REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2160 OF 1998

AUGUSTINE MARETE RUKUNGA…..…….APPLICANTS

VERSUS

AGNES NJERI NDUNGIRE & ANOTHER..……RESPONDENT

RULING

This is an application under Section 5(1) of the Judicature Act, Order 52 Rules of the Supreme Court of England 1965, Sections 3A and 63 of the Civil Procedure Act, seeking the committal of the respondents to Civil Jail for their disobedience of orders of the this court made on the 9th December, 1998.

By an application dated 28/9/1998, the applicant sought an injunction to restrain the respondents from interfering with the suit premises and an order compelling the respondents to return the goods removed from the premises.

I hear arguments on the application on 9/11/1998, after which I granted the application in terms of prayers 1,2 and 3 of the Chamber Summons in my ruling dated and delivered on The 9th December, 1998. A formal order was extracted on 21st December, 1998 in the following terms:

> "(1) THAT the defendants/Respondents be and are hereby restrained by themselves, their agents, servant or any of them or otherwise howsoever from preventing the plaintiff/applicant, his employees and customers from access to the suit premises namely a portion of plot No. 1503 Njabini where the plaintiff/applicant has been doing a hotel business or in any way harassing or obstructing the plaintiff/applicant or preventing quiet enjoyment of the suit premises.
>
> (2) THAT the defendants/respondents be and are hereby compelled to return the goods removed from the suit premises and restore to the plaintiff.
>
> (3) The defendants be and are hereby ordered to comply with these orders within one month with effect from the 9th day of December, 1998.
>
> (4) THAT the applicant to continue paying the agreed rent until the suit herein is heard and determined".

This order was to be served on the respondents for them to comply. Needless to say, these orders were not obeyed hence this application for committal of the respondents to civil jail for contempt of court.

The applicants insist that the respondents were served with the court order and Penal Notice on the 22/10/1998 at Njabini township in Kinangop but have chosen to blatantly disobey the orders. The applicant called PW1 a process server to testify on this. PW91 testified that on the 22/12/1998 he went to Njabini where he found the 1st Defendant in her shop next to the 2nd Defendants' hotel. The 2nd defendant followed him into the 1st defendant's shop whereupon after explaining the purpose of his visit he served them. He further testified that they both accepted service but refused to sign in acknowledgment. The Respondents deny this service. The 1st Respondent testified that she did not meet the PW1 on the said 22/12/1998 and that she resides at her farm 5 miles away from Njabini township and that she only visits the premises on Sundays to check what is going on at the suit premises but did not see PW1 on any of these occasions.

The consequences of a finding of contempt is penal. The standard of proof is beyond reasonable doubt. The applicant therefore had to prove service beyond reasonable doubt and I must be satisfied that the respondents disobeyed the court order made on the 9th December 1998 and that they did so willfully or intentionally.

The plaintiffs' case is that the defendants were personally served but the respondents chose not to comply and are therefore in contempt for which he wants them punished. The Respondent's case on the other hand is that service and disobedience of the court order was not proved.

In the absence of the procedure as to the determination of whether a person is guilty of disobedience of court orders, recourse is to be had to English procedure contained in Order 45 of the Rules of the Supreme Court as contemplated by Section 5 of the Judicature Act. Those rules have been interpreted by the Court of Appeal in Jacob Zedekiah Ochino & Another Vs. George Aura Okombo C.A. No. 36 of 1989 when the Court said:

> "As we read the law, the effect of the English provision is that as a general rule, no orders 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 Order must be indorsed with a notice informing the person on whom the copy is served that if he disobeys then he is liable to the process of execution to compel him to obey it".

I must therefore be satisfied that there was an order whose terms are clear and unambiguous, that the respondents had proper notice of the order and Penal Notice and that disobedience of the court order has been proved beyond reasonable doubt. It is not in dispute that there was clear and unambigous Order made on 9th December, 1998. What is in dispute is whether there was proper service and whether there was sufficient prove of disobedience of the Court Order.

The rules require that a copy of the Order indorsed with a Penal Notice has to be served personally on the person required to do or abstain from doing the act in question. However exception is made under Order 45 rule 7 (6) which provides that if the person against whom the order is sought to be enforced has had notice thereof either by being present when the order was made, or by being notified of the terms of the order whether by telephone, telegram or otherwise. The court therefore will only be satisfied that a person has willfully disobeyed an Order of the court if that person has been personally served with an Order duly endorsed with a Penal Notice or the person is aware of the existence of the Order by being present in court when it was made or was otherwise notified of the terms of the Order.

In the case of Rv. Wigand (1911 –13) All Er. 820 a husband who had been present in Court and who had knowledge of the order made by the court subsequently and before the order of the court was personally served on him went out of jurisdiction thereby evading service of the order. The court held that the husband had full knowledge of the existence of the order and notwithstanding the absence of personal service of the order the court could issue a writ of attachment for his disobedience to the order of the court.

It was argued for the applicant that the defendant was served because her counsel appeared in court

with the papers and that a certified copy of the order served on her was annexed to her appeal and that the respondents deliberately refused to annex a copy of the penal notice served on them.

What I find from this argument is that the respondents advocates by the time they lodged their appeal had full knowledge of the existence of the Orders of this court issued on 9th December 1998 and could have advised their clients accordingly.

There is however no prove that the respondents were aware of the Order. In my view, the requirements of personal service is that the respondents get an opportunity to comply with the Orders of the court. Knowledge of the advocate is not necessarily personal and knowledge of the Respondents. In this instant case, Service of the Court's Order is seriously in doubt. I give the Respondents the benefit of doubt and find that the applicants have failed to prove service of the Order and Penal Notice to the required standard. It is further argued for the Respondents that the Order was not endorsed with a Penal Notice as required since the Penal Notice is a separate document. STROUD'S JUDICIAL DICTIONARY 4th Edition Vol. 2 defines 'endorsed' to mean 'that which is written upon the back or on the face of a deed and that it must be written on the deed itself. The object of requiring endorsement is to ensure that the Order is served together with the Penal Notice. I find that the requirements as to endorsement were not complied with. The Penal Notice is therefore invalid and it is rejected. It is also argued for the respondents that the application for leave and the Notice of Motion were not served personally as required.

Under Order 52 Rule 2 of the Supreme Court Practice Rules, no application for Committal shall be made unless leave has been granted in accordance with the rules. Order 52 rule 3 provides that where such leave has been granted, the application for the order of committal shall be made by Motion within 4 days after leave has been granted, failure of which the leave shall lapse. The pertinent requirement under this rule is that the said Notice of Motion accompanied by a copy of the statement and the affidavit in support of the application for leave must be served personally on the person sought to be committed unless the court has by an order dispensed with personal service.

This rule has been adopted by the Court of Appeal in Civil Appeal No. 198 of 1998 Loise Margaret Waweru Vs. Stephen Njuguna Githuri, in which the application for committal was not served on the appellant herself but on the advocates on record for the appellants. The court adopted the English position and quoted the English case of Mander Vs. Falcke (1891) 3 Ch. 488 in which it was held that the Notice of Motion must be served personally on the respondent (even if he has an address for service) unless the court dispenses with such service on an ex parte application or at the hearing of the Motion. The attendance of the contemnor at the hearing does not of itself waive the necessity for service.

In this case I am satisfied from the evidence before the court there was no personal service of the Notice of Motion on the Respondents. The burden of proof in such a case is very high. It is that of beyond reasonable doubt. The applicant has not discharged the burden of proof to prove personal service of the Notice of Motion and the application for leave and the order granting leave on the respondent. There was indeed non-compliance with these elementary but Mandatory Procedural Rules. Where there is such noncompliance the entire contempt proceedings would be a nullity. The Court of Appeal in Kamau Mucuha vs. The ripples Ltd. Civil Application No. NAI 263 of 1994 quoted the case of Nyamondi – Ochieng-Nyamogo & Another Vs. Kenya Posts & Telecommunications Corporation where the Court of Appeal quoted the case of Mwangi Wagondu vs. Nairobi City Commission C.A. No. 915 of 1988 and said:

> "that the case had correctly set out the required procedural steps to be taken before a party could be called upon to answer a charge of disobedience of a Court's Order. The consequences of a finding of a disobedience being Penal, the party who calls upon the Court to make such a finding must show that he has himself complied strictly with the procedural requirements….."

In the circumstances, I find that there was non-compliance with procedural steps by failure to effect personal service of the application for leave and the order granting leave on the respondent. The end

result is that the respondents cannot be asked to answer charges of disobedience of this Court's Order and for these reasons, I dismiss the applicant's application with costs.

Dated and delivered this 9th day of March 2001.

KASANGA MULWA

JUDGE