



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION 17 OF 2009

COSIMO ROSAFIOAPPLICANT

VERSUS

KADZO NGONYO CHARORESPONDENT

R U L I N G

The Notice of Motion application dated 16-4-09, is made under section 5 of the Judicature Act and Order LII Rule 2 of the Supreme Court of England Practice Rules. It seeks an order for committal to prison for contempt of court against the defendant/respondent who has willfully disobeyed and/or continues to disobey the court order issued on 19th March 2009 in **SRMCC 97 of 2009 Kilifi (Cosimo Rosafio v Kadzo Ngongo Charo)** and that warrants of arrest do issue towards that effect.

It is based on grounds that the respondent was ordered by the court in Kilifi SRMCC No. 97 of 2009, not to deal in any manner with plot no. Mtondia/Roka/163 and in particular, not to excavate coral blocks. The said order, had the appropriate penal notice and was duly served on the respondent on 19-3-09.

While the said order was alive and in force, on 23rd March 2009, the respondent, in open and flagrant violation of the said order proceeded with excavation of the coral blocks of the said plot and to date she is still interfering with the said plot and carrying out excavation of the coral blocks. Respondent is cited as she is the person who is finally responsible for whatever happens at the said plot.

In the affidavit supporting the application it is deponed by the applicant that he entered into a lease agreement with the respondent in April 2008 (as per annexed lease agreement Mld CR1) wherein, he was to excavate coral blocks in respect of Plot No. Mtondia/Roka/163.

He installed electricity and cleared the said plot ready to commence the excavation works – which he commenced. He carried out his obligations under the terms of the lease until sometimes in March, 2009, when the defendant started to interfere with the applicant's excavation. He therefore filed **SRMCC No. 97 of 2009**, with a view to protecting his interests and also applied for a temporary injunction to issue against the respondent – this was granted on 9-3-09 – the same expressly temporarily restrained the respondent from dealing with the said suit plot or excavating the coral blocks, pending hearing and determination of the suit.

Having been served with the order, applicant states that respondent has always been fully aware of the court order but decided to violate the same, and so, she should be punished.

The application is opposed and respondent in her Replying Affidavit confirms that she is the registered proprietor of the suit property herein having inherited the same from her late husband Ngonyo Charo. She explains that in April 2008, she was approached by one Tom Amolo who was accompanied by two male Africans. They went to her house in Ngala village with Ksh 10,000/- which they said was to be given to her as charity and they asked her to affix her thumb print to acknowledge receipt of the money. They then gave her Ksh 6000/- and said Ksh 4000/- were their charges for processing the transaction.

At no time was she informed that what she was executing was a lease agreement with the applicant who was not even present at the time, and was not known to her. She explains that had she known what the contents of that piece of paper were. She would not have executed it and the people who would come, left with that piece of paper – she wasn't given a copy for her retention.

In November 2008, she was shocked to see tractors and coral excavation machines arrive on the plot with some strangers on the basis of lease agreement she was purported to have executed – so she and her son Anthony Ngonyo Charo, chased them away and they never returned.

When the contents of the lease agreement were finally translated to her, she instructed her son to write to applicant to terminate the lease by giving the applicant a notice of termination (annexed and marked KNC3).

Its upon serving that notice that the applicant filed the suit in Kilifi. It is her contention that applicant was denied ex parte interim injunction and his application was then heard inter partes on 16-4-09 and ruling was scheduled for 30th May 2009.

She insists that applicant has never had access to or possession of the suit property and it is misleading for him to allege that he had installed electricity, cleared the plot and carried out some excavation.

That since November 2008, there exists a valid and duly registered lease over the suit property in favour of Kilifi Coral Blocks Ltd who took over exclusive use and occupation of the suit property and whom the plaintiff sued in **SRMCC 36 of 2009 Cosmo Rosafio v Kilifi Coral Blocks Ltd** – which suit was dismissed on 24-2-09 as per annexures KNC5.

She points out that even prior to filing Kilifi SRMCC 97 of 2009 (which has given birth to this application), the applicant knew at all material times, that respondent no longer had any control possession, use and occupation of the suit property since November 2008 as the same is in the exclusive control, possession and occupation of Third Parties namely, Kilifi Coral Blocks Ltd.

She denies ever being served with the order dated 19-3-09 and that the affidavit of Elvis Mwadzuya is false.

Finally respondent requests this court to dismiss the application for being defective as:-

- (1) The procedure and form adopted are not known in law for an application of this nature
- (2) The applicant has failed to file and/or serve the statutory statement of facts together with the substantive application for committal.
- (3) No application for leave to commence proceedings was filed and/or served as required.
- (4) Any leave obtained and granted to commence these substantive proceedings for committal was obtained in error and was wanting in form and substance.
- (5) The mandatory statutory and procedural requirement that a notice be served upon the Crown

Office (That would be the Attorney General for the Kenyan equivalent) prior to the lodging of an application for leave was not complied with.

(6) No evidence has been tendered to prove the allegations made.

In arguing the application, Mr. Mwavoto (for the applicant) submitted that respondent continues with her acts of disobedience and should go to jail. He reiterated the contents of the supporting affidavit.

Mr. Onyango for the respondent in answer stated that the application is fatally incompetent as the form used is not the one envisaged under section 5 of the Supreme Court Rules of 2001 and that what ought to be before this court is a claim form, not a Notice of Motion, as that is the practice in England and that is what ought to have been before Anzangalala J. and that the Supreme Court Rules contain material warnings which cannot be in a Notice of Motion. He points out that the warnings are to the alleged contemprior and refers to **HCC 34 of 2004 Zakuddin Anverati V Rajab Annu pg 4** to support his argument as regards the procedure to be adopted in contempt proceedings.

Further he says the notice has not been served on the Attorney General – the requirement being that it should be served at least a day before the application for leave is made as the AG is vested with powers in criminal proceedings – he explains that since service is required when a party raises the issue of contempt under section 5 Judicature Act unlike when one raises it under order XXXIX.

Further that there is no statement of facts filed and served on the alleged contemprior and that this offends Rule 52 (4) of the Supreme Court Rules. Mr. Onyango argues that there is even no proof of contempt – drawing from the case of **Mwangi Wangondu v Nairobi City Commission Civil Appeal No. 95 of 1988** saying there isn't a specific incident referred to in the supporting affidavit and that the proof that respondent was never served with the order, lies with the fact that the purported order signed by her is not annexed. He also points out that the alleged contemprior has already leased out the property and cannot do any work on it nor does she have the capacity to control activities therein.

In a final plea, Mr. Onyango urges that if this court finds respondent to be in contempt then the alleged contemprior's advanced age (she is 85 years) should be considered and she be exonerated.

Two categories of issues arise in this matter:

- (a) Procedure and Form
- (b) Substance

With regard to procedure, certainly section 5 of the Judicature act lays down the law on contempt in the High Court to the extent that the High Court and 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. The Judicature Act, however does not set out the procedure to be adapted by parties who wish to move a court in contempt proceedings. This therefore means that we have to refer to the rules guiding the High Court and the Supreme Court in England – which is contained in Order 52 of the Supreme Court Rules – this matter as regards procedure has been addressed in the Matter of an Application of **Gurbakash Singh and Sons Ltd Misc. Civil Case No. 50 of 1983.**

Order 52 Rule 2(2) of the Supreme Court of England Practice Rules provides that:

“An application must be supported by a statement setting out the name and description of applicant and name, description and address of the person sought to be committed and the ground on which his committal is sought and by an affidavit filed before the application is made, verifying the facts relied on.”

To my mind, the provision is not a standard prescribed form but rather a format which an applicant must adopt in its application and there is absolutely nothing illegal about moving this court by way of Notice of

Motion to commence proceedings for contempt of court.

Order 2(3) provides that the applicant must give notice of the application for permission not later than the preceding day to the Crown Office (in our situation it would be the Attorney General), this was not done and Mr. Onyango says it is fatal and therefore makes the leave granted by Anzangalala J to commence contempt proceedings a nullity. I would say that is now water under the bridge, whatever the omissions were, there is an order by a Judge of concurrent jurisdiction and it has not been set aside or appealed against and as far as that goes, it remains a valid order – I am not competent to sit on appeal and make findings about procedural validity of an order granted by fellow judge of concurrent jurisdiction.

In any event respondent should have raised that as a Preliminary Objection – instead they have elected to participate in proceedings they say had an illegal commencement – respondent has acquiesced to that.

Of course, the most logical thing one would ask is why didn't the applicant move to the same court which granted the orders for injunction? The answer would appear to be that by the time the breach was being committed, the lower court file was in the trial magistrate's custody awaiting ruling if we are to go by the claim that the interpartes application for injunction had been argued and ruling reserved for 30th May. Whatever the case, this kind of situation was addressed in the case of **Isaac J. Wanjohi and Another v Rosaline Macharia HCCC 450 of 1995**

“...The power donated to the court by Order XXXIX Rule 2(3) is independent of the provisions of section 5 of the Judicature Act. A party aggrieved by the disobedience of an injunction made under Order XXIX Rule 1 or 2 (of the) Civil Procedure Rules, appears to be excluded from involving the jurisdiction under section 5 above. The power donated by section 5 is only exercisable by either the High Court or the Court of Appeal. Subordinate courts have no power to punish for contempt under that section. The power donated by Order XXIX rule 2(3) is basically available to the court which granted the order respecting which breach is complained of, A subordinate court would therefore exercise powers under that rule to deal with breach of its orders made under it...”

So then does breach of an order made under Order XXIX of the Civil Procedure Rule become excluded from being punished under section 5 of the Judicature Act?

I will borrow from my brother Justice Ojwang's comments in the case of **Dima V Lands Resource exploitation and Development 2005 eKLR** to the effect that:

“The objectives of an applicant in an application expressed to be brought under section 5 of the Judicature Act are set out in Order 45 and 52 of the Rules of the Supreme Court of England. The applicant moved to court under the Judicature Act, and although the jurisprudence that seems to develop is that contempt before the subordinate courts and the High Court relating to injunction is made under the Civil Procedure Rules, while contempt in all other situations is exclusive to the High Court and Court of Appeal, the applicant herein elected to move the court under the provisions of the Judicature Act.”

Having done that then, he was bound to comply with the procedural requirements of the Supreme Court of England Practice Rules.

Although the applicant has on the body of the application, cited the provisions of the Supreme Court, there has not been compliance with the format of statement envisaged under Order 52(2) and to that extent the Notice of Motion is defective and as was noted in the case of **Zakiuddin Anveral and Another v Rajab Auni and Ano (2005) eKLR**

“It is common ground that a suit not commenced in the prescribed manner is incompetent.”

This cited case of **Zaikuddin** addressed the elaborate procedure set out in Order 52 of the Rules of the Supreme Court of England.

But then Mr. Mwavoto has urged this court not to become too encumbered by matters of procedure as to lose focus of substance e- the substance being the disobedience of the court order. Were such orders granted restraining the defendant/respondent or did the court decline to grant ex parte orders and proceeded to hear the matter inter partes and reserve ruling for 30th May? - An order which has been extracted and annexed to the applicant's supporting affidavit and marked CR3 is dated 19-3-09 was made ex parte and duly signed by J.M. Nduna, Senior Resident Magistrate.

It is not stated that this order is a forgery and applicant has not shown any other order that set aside this one. So there was an order restraining respondent from entering, trespassing, encroaching, wasting, destroying, constructing or in any manner whatsoever interfering with the plaintiff.

So is there any evidence to demonstrate that applicant is doing any of these anticipated acts? Apparently not – indeed there is not a specific incident on any given date referred to by the applicant. It would seem that the respondent had already surrendered her rights to Kilifi Coral Blocks Ltd Co. against whom the applicant filed a suit – no evidence has been tendered to confirm that the respondent is in control of the activities by Kilifi Coral Blocks, or that she is the one carrying out the excavation – for an action to be found to be contemptuous, there must be specific reference to the act and the date on which the act was committed. This is lacking in the present case, so that even on the substantive matters, this application lacks merit and is consequently dismissed with costs to the respondent.

Delivered and dated this 7th day of **July 2009** at Malindi.

H. A. Omondi

JUDGE