

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CIVIL CASE NO. 111 OF 2002

DR. MOSES NJUE PLAINTIFF

VERSUS

CHARLES MWANIKI KAMARA DEFENDANT

R U L I N G

By a notice of Motion dated 11th August 2003, the Plaintiff/Applicant seeks to have the Defendant/Respondent committed to civil jail for failure to comply with an order of the court issued on 14th July 2003. The application is brought under section 5(1) of the Judicature Act Cap 8 of the Laws of Kenya and Section 3A of the Civil Procedure Act.

A preliminary objection has been raised to the hearing of the application on the grounds that the same is incompetent as there is no evidence of personal service of the order nor service of a notice of penal consequences.

Secondly it is contended that the application is incompetent as no leave of the court has been obtained for the contempt proceedings to be brought.

In response to this objection it was contended on behalf of the Applicant that the order of 14th July 2003 being a consent order duly signed by the parties advocate there was no need for service on the Respondent. On the question of leave it was submitted that such leave is not necessary where the order contravened was issued by the same court.

It is clear that the application for contempt is brought under section 5 (1) of the Judicature Act. Contrary to the submissions made by the advocate for the Applicant *HCCC (Nrb) No. 2906 of 1981 William Mark Shipin v/s James Ngengi Mu igai* and another, does not support her position that no leave is required for the contempt proceedings. It is clear that the authority makes a clear distinction between a contempt proceedings brought pursuant to order XXXIX rule 2(3) of the civil Procedure Rules in respect of which no leave is required and contempt proceedings brought under section 5(1) of the Judicature Act in respect of which leave must be sought.

This application having been brought under Section 5(1) of the Judicature Act and no leave of the court having been obtained, the application is incompetent.

On the issue of service of the order and notice of penal consequences the consent order notwithstanding it is necessary for the Respondent to be served with the order and notice of penal consequences. Only then can he be taken to have deliberately disobeyed the order.

In the above premises I do uphold the preliminary objection and strike out the notice of motion dated 11th August, 2003 as being incompetent.

Dated signed and delivered at Nyeri this 5th day of December 2003.

H. M. OKWENGU

JUDGE