



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Misc Civil Appli 170 of 2004
IN THE MATTER OF THE JUDICATURE ACT CAP 8 LAWS OF KENYA
AND
LEAVE TO APPLY FOR ORDERS FO COMMITTAL TO CONTENT

CHARLES WANJOHI WATHUKU APPLICANT

VERSUS

1. GITHINJI

NGURE

2. CHARLES MWANGI GITUNDU RESPONDENTS

RULING

Charles Wanjohi Wathuku (hereinafter referred to as the applicant) has come to this court by way of Chamber Summons through a miscellaneous application brought under section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England seeking leave of this court to apply for an order that the Respondents Githinji Ngure and Charles Mwangi Gitundu be committed to jail for 6 months or for such other period as the court may direct and also that the court may be pleased to impose a fine or order of sequestration upon the Respondents as it may deem just for contempt of court.

From the statement of facts, the verifying affidavit and the annextures. It is alleged that Respondents are in contempt of court orders issued by Hon. Juma J in HC. Succession Cause (Nyeri) 60 of 1997. The first order was issued on 19th October 2001 and stated:

“(1) That the Respondents and or their Agents do move and vacate out of land parcels LR 2280 Nyaribu Kiganjo, Euso Nyiro Suguroi Block V III/186, Muhito/Mbuni/ 1062 forthwith and return the documents of title to the said properties.

(2) That the Respondents do hand over to the applicant/ judgment-creditor motor vehicles KAE 625Y Toyota DX, K VW 690 Toyota, inter-national Tractor Model 444 S/W 4191, Massey Ferguson – Tractor marked 182840 Howard Rotaslater one gas cylinder, 2 rolls of wire, one large mortar, Massey Ferguson KDT 314 Earth mover.”

In the order of 16th August 2002 the same court and same judge ordered:

“(1) That a sum of Kshs.4,526,740 be returned to the Estate of the deceased.

(2) That costs of this application be paid to the present petition.”

It is the applicant’s contention that he above orders were served on the Respondents on the 24th July 2003 and that to date the orders have not been complied with and therefore the Respondents are in blatant

breach of the court orders.

The applicant have properly come to this court under section 5 of the Judicature Act Cap. 8, which gives this court the same powers to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. He has also rightly cited order 52 of the Rules of the Supreme Court of England Order 52 rule 2 of the supreme court Rules as contained in "The Supreme Court Practice 1997" as follows:

"2 (1) No application to a divisional court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex-parte to a Divisional Court, except in vacation when it may be made to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the name and description of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made verifying the facts relied on.

2. The applicant must give notice of the application for leave not later than the preceding day to the crown office and must at the same time lodge in that office copies of the statement and affidavit."

In our local context sub-rule 3 above would be complied with through service upon the Attorney General filed, there is no evidence that such notice and all the required documents were served upon the Attorney General.

Secondly it is clear that the contempt alleged is in connection with proceedings before the High Court in Nyeri wherein the orders alleged to be breached were made. There is therefore no justification for the applicant to come to this court by way of a miscellaneous application where there is already proceedings before the High Court relating to the orders subject of the contempt. The applicant ought to have sought leave to apply for an order of committal against the Respondent in the High Court Succession Cause No. 60 of 1997 (Nyeri) wherein the orders flouted were issued.

For the above reasons I decline to issue the leave sought and dismiss the application dated 5th November 2004.

Those shall be the orders of the court.

Dated signed and delivered this 4th day of August 2005.

H. M. OKWENGU

JUDGE