



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 466 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE

CONTEMPT OF COURT PROCEEDINGS

LINDA MARITIM CHEPKORIR.....APPLICANT

VERSUS

1. MORARA NGISA & CO. ADVOCATES

2. NGISA RONALD MORARA

3. NGALA STEPHEN COSMAS

4. ALICE NYOMENDA OERI

5. EVANS KENDA KIPLAGAT.....RESPONDENTS

R U L I N G

1. The notice of motion dated 27th May 2014 is for leave to commence contempt of court proceedings. It is brought under section 5 of the Judicature Act, Cap 8. It seeks the main orders -

(i) “That leave be ranted for the Applicant to apply for the 2nd to 4th Respondents be cited for contempt and be committed to civil jail for 6 months for having willfully disregarded the orders of:

(a) Hon. T Ngugi, SPM arising from an application they filed under certificate of urgency; and

(b) Hon. T.S. Nchoe, Ag SRM arising from an application they filed under certificate of urgency.”

(ii) “That (leave be granted for the Applicant to apply for) the 5th Respondent be cited for contempt and be committed to civil jail for 6 months for having instructed the 2nd to 4th Respondents to disregard the lawful orders of Hon. T Ngugi, SPM and Hon. T S Nchoe, Ag

SRM in the Chief Magistrates Court, at Milimani.”

2. There is another prayer in the application which is rendered as follows –

“That leave so granted does operate as a recourse to the contempt of court proceedings to the orders of Hon. T Ngugi, SPM and Hon. T S Nchoe, Ag SRM in the Chief Magistrates Court at Milimani.”

I cannot understand this prayer; if it was meant to seek stay as is available in judicial review proceedings upon grant of leave, then it is not available in contempt proceedings.

3. The entire application is quite poorly drawn and rendered. It is also rather unique as will be apparent from the background which I shall give shortly as gathered from the material now before the court. That is why I directed that the application be served and heard *inter partes*, though ordinarily applications for leave to bring contempt proceedings, where necessary, are heard *ex parte*.

4. The background I have gathered is as follows. The Applicant and the 5th Respondent are the plaintiff and defendant respectively in **Milimani CMCC No 5256 of 2013** where the plaintiff (Applicant) sued the defendant (5th Respondent) for money. Judgment was entered there for the Applicant for the sum of KShs 345,050/00 after the 5th Respondent’s statement of defence was struck out on 28th March 2014 upon application by the Applicant.

5. On 4th April 2014 the 5th Respondent applied to the same court for stay of execution pending hearing and determination of an intended appeal. That application was placed before **Hon. T Ngugi** on 4th April 2014 who declined to grant any interim stay of execution but directed that the application be served for hearing *inter partes* on 25th April 2014 before the court that struck out the 5th Respondent’s defence and entered judgment (**Hon. D Ole Keiwua, PM**).

6. Instead of waiting for 25th April 2014 to argue his application, the 5th Respondent filed another similar application on 10th April 2014. This new application was placed before a different magistrate on the following day (**Hon T S Nchoe**) who granted stay of execution pending hearing and determination of the intended appeal. He also directed that the application be served within 3 days. Apparently service was not effected as directed. It also appears that the previous application was not brought to the attention of **Hon T S Nchoe**.

7. When the Applicant discovered all this she was justifiably livid. It is her case in this application that by the second application dated 11th April 2014 and failure to serve the first application the 5th Respondent and his advocates (the 2nd to 4th Respondents practicing under the name and style of the 1st Respondent) were grossly abusing the process of the court. Having failed to get stay of execution before Hon T Ngugi on 4th April 2014 they irregularly filed the second application in flagrant abuse of the court process and had it taken before a different magistrate who, had he been alive to the earlier application and the orders made thereon, would certainly not have given the orders that he gave on 11th April 2014. The conduct of the 5th Respondent (and much more seriously that of his advocates) was reprehensible in the extreme.

8. There may well be a situation where such conduct will be construed as contempt of court and attract severe penalties. However, in the present case the gross abuse of the process of the court exhibited by the Respondents is best and properly remedied, not by contempt proceedings, but by reversal of the orders that were irregularly obtained.

8. Having considered all the material placed before the court, including the supporting, replying and supplementary affidavits, and having considered also the submissions of the learned counsels appearing, I will refuse leave to bring contempt proceedings.

9. I will instead give the following orders in the interests of justice in exercise of the supervisory jurisdiction and the inherent power of the court in order to prevent further abuse of the court process in **Milimani CMCC No 5256 of 2013** –

- (a) The present application for leave to bring contempt proceedings is hereby dismissed.
- b. The order of stay of execution of decree granted in **Milimani CMCC No 5256 of 2013** by **Hon T S Nchoe, Ag SRM** on 11th April 2014 is hereby set aside.
- (c) The application upon which the said stay of execution was granted (now set aside), being **notice of motion dated 10th April 2014**, is hereby struck out with costs for being an abuse of the process of the court.
- (d) The 5th Respondent shall, if he is so minded, prosecute his application by notice of motion dated 3rd April 2014 now pending before the lower court.
- (e) The Respondents shall, jointly and severally, pay the Applicant's costs of the present application to be agreed or taxed.

Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014