



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 53 of 2009

No.586

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 53 OF 2009

PHILIP KIPSIGEI RUTO

PLAINTIFF

VERSUS

DAVID TORE PIRADE 1ST

DEFENDANT

RULING

1. The Notice of Motion before me is dated 25th May 2012 seeking the following orders:-

1. *The application herein be certified urgent and the same be heard on priority basis.*
2. *The Honourable Court be pleased to cite and punish the defendants/respondents, for disobeying, ignoring and/or regarding the lawful court order issued and/or granted on the 7th May, 2009 and served upon the defendants/respondents on the 11th May, 2009.*
3. *Consequent to prayer (2) hereinabove being granted, the Honourable Court be pleased to issue Warrant of Arrest, to bring the defendants/respondents before this Honourable Court for committal to jail for disobedience and/or sentence.*
4. *Consequent to prayer (3) hereinabove being granted, the Honourable Court be pleased to commit the defendants/respondents to jail for a duration not exceeding six (6) months and/or such shorter period as the court may deems fit and expedient.*
5. *In the alternative and without prejudice, the Honourable Court be pleased to grant an order of Sequestration to attach the properties of*

HCCC (KISII) NO. 53 OF 2009

No.586

the defendants/respondents, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful court orders of Temporary Injunction dated 7th May, 2009.

6. *Costs of this application be borne by the defendants/respondents.*
7. *Such further and/or other Orders be made as the court may deem fit and expedient.*

2. The application is supported by the grounds on the face thereof and by the averments contained in the supporting affidavit sworn by Philip Kipsigei Rono. The main ground raised by the plaintiff/applicant is that despite being served with this court's order dated 7th May 2009, together with a Penal Notice, the respondents have disobeyed the said order, by interfering with the plaintiff's/applicant's occupation and use of the suit land known as LR NO. OLOSAKWANA GROUP RANCH TRANSMARA PLOT NO.434. The deponent of the supporting affidavit has annexed to the affidavit a copy of the affidavit of service dated 28th August 2009, which is to the effect that the two defendants/respondents herein were duly served with the court order on 11th May 2009 though the 1st defendant David Tore Pirride allegedly refused to sign the order. The 2nd defendant, Kingasunye Ole Lepore is said to have accepted service by signing at the back of the order. The court has been shown and seen a L.H.T.P. on the back of a copy of the

HCCC (KISII) NO. 53 OF 2009

No.586

order, but no name is given of the person to whom the thumb-print belongs, save that it shows the same was affixed at 11.45 a.m. on 11th May 2009 at Ngainet village, Emarti Location. The court can only infer that perhaps that is the LHTP for Kingasunye Enole Lepore, the 2nd defendant herein. There is also no detail of the identity card number of the person who thumb printed at the back of the said document.

3. There are no replying papers to the application, though the firm of Moronge & Company Advocates entered appearance on behalf of the defendants on the 2nd October 2012. When the matter came up for hearing on 2nd October 2012, there was no appearance for the defendants/respondents, so the application proceeded ex-parte. Counsel for the applicant urged the court to grant the orders sought since the respondents had failed to respond to the application.

4. I have now carefully read the application and considered the submissions made on behalf of the plaintiff/applicant. The issue that arises for determination is whether the applicant has complied with the strict requirements of service of the court order for the alleged contemnor to be held liable in contempt of court orders. Upon perusal of the application and upon consideration of the submissions, it appears

HCCC (KISII) NO. 53 OF 2009

No.586

clear to me that the plaintiff/applicant has not met those conditions. It is trite law that for a contemnor to be cited and punished for contempt, there must have been personal service upon him/her. In this regard, I am guided by the Court of Appeal decision in the case of Mwangi H.C Wangonde -vs- Nairobi City Council in which the Lords of Appeal said the following in part of their judgment dated June 1989 (unreported).

“The procedure for committal for civil contempt in England where an

order of sequestration is sought is set out under the Rules of the Supreme Court (R.S.C.), Order 45 and 46 and in Halsbury’s Laws of England, Vol. 9 (4th Edition) under the heading “Contempt of Court”. Briefly the effect of these provisions is that as a general rule, no order of Court requiring a person to do or abstain from doing any act may be enforced 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 served must be endorsed 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. This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt. In re Bramblevale Ltd (1970) Ch. 128, was a case where after a property company called Bramblevale Ltd had been put into a creditors’ voluntary winding up and a liquidator appointed, an order was made requiring its managing director a Mr. Hamilton to produce the books and papers of the company. He produced some papers but not all. He then claimed that the rest of the papers had been damaged in a car accident. The liquidator then applied for the committal of Mr. Hamilton for contempt and Megarry J., made the order against which the contemnor appealed to the Court of Appeal. In the course of his judgment allowing the appeal, Lord Denning M.R. said at P. 137 (A):

“A contempt of Court is an offence of a criminal character. A

man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved

HCCC (KISII) NO. 53 OF 2009

No.586

beyond reasonable doubt. It is not proved by showing that,

when the man was asked about it, he told lies. There must be

some further evidence to incriminate him.”

5. From the above decision, I note that there is no substitute for personal service and that even service upon a party’s advocate will not be construed as service upon the alleged contemnor. See generally Kariuki & others -vs- Minister for Gender, Sports Culture & Social Services [2004] 1 KLR 588 and

Nyamogo –vs- KP&TC CA Appl. No. Nai 264 of 1993. The essence of contempt proceedings as was held in the persuasive authority of **Rodgers Muema Nzioka & 2 others –vs- Tiomin Kenya Ltd., Mombasa Civil Appeal NO. 97 of 2001,** is the maintenance and enhancement of the dignity of the court as an institution so that where it is shown by an applicant that the dignity of the court is at risk of being diminished, the court will not hesitate to punish for contempt.

6. In the instant case, the evidence of personal service upon the respondents herein is not watertight. The alleged service upon the 1st defendant/respondent is clearly not established as it is alleged that he refused to sign that he had been served with the order. As for the 2nd defendant/respondent, there is an unidentifiable LHTP. Considering the serious penal consequences of disobeying a lawful court order, it

HCCC (KISII) NO. 53 OF 2009

No.586

was incumbent upon the applicant, through the process server Walters Kiprono Kosge T/A Lakoma Enterprises to ensure that all loopholes that may negate the contention of personal service were sealed. In this case, there are gaps in the alleged service. In such a case, the benefit of the doubt goes to the defendants/respondents.

7. In the premises and for the reasons above given, the Notice of Motion dated 25th May 2012 and filed in court on 14th June 2012 is found to be without merit. The same is accordingly dismissed but with no order as to costs.

8. It is so ordered.

Dated and delivered at Kisii this 18th day of October, 2012

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of:

Mr. J.K. Rono (absent) for Plaintiff/Applicant

N/A for Defendants/Respondents

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI
JUDGE.**

HCCC (KISII) NO. 53 OF 2009