



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISCELLANEOUS APPLICATION 53 OF 2004

MOHAMMED YESLAM AWADH APPLICANT

VERSUS

PETER WILBUR MARUMBU RESPONDENT

RULING

The applicant herein sought and obtained an *ex parte* order of injunction restraining the respondent from *inter alia* trespassing and dispossessing the applicant his quiet and peaceful enjoyment of the suit premises at plot No 499, Bungoma pending the hearing *inter partes* of the application in Bungoma HCCC No 30 of 2004. It is alleged that the application with the *ex parte* order were served upon the respondent who refused to comply with the order. Being aggrieved the applicant sought and obtained leave to commence contempt proceedings against the respondent pursuant to the provisions of section 5 of the Judicature Act and order XXXIX rule 2A (2) of the Civil Procedure Rules. Pursuant to the aforesaid leave the applicant filed the Notice of Motion dated 23rd of March 2004 the subject matter of this ruling.

When the motion was served the respondent filed a notice of preliminary objection dated 21st April 2004 in which he sought to have the motion struck out for being incompetent. The applicant is accused of adopting a wrong procedure when instituting these proceedings. Mr Waswa who appeared for the respondent was of the view that there was no need to seek for leave. He submitted to the effect that the applicant should have commenced the application in Bungoma HCCC No 30 of 2004 instead. He accused the applicant of adopting the procedure normally used in judicial review applications which is foreign to applications of this nature.

The respondent further attacked the format of the application saying that the applicant should have come to court by way of a Chamber Summons instead of a motion. He urged this Court to have the motion struck out.

Mr Onyando who appeared for the applicant opposed the preliminary objection and urged this Court to reject the same. He pointed out that the applicant's motion was properly before court and that the correct procedures were followed. He cited the provisions of section 5 of the Judicature Act as his fortress.

The power to deal with contempt of court is provided for under section 5 of the Judicature Act (cap 8 Laws of Kenya). Which provides:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the dignity of subordinate courts.”

The law under order XXXIX rule 2 (3) CPR also empowers the Court to deal with cases of contempt. O 39 rule 2 (3) CPR provides:

“In cases of disobedience or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be detained in prison of a term not exceeding six months unless in the meantime the Court directs his release.”

It should be noted that the substantive law governing proceedings in respect of contempt of court is under section 5(1) of the Judicature Act. In other words we have to turn to the Practice and Procedure in England in order to discover how the power to punish for contempt of court is exercised. The procedure is clearly stated under order 52 of the Rules of the Supreme Court of England. An applicant must seek leave by making an *ex parte* application which must be supported by a statement setting out the name and description of the applicant, description and address of the person sought to be committed and the grounds on which his committal is sought and accompanied by a verifying affidavit.

It is also a prerequisite that the applicant must give notice to the Deputy Registrar of this Court of the intention to seek leave not later than the preceding day.

In this matter the applicant appears to have taken this root to reach where he is now. He cannot be faulted. He followed the legal path as defined by the law to obtain leave.

Under order 52 rule 3 of the Rules of Supreme Court of England, an applicant who has been granted leave must file a motion within 14 days from the date of obtaining leave. In this case the applicant filed the motion within 14 days from the date he obtained leave. The preliminary objection therefore lacks merit.

The Court of Appeal of Kenya in this case of *Mwangi H C Wangondu Vs Nairobi City Commission CA No 95 of 1988*.

Said;

“In view of the clear provisions of section 5(1) of the Judicature Act, we have to turn to the Practice and Procedure in England in order to discover how the power to punish for contempt of court is exercised.”

I am bound by this decision which I also agree in its entirety.

Consequently the preliminary objection is dismissed with costs to the applicant.

Dated and Delivered at Bungoma this 29th day of April 2004.

J.K.SERGON

JUDGE