



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISCELLANEOUS CIVIL CASE NO. 107 OF 2013

JACINTA NJERU KAITHA.....1ST APPLICANT

CATHERINE RWAMBA GICHOVI.....2ND APPLICANT

VERSUS

DAVID K. KANYIRI.....RESPONDENT

R U L I N G

1. This is the Notice of Motion dated 19/7/2013 filed under the Judicature Act, Section 3a & 1a of the Civil procedure Act for the following orders:-

- i. That the person of David K. Kanyiri be committed to civil jail for contempt of court.***
- ii. The contemnor be ordered to purge the contempt by obeying the orders of Business Premises Tribunal of 15th April 2013 and 22nd May 2013 respectively being to reinstate the applicants back to the suit premises.***

2. The application is supported by the following grounds:-

- a. The contemnor was served with orders and penal notices and continues to disobey th said orders.
- b. The contempt is glaring on the face of it.
- c. The contemnor is acting with impunity and abusing the process of the Court.
- d. The tribunal is a quasi-judicial body with capacity to make legal orders.

3. Its also supported by the affidavits of both applicants. Copies of the orders and penal notice have been annexed as annexures 'A' & 'B'.

4. In their affidavit the applicants state that inspite of the orders by the Tribunal dated 15/4/2013 & 22/5/2013 respectively the Respondent evicted them from the suit premises on 14th June 2013.

5. The Respondent filed a replying affidavit on 25/11/2013. He does not deny evicting the applicants on 14/6/2013. At paragraph 17 he states that he was only served with this Notice of Motion on 28/10/2013 when infact the same was filed in July 2013.

6. He also denies service on him of the orders said to have been disobeyed.

7. Both applicants filed similar supplementary affidavits on 10/1/2014, in response to the replying affidavit of the Respondent.

8. G.M. Karuoro a process server was summoned for cross-examination over his affidavit sworn on 5/6/2013 in respect of the order of 15/4/2014 which he served on 29/5/2013. He told the Court that he did not serve on time as the parties were negotiating.

9. In the course of these proceedings this Court had to call for the original files from the Business Premises Rent Tribunal vis No. 37/2013 & 38/2013 for purposes of scrutiny following allegations of doctoring of documents.

10. Both counsels agreed to dispose of the application by way of written submissions which they later on highlighted.

11. Mr. Mungai for the Applicants contended that the Respondent was served with the two orders and he chose to disobey them.

He further submitted that the Respondent through his replying affidavit was justifying his reasons for disobeying the said orders and he should be punished.

12. He referred the Court to several authorities submitting that the penal notice was not mandatory; what was important was the order itself he said.

13. Mr. Kathungu for the Respondent submitted that there was no personal service of the said orders on the Respondent. He referred to paragraph 8 of the replying affidavit.

14. He also raised issue with the fact that the orders in the original files had no penal notices but those filed in Court had them.

15. He submitted that at the time the Respondent evicted the Applicants the orders were not effective.

16. In response Mr. Mungai submitted that the Tribunal's orders were indefinite as the Tribunal sat in circuits and so the order could not be said to have ceased being effective.

17. I have considered the submissions made by both counsels and the sworn affidavits and the annexures, on this matter before me.

18. The power to punish for contempt is donated to this Court by Section 5(1) of the Judicature Act which provides as follows:-

“The High Court and Court of Appeal shall have the same power to punish for contempt as is for the time being by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts”.

19. Before a court deals with contempt there must be proof that indeed there was an order by the Court in the first instance. I will first establish this before getting into the merits of the application.

20. Before me are two files from the Business Premises Rent Tribunal (BPRT). These are:-

(i) **BPRT NO. 37/13**

It confirms that there were restraining orders issued against the Respondent on 15/4/2013 which were to be served within three (3) days. Inter partes hearing was to be at the next circuit.

(ii) **BPRT NO. 38/13**

It also equally confirms that restraining orders were issued against the Respondent on 22/5/2013. The same were to be served within three (3) days.

21. Were these orders served as directed by the Tribunal"

A perusal of the two files shows that there are no affidavits of service filed therein. The Respondent had to be served with the pleadings and the orders in both files.

22. A further perusal shows that no certified order was extracted in respect of BPRT NO. 38/13. There is however a copy of an order annexed to Jacinta N. Kaitha's affidavit of 19/7/2013 marked as annexure 'A'. It states the following at point No. 4 - "**To serve the Land lord**".

23. This cannot therefore be a true extract of the orders given by the Tribunal which clearly indicated at point No. 4. "**To serve the landlord within three days**". I find annexure 'A' to be a questionable document.

24. Where did the applicant Jacinta Kaitha get this order annexure 'A' from and when was it served" Service of this order ought to have been on or before 18th April 2013, going by the order of service within three (3) days as directed by the Court.

25. The order of 15th April 2013 is the one that involves the questioned service by G.M. Karuoro. In his affidavit of service he does not state when he received the said order, which he says he served on 29/5/2013. More curious is the fact that G.M. Karuoro has never to date filed an affidavit of service of this order at the Tribunal.

26. The Tribunal had a reason for giving specific directions on the service as one of the orders granted by the said Tribunal.

27. If indeed the parties were negotiating as claimed by the process server they ought to have gone back to the Tribunal for extension of the timelines. It was not the Process Server to extend the timelines since the said order was not served as directed by the Tribunal. My finding is that it ceased to be effective after three days for non service.

28. There was therefore no order in that regard which was disobeyed by the Respondent as far as BPRT NO. 38/13 is concerned.

29. BPRT NO. 37/13

The order herein was granted on 22/5/2013 and was also to be served within three (3) days.

30. I have gone through the said Tribunal file plus the annexures filed herein and I do not find any

affidavit of service showing how the service of this order was effected.

31. The Respondent has in his replying affidavit at paragraph 8 stated the following:-

“That on 23rd May 2013 one of my workers by the name Julius Kibabu at my Motor Garage was given an envelop to give me by “Boda Boda” rider and when I later opened it, I found the order given by the Tribunal on 22nd May, 2013 and it did not have a Penal Notice”.

He does not say how later or exactly when he opened this envelope that was given to his worker Julius Kibabu. The Applicant (Catherine Rwamba Gichovi) has equally not produced any evidence to show how and when this order was served on the Respondent. As stated earlier there is no affidavit of service filed at the Tribunal. And if what is stated by the Respondent at paragraph 8 of his replying affidavit is what happened then there was no integrity in the whole process.

32. The question this Court asks itself is whether or not this order was served within the three (3) days as directed by the Tribunal. The onus was on the Applicants to confirm compliance by themselves of the orders of the Tribunal before citing the Respondent for contempt.

33. As correctly stated by Mr. Mungai for the Applicants, the BPRT sits in circuits. Its not clear how often they sit but from the two files its confirmed that the Tribunal sat in Embu in April and May 2013.

34. The Tribunal gives the directions on the service since such orders as the ones involving the two Applicants are given *ex parte*. *Ex parte* orders cannot last forever, hence the timelines on service which were not complied with by the applicants in this case.

35. Finally the Applicants were on 11/7/2013 granted **LEAVE** to **file** and **serve** the substantive Motion within 7 days.

36. The Motion ought to have been filed and served on or before 18/7/2013. The Notice of Motion herein was filed on 19/7/2013 which was a day outside the 7 days and without the leave of the Court.

37. Further the Respondent at paragraph 17 of his replying affidavit avers that he was served with this Notice of Motion on 28th October 2013, yet the Notice of Motion was filed in July 2013.

38. The record also confirms that pursuant to that service the Memorandum of Appearance was filed on 30th October 2013.

39. Both Applicants have responded to this at their paragraph 10 of their respective supplementary affidavits saying

“THAT paragraph 15,16,17, 18, are mere puffs and shenanigans to the matter in issue and should be disregarded by the Court in determining an application for contempt”.

40. The Applicants did not rebut the Respondent's claim that they served him with this Notice of Motion on 28/10/2013. As per the orders of this Court, they ought to have served the Respondent on or before 18/7/2013. Their service was three (3) months late!

41. It is therefore clear that the Applicants themselves did not comply with the orders of the BPRT dated 15/4/2013 & 22/5/2013 and of this Court dated 11th July 2013.

42. He who comes to Court must come with clean hands. In this case I find the opposite to have been done. It therefore follows that the Notice of Motion filed on 19/7/2013 is incompetent and dismissed with costs on those preliminary points.

The BPRT files to be returned forthwith.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MAY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Mungai for Applicants

Mr. Kathungu for Respondent

All parties

Njue/Kirong CC



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