



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCC. NO. 204 OF 1991

M'INYOTA M'IMATHIU & 5 (FIVE) OTHERS PLAINTIFF

VERSUS

JEREMIAH M'MBWIRIA DEFENDANT

RULING OF THE COURT

The application before this court is dated 28.8.1998 filed under Order XXXIX Rule 2(3) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya. In the application, the plaintiff/applicant is asking for an order that this honourable court be pleased to commit the defendant/respondent herein one Jeremiah M'Mbwiria M'Arachi to civil jail for contempt of the court order dated 19.6.1991 as read with the judgment of the court dated 19.10.1995. The application is supported by the affidavit sworn by the applicant on 28.8.98 in which he has deponed (see paragraph 2 thereof) that on 19.6.91, the court issued an order restraining the defendant/respondent either by himself or by his servants and or agents from extracting concrete stones or building stones from land reference No. ABOTHUGUCHI/MARIENE/1557 and that thereafter the Land Registrar Meru Central District filed his findings regarding the dispute on the boundaries which findings were confirmed as judgment of the court on 19.10.95.

The applicant has deponed further that inspite of the judgment of 19/10/95 which clearly indicated the boundaries between the applicant's and the respondent's parcels of land the respondent on 7.1.1994 uprooted the fencing posts and chased away the applicant from the suit land and further that on 19.7.1998, the respondent entered onto the suit land and started extracting concrete stones in complete disregard of the court order dated 19.6.1991, and that he has continued extracting concrete stones from the said land.

It is for this reason that the applicant now seeks an order committing the respondent to jail for contempt. The applicant is represented by Mr. V.P. Gituma Advocate.

When the application first came up for hearing before me on 30.6.2004, Mr. J. Mwangi for the respondent applied for an adjournment to allow him time to file a replying affidavit on the ground that he had not been able to do so earlier because he had not seen his client. The application was allowed and in his 17 paragraph Replying Affidavit sworn on 1.7.2004, the respondent denied the allegations of contempt by the applicant. At paragraph 13 thereof, the respondent averred that the applicant has never at any time served him with the order of which he (respondent) is said to be in contempt, and that that notwithstanding, he has observed the boundaries as determined by the Meru Central District Land Registrar.

On the date of hearing of the application on 13.7.2004, Mr. Mwangi for the respondent raised a

preliminary objection on a point of law, namely that the applicant's application was fatally defective and incompetent. Mr. Mwangi argued that for contempt proceedings to succeed, it must be established that the order which is said to be breached must have been personally served upon the person said to be in contempt. He submitted that no personal service was effected upon the respondent, thereby rendering the applicant's application defective. In support of his argument, he cited the case of JACOB ZEDEKIAH OCHINO V. GEORGE AURA OKOMBO & 4 OTHERS being C.A. No. 36 of 1989 – Nairobi. Mr. Mwangi further submitted that apart from personal service of the order upon the respondent, the order must be endorsed with a penal notice containing the consequences to be suffered as a result of the breach of the order. It was Mr. Mwangi's submission that infact the order purportedly breached by the respondent has not even been extracted, thereby implying that such alleged order could not have been served in the first place. In this regard, Mr. Mwangi relied on the JACOB ZEDEKIAH OCHINO case (supra) and also cited the case KOBIL PETROLEUM LIMITED V. SHEIKH AHMED TAIB & ANOTHER – Civil case No. 6244 of 1992 where it was held that:-

- (i) Law pertaining to contempt as existing in England now applicable (in Kenya).
- (ii) Service of notice of penal consequences (is) mandatory before contempt proceedings can be allowed.
- (iii) Personal service must be effected.

For these reasons, Mr. Mwangi urged the court to strike out the application for contempt and award costs to the respondent.

Mr. Gituma for the applicant conceded that the order alleged to have been breached was not personally served upon the respondent. He submitted however that since the respondent was personally in court he knew that such an order had been made against him. Secondly Mr. Gituma submitted that should the court be inclined to find in favour of the respondent, then the respondent should not be given any costs because he should have raised the preliminary objection much earlier than now.

After considering submissions by both learned counsels and especially the fact that Mr. V.P. Gituma for the applicant has conceded that the proper procedure was not followed before the filing of the contempt proceedings, I have no other option but to strike out the applicant's application dated 25.8.1998. In the Ochino case, the learned judges of the court of Appeal had this to say at page 214 of their judgment:-

“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. We have to follow the practice and procedure 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 on 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.”

That in my view is the law. In this case, the order was never extracted in the first place and the same was therefore, as conceded, not served upon the respondent. In my respectful view, the applicant was in total breach of both the practice and the procedure for bringing contempt proceedings before court.

Mr. Gituma has submitted that because the respondent has taken so long to raise his preliminary objection on a point of law, he should not be awarded costs. My humble view is that the applicant has not been vigilant either because no explanation is given as to why the application that was filed on 2.10.1998 has taken so long to prosecute. In the premises, I strike out the plaintiff's/applicant's application dated 25.8.1998 with costs to the defendant/respondent.

It is so ordered.

Dated and delivered at Meru this 30th day of September 2004.

RUTH N. SITATI

Ag. JUDGE