or better orders as it may seem appropriate to meet the ends of justice and maintain and uphold the dignity of this honourable court.
3. That upon issuance of the orders, the same be served upon the O.C.S. Meru Police Station for compliance. The applicant also prays for costs. The application was filed under certificate of urgency.

The application is supported by an affidavit sworn by the applicant and by the grounds on the face of the application. In the affidavit, the applicant has deponed that the respondent was duly served with the court order dated 21.6.2004 on 28.6.2004 and that on 29.6.2004, the respondent locked out the applicant from the suit land. See paragraphs 3 and 4 of the affidavit. That since then, the applicant has not been allowed back onto the suit land and into his home despite the court orders of 21.6.2004 and for this reason, the

respondent (contemnor) should be committed to civil jail for a period not exceeding six months.

The application is opposed. In the replying affidavit dated 13.8.2004 and filed in court on the same date, the respondent admits (at para 3) that he was served with the court order dated 21.6.2004 on the 28.6.2004 but denies that he has disobeyed the said order. At paragraphs 5 and 6, the respondent states:-

“5. That immediately the ruling was read in open court, I allowed the applicant to occupy the house.

“6. That the applicant has been enjoying quiet possession of the said house until 31.7.2004 that he trespassed to my parcel and cut down maize, banana and pigeon peas and also threatened me.”

And that as a result of the averments in paragraph 6 (above) the respondent made a report to Meru Police Station. The respondent avers further at paragraph 15 that the applicant has no right over the suit land. Further, the respondent avers that the order which the respondent was required to obey is fatally defective and is incapable of being implemented.

In his submissions on behalf of the applicant, Mr. Ondari contended that the order of 21.6.2004 has been disobeyed by the respondent, that the respondent has admitted being served with the order. Mr. Ondari sought to rely on a further affidavit sworn by the applicant on 18.2.2005 showing further aggravation of disobedience but since this affidavit was filed without leave of the court, and Mr. Ondari having made no oral application to have the said affidavit admitted out of time the same is expunged from the record.

It was also contended for the applicant that the order served on the respondent contained the requisite Penal Notice to the respondent and consequently this court should find that the respondent is in contempt of the order. Mr. Ondari addressed the court on the three key areas to be considered by this court before determining whether or not the respondent is in contempt:-

1. Personal service of the order on the respondent (contemnor).
2. indorsement of Penal Notice carried on the order.
3. Order which is alleged to have been disobeyed must be capable of being obeyed.

He submitted that the applicant had complied with all the three prerequisites and urged the court to allow the application.

Mr. E. Momanyi for the respondent submitted that the application before court was fatally defective as the same was filed under the wrong provisions of the law namely Rule 73 of the Probate and Administration Rules. Secondly that the application was fatally defective for failing to annex to the affidavit a copy of the order and thirdly that there was no affidavit of service. Mr. Momanyi further submitted that the respondent has never disobeyed the court order dated 21.6.2004 and that the application before court has been made in bad faith.

This court derives its power to punish for contempt from the provisions of section 5(1) of the Judicature Act. That power is the same power as is for the time being possessed by the High Court of Justice in England. In England Rule 5 of Order 45 R.S.C. (1982 Ed) governs the method of the enforcement by the court of its judgments or orders in circumstances amounting to contempt of court. The relevant procedural obligation is succinctly stated in Order 45 Rule 7/5 of the R.S.C. 1982 Ed as follows:-

“It is a necessary condition for enforcement of a judgment or order under Rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon.”

The indorsement is required to be in the following words in the case of a judgment or order requiring a person to abstain from doing an act:

“If you, the within named A.B. disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same.”

(See Nyamodi - Ochieng Nyamogo & another V Kenya Posts & Telecommunications Corporation – Court of Appeal Civil App. No. Nai 264 of 1993 (Nai 114/93 – UR).

I now must proceed to deal with the three issues. First is the issue of service. It is not disputed that this court’s order of 21.6.2004 was duly effected upon the respondent on 28.6.2004. There is an affidavit of service also to that effect annexed to the applicant’s supporting affidavit as annexure “DKI”. As part of that annexure, the court has seen a copy of the duly served order dated 21.6.2004 and acknowledged as served on 28.6.2004.

The issue of service is therefore resolved and I need not say anything more about it. Secondly, did the order so served upon the respondent contain the appropriate or requisite penal notice? In the case of **JACOB ZEDEKIA OCHINO and ANOTHER V GEORGE AURA OKOMBO and 4 others**, Civil Appeal No. 36 of 1989 at Nairobi – the Court of appeal applying the principles set out in the case of **MWANGI MWANGONDU V NAIROBI CITY COMMISSION** (Civil Appeal No. 95 of 1988) expressed itself in the following words on the issue of indorsement of the penal consequences in case of disobedience before the application for the contemnor’s committal for contempt can be made:-

“The power to deal with contempt of court is provided for under section 5 of the Judicature Act (Cap 8) and Order 39 Rule 2 (3) of the Civil Procedure Rules (CPR). We have to follow the procedure and practice in England. As we read the law, the effect of the English Provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the served order must be indorsed with a notice informing the person to 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. As this court pointed out recently in the case of Mwangi Mwang’ondu – V – Nairobi City Commission (Civil Appeal No. 95 of 1988) (unreported):

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt.”

I have no doubt that the order-dated 21.6.2004 was properly served upon the respondent and that the said order was properly indorsed with the notice of penal consequences. The only issue remaining for determination is whether this application has been competently brought before this court.

Mr. Momanyi submitted that the application is flawed because it has not been brought under the proper sections of the law. Mr. Momanyi however did not say what these provisions are that the applicant ought to have brought the application under. Mr. Ondari submitted that rule 73 of the Probate and Administration rules was sufficient for the applicant’s purposes and that the application in its present form does not breach any rules of procedure. In my ruling giving rise to the orders of 21.6.2004, I made it clear that I was treating the applicant’s application then as one brought under Order 39 of the Civil Procedure

Rules (CPR) since indeed the applicant was seeking an injunction against the respondent. Although Rule 73 of the P & A Rules saves the inherent powers of this court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court, the proper sections applicable in the case of contempt proceedings are section 5 of the Judicature Act Cap 8 and Order 39 Rules 2A (2) of the CPR.

In the present case, the provisions conferring powers upon this court to punish for contempt having been left out, then this court can only conclude that there is no competent application before me and

consequently there is no basis upon which I can make an order committing the respondent to civil jail for contempt.

For that reason and that reason only which goes to the root of the application the prayer for committal of the respondent must fail. In the case of **Nyamodi Ochieng – Nyamogo and another V Kenya Posts and Telecommunications Corporation** (above) the Court of Appeal said:-

“The consequences of a finding of disobedience being penal, the party who calls upon the court to make such a finding must show that he has himself complied strictly with the procedural requirements and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do.”

In this case, Mr. Ondari has simply stated that the application does not breach any rule of procedure. My finding is that in failing to bring the application under the substantive provisions of the law giving power to this court to deal with the application, then the applicant has not shown that he himself has complied strictly with the procedural requirements.

As regards the other prayers of the application, the applicant sought further orders of this court as may seem appropriate to meet the ends of justice and maintain the dignity of the court. The cause herein was filed on 7.12.2001. The objection proceedings were then filed on 15.11.2002. The petition by way of cross petition and Answer to Petition were both filed on 21.1.2003. In my ruling of 21.6.2004, I directed that the objector/applicant should ensure that the objection is heard without delay. It is time now for this matter to be substantively dealt with and I direct that the same be fixed for hearing within one month after the beginning of the new term. If the applicant does not move the court for a hearing date as directed, the petitioner/respondent shall be at liberty to do so. I make no order as to costs. It is so ordered.

Dated and delivered at Meru this 16th March 2005.

RUTH N. SITATI

Ag JUDGE

16.3.2005