



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO. 65 OF 2009

NGURUMAN LIMITED.....PLAINTIFF

VERSUS

SHOMPOLE GROUP RANCH.....1ST DEFENDANT

MOSHILA OLE NATAYIAN.....2ND DEFENDANT

NKOITIKO OLE NAPIDIYA.....3RD DEFENDANT

TURANA OLE KUMARI.....4TH DEFENDANT

AS CONSOLIDATED WITH:

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NGURUMAN LIMITED.....PLAINTIFF

VERSUS

OL KIRIMATIAN GROUP RANCH.....1ST DEFENDANT

MOINTI LEMARORA NKOYOKOY.....2ND DEFENDANT

ALBERT KUSEYO KIPANDI.....3RD DEFENDANT

MUGESA OLE LENANA.....4TH DEFENDANT

R U L I N G

(Application for contempt; procedure in instituting an application for contempt; applicant supporting his application for contempt on documents not contemplated by the rules;

application as drawn may prejudice respondents; application struck out but with liberty given to the applicant to file a proper application)

On 3rd June 2015, the plaintiff filed the following documents :-

- (i) A certificate of urgency signed by the law firm of M/s Nyaencha Waichari & Company Advocates.
- (ii) A Claim Form
- (iii) Particulars of Claim.
- (iv) A witness statement of Moses Loontasati Ololowuaya.
- (v) Supporting Affidavit sworn by Moses Loontasati Ololowuaya.
- (vi) Plaintiff's list of exhibits.

The above documents were meant to support an application for contempt of court. In the claim form and in the particulars of claim document, it is averred that the plaintiff claims the following :-

(a) *This Honourable Court does fine each of Shompole Group Ranch, the 1st defendant in Kericho HCCC No. 65 of 2009 and Ol Kiramatian Group Ranch, the 1st defendant in Kericho HCCC No. 66 of 2009 the sum of Kshs. 20 Million or such other sum as this Honourable Court may decide consequent upon the said Shompole and Ol Kiramatian Group Ranches' and their members', servants', and/or agents' contempt of this Court in invading the plaintiff's property known as Title No. Narok/Nguruman/Kamorora/1 or some part(s) thereof on diverse dates from 1st November 2014 and thereafter remaining in armored occupation thereof notwithstanding the Judgment and decree dated 2nd December 2009 made in these actions and in breach of the injunctions therein contained.*

(b) *Isaac Kiresian and John Kamanga, the Chairmen of Shompole and Ol Kiramatian Group Ranches respectively be committed to prison for a period of two (2) years or such other period as this Honourable Court may decide consequent upon Shompole and Ol Kiramatian Group Ranches' and their members', servants' and agents' contempt of this Court in invading the plaintiff's property known as Title No. Narok/Nguruman/Kamorora/1 or some part(s) thereof on diverse dates from 1st November 2014 and thereafter remaining in armored occupation thereof notwithstanding the Judgment and decree dated 2nd December 2009 made in these actions and in breach of the injunctions therein contained.*

(c) *Such consequential, further or other order(s) as this Honorable Court may deem just to grant.*

(d) *Costs of this application.*

It is apparent from the above that the plaintiff does want certain persons, or entities, punished for contempt, that is, Shompole Group Ranch and Ol Kiramatian Group Ranch, together with their Chairmen, Isaac Kiresian and John Kamanga. I will refer to them as the respondents and they are represented by Prof. Tom Ojienda (SC). The plaintiff/applicant is represented by Mr. Kennedy Nyaencha.

The matter before me is deemed to be an application for contempt and the respondents filed a replying affidavit sworn by John Kamanga in reply to the same. Further affidavits were also filed by both the plaintiff and the respondents and the matter was argued by way of both written and oral submissions of Prof. Ojienda and Mr. Nyaencha. I have considered all these, but before I go very far, I think I need to

decide a preliminary issue of whether what has been placed before me is a proper application for contempt. That issue has been raised in the written submissions of Prof. Ojienda, who submitted that the application is supported by strange documents not contemplated by the Rules. If I find that the application is proper, I will go to the merits of the application, but if I find that it is not, then it will not be wise for me to go into the merits of the application so as not to prejudice any future application seeking similar orders that may be filed by the plaintiff.

The starting point is to appreciate that we do not have a homegrown statute dealing with contempt. The power to punish for contempt of court in our country, is found in Section 5 of the Judicature Act, which provides as follows :-

S. 5 (1) The High Court and the 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, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

As was emphasized in the Court of Appeal decision of ***Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others (2014)eKLR***, there is a duty imposed on the High Court, the Court of Appeal, and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England at the time an application for contempt is brought.

In applications for contempt, since the liberty of a person is at stake, it is important that the procedure outlined be strictly followed. This was indeed affirmed by Justice J.B Ojwang' (as he then was) in the case of ***Dima vs Arid Lands Resource Exploitation & Development (2005) eKLR*** where the learned judge cited with approval the case of ***Chiltern vs District Council of Keane (1985) 1 WLR 691*** on the importance of strict compliance with procedural rules when it comes to applications for contempt. The reasoning for this holding is that since the respondent's liberty is at stake, he ought not to be prejudiced for the improper procedure adopted by the applicant.

So what is the procedure for instituting a contempt application "

I mentioned earlier that the law of contempt in Kenya, is found by reference to the prevailing law of England. This is on both procedure and substance. The current procedure for instituting a contempt application is found in Rule 81.10 of the English Civil Procedure Rules and Directions, whose title is "*How to make the committal application* ". It provides as follows :-

81.10

(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.

(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.

(3) The application notice must—

(a) set out in full the grounds on which the committal application is made and must identify, separately

and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and

(b) be supported by one or more affidavits containing all the evidence relied upon.

(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.

(5) The court may –

(a) dispense with service under paragraph (4) if it considers it just to do so; or

(b) make an order in respect of service by an alternative method or at an alternative place.

It will be seen from the above provisions that a contempt application is made by way of an Application Notice. Such Application Notice must set out the full grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts. The application must be supported by one or more affidavits containing all the evidence relied upon.

In our instance, there is no "Application Notice." I would probably have forgiven the plaintiff if he had some sort of formal application (I have in mind a Notice of Motion), but the plaintiff has none. What he has is a Claim Form and a document titled "Particulars of Claim". These, I am afraid are not the type and nature of documents referred to in the above rule. Neither are there any grounds which identify "*separately and numerically*" each alleged act of contempt complained of. The documents filed include a Witness Statement, which to me, is a strange document to support an application for contempt. The appropriate document required to be filed, was an affidavit, which is the document that should contain ***all*** the evidence to be relied on, as pointed out in the rules. The rules bar me from referring to evidence contained in a witness statement or claim form when dealing with an application for contempt, for these documents are not contemplated in an application for contempt.

Following the above, I am of the opinion that the application as filed is incompetent. I am aware that Article 159 (2) (d) of the Constitution of 2010, requires the court not to be too preoccupied with procedural technicalities, but I think this provision can only apply where no prejudice is caused to the other party. In this instance, I am of the view that the respondents will be greatly prejudiced if I refer to material which I am barred from the rules from referring to (i.e the Claim form, the Particulars of Claim, and the Witness statement) and for the reason that they will not be able to answer to any specific grounds which set out separately and numerically, each of the alleged acts of contempt. Contempt proceedings are quasi-criminal in nature and if I am to proceed with the documents filed, and find the respondents guilty of contempt, it will be akin to a person being convicted in a criminal trial, on the basis of inadmissible evidence.

The respondents' liberty is at stake and they are entitled to be given an opportunity to fully respond to the application, and they can only properly do so, if the application is correctly presented.

For the above reasons, I have little option but to strike out this application with costs. This application has been struck out on a preliminary point, without the merits having been considered. For the avoidance of doubt, the applicant is free to file a competent application for contempt, if it is minded to do so, and which, if filed, will be considered on merits.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 2ND DAY OF OCTOBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

In the presence of:

Mr. Kennedy Nyaencha for Plaintiff/Applicant

Mr. Henry Opondo h/b for Prof. Tom Ojienda (S.C) for Defendants/Respondents



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