



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 176 OF 2013

MADHUKAR DILSUKHRAI VIBHAKAR.....PLAINTIFF

- V E R S U S -

1. JIM OGOYI OPEE

2.ODHIAMBO HANNINGTON PHARES

3.DAVID K. KANDIE

4.GEOFFREY GICHUHU GATU

5.KIPROTICH KORIR

6.THE REGISTRAR OF TITLES MOMBASA.....DEFENDANTS

RULING

1. The plaintiff/applicant has moved this court under Order 40 rule 3 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Section 5 (i) of the Judicature Act seeking for the Orders to cite the 1st and 2nd defendants for contempt of court. He also asked the court to direct the 1st and 2nd defendants to appear before it and show cause why they should not be punished in accordance with the law. The motion is premised on the grounds on the face of it, the Supporting Affidavit of the Applicant together with annexures thereto.

2. The motion is opposed by the 1st and 2nd defendants who have sworn an affidavit through the 1st defendant. The advocates also put in written submission as a way of arguing this motion. I have had occasions to read and considered the issues raised through the submissions.

3. The brief background of this motion is; the applicant filed this suit together with an application for injunction. The court on 14.8.2013 issued temporary orders of injunction as per the annexure MDV-2. The pleadings in the suit together with the order was served upon the Respondents through an advertisement in the newspaper (annex MDV 4) on 9th September 2013. The applicant avers that inspite of service of this order, the Respondents in mid September commenced constructing a perimeter wall around the suit parcel.

4. In paragraph 6 of the affidavit in support of the motion, the applicant deposes that the Human Resource Manager of the security company guarding the premises informed him that in mid August 2013 the 1st and 2nd Respondent in cahoots with people who said they were police men invaded the suit premises in the dead of night and forcefully evicted the guards. In paragraph 9, the same person informed the applicant that in or about late August 2013, the 1st and 2nd Respondents invaded the suit premises and evicted their guards. The same guards informed the Applicant that these Respondents demolished the gate, cut down trees and commenced building a perimeter wall on the suit premises.

5. Ben Aduda the Human Resource Officer of the Security firm swore an affidavit which was annexed as MDV 3 in the Applicant's Supporting Affidavit. He confirmed their company provided security on the suit premises. In paragraph 4, he deposed that in **late August**, a group of people identifying themselves as officers from Nyali police station accompanied by 1st and 2nd Respondents invaded the premises at night and forcefully evicted their guards. In paragraph 5, he deposes the invaders took possession, demolished the gate and commenced constructing a perimeter wall thereon.

6. In an application such as this to succeed, knowledge of order and personal service of the order must be established before punishing a party for contempt. The applicant deposes that the Respondent was served on 9.9.2013 by way of advertisement. The annexed newspaper cuttings do not have any dates on it but the court believe the date given in the affidavit since the application for leave to serve by advert is dated 27.8.2013 and was allowed the same day. The alleged acts of contempt complained of is deposed to have taken place in mid August or late August when the Respondents invaded the premises and evicted the guards. By this time, the Respondents had not been served with the Order. The applicant from the proceedings of 27.8.2013 did inform the trial court that he had been unable to effect physical service of the pleadings and the order on all the Respondents. He has not stated why he thinks the Respondents were aware of this order before service was effected. Certainly this court cannot order the punishment of a party based on an order which has not been proved to have been brought to their attention. I will not go further as to whether there was proof of contempt as it will not make any difference.

7. It is clear the contempt proceedings commenced herein is misconceived and vexatious. The same is dismissed with costs to the 1st and 2nd Respondents.

Dated and delivered in open court at Mombasa this 14th day of April 2015.

A. OMOLLO

JUDGE

14.4.2015