



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL
COURTS)
CIVIL CASE 274 OF 1999**

MARYL WANJIRU

GITAUPLAINTIFF

VERSUS

MARGARET WANGECHI

WACHIRADEFENDANT

RULING

By a Motion on Notice dated 15th October, 2004, the Defendants moved this Court under Section 5(1) of the Judicature Act Section 8 of the distress for Rent Act Section 3A and 63 of the Civil Procedure Act Order XXI Rule 28, and Order XXXIX Rule 2A (2) of the Civil Procedure Rules and all other enabling provisions of the Law for mainly two reliefs.

- 1. That an order of committal to prison be made against the Plaintiff for such period of time as this Court may deem fit and just for disobedience of an order of injunction given by consent on 18th March 2003 before Hayanga J.***
- 2. That the Plaintiff be personally surcharged for double the value of the household foods wrongfully attached from the Defendants house on 30th January 2004 and her personal property be attached and sold to recover such double value of the goods.***

The Defendant's application was set down for hearing on 9th November, 2004. Before this date, the Plaintiff on 3rd November, 2004 filed a Notice of Preliminary Objection to the Defendant's application. I allowed him to canvass the Objection first.

Counsel for the Plaintiff submitted that the Defendant had not obtained leave to commence the contempt proceedings. The Court therefore has no jurisdiction to entertain the same. For this proposition Counsel relied on the decision of my Learned Brother J.K. Serگون J. in the case of Mohamed Islam Awadh –v- Dr. Peter Wilbur Marumbu: Bungoma H.C. Misc. Application No.53 of 2004. The Learned Judge was of the view that the procedure for invoking the Court's jurisdiction in contempt proceedings is the procedure obtaining in England and is provided under Order 52 of the rules of the Supreme Court of England. He accordingly stated at page 3 of his ruling that:

“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.

On the basis of this authority Counsel for the Plaintiff submitted that the Defendant's application is incompetent as no leave was sought or obtained before filing the application.

Counsel further submitted that the order on which the application is premised was never served personally on the Plaintiff nor was any penal notice also served. In Counsel's view failure to personally serve the order and Penal Notice is fatal to the Defendant's application. For this proposition he relied upon the decision of the Court of Appeal in Jacob Zedekiah Ochino and Another –v- George Aura Okombo and 4 others: Nairobi C.A. No.36 of 1989 (UR) Their Lordship stated at page 14 of their judgment:

“As we read the Law the effect of the English provision is that as a general rule, no order of a 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. The copy served must be endorsed 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.”

Counsel finally submitted that committal is a serious matter and the Court should ensure that the rules are followed strictly.

Responding to the Preliminary Objection Counsel for the Defendant submitted that the Defendant had invoked more than Section 5 of the Judicature Act. The Rules of the Supreme Court of England do not therefore apply to the application as the Plaintiff is in breach of an order of injunction. In Counsel's view Order 39 Rule 2A(2) provides for punishment and no leave is required before commencing contempt proceedings.

Counsel distinguished the case of Mohammed Yeslam Awadh –v- Dr. Peter Wilbur Marumbu (supra) on the basis that in that case the Court was dealing with breach of an ex-parte order. This was also the position in the case of Jacob Zedekiah Ochino and Another –v- George Aura Kombo (supra).

Counsel relied on the decision of Bosire J. as he then was in the case of Isaac J. Wanjohi and Another –v- Roseline Macharia: Nairobi HCCC No. 450 of 1995 (UR) for his assertion that no leave is required if contempt proceedings are pursuant to disobedience of an order of injunction under Order 39 Rule (i) of the Civil Procedure Rules.

Counsel further argued that the Plaintiff will suffer no prejudice if the proceedings are allowed to proceed the way they are.

As regards submissions made in respect of personal service and endorsement of a penal notice, Counsel submitted that these are matters of evidence which cannot be resolved at this preliminary stage. In any event Counsel further submitted that the order disobeyed was entered by consent and in the circumstances service was not necessary. For this proposition Counsel placed reliance on the treatise on the Law of Contempt by Nigal Lowe and Brenda Sufrin Third Edition pages 555 and 556.

I have considered the rival submissions by Counsel. I have also perused the authorities cited and others relevant to the points raised. Having done so I take the following view of the matter.

The Court of Appeal in the Jacob Zedekiah Ochino case (supra) appears to have dealt with an appeal from committal proceedings as if the same were commenced under Section 5 of the Judicature Act (Cap.8 of the Laws of Kenya). This section 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.”

In my view the power to punish for contempt under this section is a general power; the general basis of the power to punish for contempt. It is not the source of the power to punish for contempt for disobedience or for breach of terms of an injunction granted under Order 39 (2) of the Civil Procedure Rules.

I am of the view that disobedience of or breach of terms of an order of injunction granted under Order 39(2) should be dealt with as provided for under the order i.e. by an application made by way of a Chamber Summons as provided under Rule 9 of the said order. Leave to commence the proceedings or file the application for contempt is not required.

In the Jacob Zedekiah Ochiro case (supra), the appeal against the order for committal was allowed on the ground that a copy of the order of injunction served did not have a penal notice i.e. the notice informing the Appellant that if he disobeyed the order he would be liable to the process of execution to compel him to obey it. A careful reading of this case shows that the Court of Appeal was not setting an inflexible rule that this requirement would always be required. I repeat what the Learned Judges of Appeal said at page 4 of their judgment:

“As we read the Law the effect of the English provisions is that as a general rule”(underlining mine).

This obviously suggests that there can be occasions when there may be departure from the general rule. In any event the elaborate preconditions obtaining in England were not in issue and were not considered in the Jacob Zedekiah Ochieng case supra. That case was therefore not authority for saying that the entire English Procedure and entire English practice must be followed where a party is in disobedience of an order of injunction under Order 39 Rule 2.

In any event the issue of service of the order of injunction and Penal Notice is a matter of fact which cannot be resolved without considering evidence. In Mukisa Biscuits –v- Westend Bakery (1969) E.A.696, the East African Court of Appeal the predecessor of our present Court of Appeal held that a Preliminary Objection raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

From the above it is obvious that I agree with the interpretation given to the provisions of Order 39 Rule (2) by Bosire J. as he then was. I am not alone in agreeing with Bosire J. J.V. Juma in Nairobi HCCC No.3697 of 1995 (UR): John Sachia Ndirangu –v- Peter Nganga Njenga and Another held that:

“In contempt proceedings, one has to elect whether to proceed under section 5 of the Judicature Act or under Order 39 Rule 2 of the Civil Procedure Rules. It should be now clear that for breach of injunction one has to proceed under Order 39 Rule 2. You do not require leave to institute proceedings for contempt under this order. All other proceedings for contempt are brought under Section 5 of the Judicature Act and one requires leave to institute such proceedings.”

I have said enough to show that the Preliminary Objection raised by the Plaintiff is for dismissal. I accordingly dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 30th DAY OF NOVEMBER, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-