



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.560 OF 2000

KIILI NDUVA MAKITE & 44 OTHERS
.....PLAINTIFFS

V E R S U S

LUKENYA RANCHING & FARMING

CO-OP SOCIETY LIMITEDDEFENDANT

R U L I N G

This is an application by way of Chamber Summons under Section 5 of the Judicature Act Cap 8 and Section 3A of the Civil Procedure Act Cap.21 both of the Kenya Laws asking that (i) Benson Athusi, (ii) Kithuka Musya (iii) Munyao Muindi (iv) and Jacob Munyao be penalized for contempt of the court order issued herein on 24th September 2001. In supporting affidavit by One KIILU NDUVA sworn on 11th October 2002 on behalf of 44 other original applicants for injunction he states that on 19th September 2001 they obtained a court order issued on 24th September 2001 restraining the respondents Lukenya Ranching & Farming Co-operative Society Limited under Order 39 rr 1, 2 and 3 in terms that by itself, its agents and or servants be restrained from interfering, evicting and or in any way intermeddling with the plaintiff`s quiet possession of the portion of L.R. NO.10501/2 and L.R. No.8529/4 Athi River in Machakos District until the hearing and final determination of the suit.

The applicant claims that on 10th October 2001 after the order was issued the four named contemnors in defiance of the order encroached upon the said portion earlier occupied by the plaintiff/applicants in blatant breach of the aforesaid court order and in connivance with officials of Lukenya Ranching & Farming Cooperative Society Ltd. The deponent claims in the affidavit that they have shown a copy of the order to the contemnors who are aware of the order. That one Benson Muthusi has called a special meeting to improve water supply to the suit land which would mean entering their order in the register in violation of the order. The deponent claims that the contemnors have not complied with the order and that they have not taken any steps to rectify the situation. The deponent claims that the contemnors have not taken any steps to rectify the situation. The deponent claims that the contemnors have not taken any steps to rectify the situation.

“In cases of disobedience or of 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 attached and may also order such persons to be detained in prison for a term not exceeding 6 months unless in the meantime the court directs his release”.

The respondents have opposed this application through their affidavit by Daniel Mulwa Karithi the Secretary of the respondent Co-operative Society saying that none of the alleged contemnors is a member of the committee of the Cooperative Society or its agent. That there was no personal service upon them and the alleged complaints are strangers.

The jurisdiction of this court to punish for contempt is contained in Section 5 of the Judicature Act empowering the courts to apply the law of as is in United Kingdom. Then secondly is the right to punish for contempt for disobedience of injunction under Section 63 of the Civil Procedure Act Cap.21 of the Kenya Laws.

The law of contempt seems to confirm that anyone who knowing of an injunction or an order who willfully does something to break the injunction or interfere with the order is liable to be committed for contempt and where the injunction is directed against a Corporation then Order 39 r5 says that such order would bind the Corporation itself all members and officers of the corporation whose personal actionseeks to restrain.

The respondents have raised the issue of Notice. Normally an order would be extracted and served on the alleged contemnor personally under the English Practice (O.52 rr 3 & 4 RSC) no order would be issued for committal of a person unless he has been personally served with order disobedience of which is said to constitute the contempt. Where it is directed against a group of persons one appropriate member would be served but the prosecutor must give each person cited for contempt the fullest NOTICE that an application is being made for his committal. In the appeal case of MWANGI WANGONDU vs NAIROBI CITY COMMISSION (Civil Appeal No.95 of 1988) the court confirmed the procedure in England and added

“.....that the copy of the order served 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”.

What the court of appeal confirms here is the mandatory requirement of indorsement of Notice of Penal consequence on the order.

In this application there is not only evidence of service of the order on the alleged contemnors but of personal service and or penal Notice.

Kiilu Nduva`s supporting affidavit says on paragraph 7:

“That I together with David Mutune, Musyoka Mutua and Peter Muathe who are my fellow applicants/Plaintiffs have on several occasions shown a copy of the said court order restraining the society to Benson Nthusi, Kithuka Musya, Munyao Muindi and Munyao Jacob who are members of the said Society...”

This is no proof of service. A person disobeying an injunction should not suffer imprisonment on mere suspicion. There must be clear proof that he has on facts proved deliberately disobeyed the order before he is punished. Before a person can be made to suffer such a consequence it must be shown that such person could not have any other belief than that there was subsisting injunction. (A.I.R 1958 All.639).

Contempt is a serious matter even as to its proof the law is that it must be proved to a standard higher than proof on the balance of probabilities almost but not exactly beyond reasonable doubt. See MUTITIKA & OTHERS vs BAHARAN FARM LTD – Civil application No.NAI 24 of 1985.

This application for contempt cannot succeed and is dismissed with costs.

Delivered this 7th day of February 2003

A. I. HAYANGA

J U D G E

Read to Mr. Mung`ao for applicants

N/A for respondent

A. I. HAYANGA

J U D G E

7/2/03