

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 56 of 2004

JOSEPH BORO NGERA.....APPELLANT

VERSUS

ELIZABETH WANJIKU NGERA.....RESPONDENT

RULING

On the 3rd of February 2006, the parties to this appeal recorded the following consent which was adopted as an order of the court;

“By consent of the parties herein the appellant shall pay the respondent the sum of Ksh.2,000,000/= being maintenance within sixty days of today’s date. Thereafter, the respondent shall have no claim whatsoever on her maintenance from the appellant. For the avoidance of doubt the appellant shall still provide for the education of the children.”

On the 9th of May 2006, the respondent sought and was granted leave to institute contempt of court proceedings against the appellant for disobeying the said order of the court which was issued when the parties agreed by consent to resolve the dispute between them on the 3rd of February, 2006. On the 22nd of May 2006, the respondent filed an application before this court seeking the following orders against the appellant;

“2. This Honourable court be pleased to commit the appellant, Joseph Boro Ngera to Civil Jail for such a period as this Honourable court may deem fit for disobeying the orders recorded by consent of the parties and their counsels by this Honourable court on the 3rd of February, 2006 to the effect that the appellant pays the sum of Ksh. 2,000,000/= within 60 days from the said date in respect of maintenance of the respondent.

3. This Honourable court be pleased to make such further and/or other orders as is just in the circumstances.”

The application is supported by the annexed affidavit of the respondent and based on the grounds stated on the face of the application. The appellant has filed a replying affidavit to the said application. In it, he has deponed that he had not deliberately failed to abide by the terms of the court order. He deponed that he had been unable to sell his assets that he had expected to dispose of to enable him pay the said amount ordered by this court. He pleaded with the court to allow him to substitute the requirement that he pays the said sum of Ksh.2,000,000/= by transferring a parcel of land at Kwale measuring six acres and which he valued at Ksh.3,000,000/=.

At the hearing of the application, Miss Mathenge, learned counsel for the respondent reiterated the contents of the application and the supporting affidavit. She urged this court to allow the application and punish the appellant for being in contempt of the orders of this court. She submitted that the appellant had not paid a single penny to the respondent since October, 2005 for her maintenance. In her view, the appellant had deliberately disobeyed the order of this court. Mr Okeke, learned counsel for the appellant was of contrary view. He submitted that the appellant had not deliberately disobeyed the orders of this court. He submitted that the appellant had made all the efforts to dispose of his assets but had been unsuccessful. He pleaded with the court to give the appellant an extension of time to comply with the

order of this court. He however submitted that the plaintiff had not been in contempt of the orders of this court.

I have carefully read the pleadings filed by the parties in support of their positions in this application. I have considered the submissions which were made before me in respect of this application. The issue for determination by this court is whether the respondent has established that the appellant has been in contempt of the order of this court and should therefore be punished. Certain facts are not in dispute in this application. It is not disputed that the parties compromised this appeal by consent on the 3rd of February, 2006. It is further not disputed that the appellant was given sufficient time to pay the amount that constituted the subject matter of this appeal. When the said consent order was recorded, the appellant had indicated to the court that he was in the process of disposing of mature trees on his farm whose proceeds he could use to pay the said amount agreed by consent to the respondent. It is apparent that the appellant was not serious when he made the offer to pay the respondent.

In my view, the appellant was only trying to buy time. In view of the history of this case, it is clear that the appellant had all along no intention to pay the respondent. He has now come up with another story that he would be willing to transfer to the appellant a property in Kwale district which he estimates to be valued at Ksh.3,000,000/=. I take this offer made by the appellant to be in jest. It is derisory. This is because the appellant had earlier offered to transfer a parcel of land situate at Nakuru to the respondent. It later emerged that the said parcel of land had all along been charged to a bank. The appellant did not disclose this fact to the court.

In the circumstances of this case, it is clear that the respondent has made out a clear case for the appellant to be punished for contempt of court. The appellant has been in contempt of the order of this court dated the 3rd of February, 2006. This court cannot allow the appellant to get away with deliberate disobedience of the orders of this court. This court has taken into account the particular facts and circumstances of this case. I hereby order that the appellant shall serve an initial period of three months in civil jail after which this case shall be mentioned before this court to confirm compliance with the orders of this court. This matter shall therefore be mentioned on the 22nd of September, 2006 for further orders.

DATED at NAKURU this 14th day of July, 2004

L. KIMARU

JUDGE