

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL MISC. APPL. NO. 376 OF 2010

RUMBA NDULE.....PLAINTIFF

VERSUS

KIDZAO MWANZA.....RESPONDENT

RULING

Before court is the notice of motion dated 28th April, 2011 in which the applicant prays that

- “1. KIDZAO MWANZA the respondent herein be committed to prison for such period as this honourable court may deem fit.**
- 2. The costs of and/or occasioned by this application and obtaining have thereto be paid by the respondent.”**

The application was opposed. Both parties duly filed written submissions in respect of the same.

The genesis of this application was an eviction order issued by **HON. D. O. OGEMBO** on 22nd December, 2009 following a civil suit **SRMCC 8 OF 2001** in which the ownership of LR No. Kwale/Mwanguda/436 was in dispute. The learned trial magistrate ruled in favour of the applicant and directed that the respondent vacate plot 436. The eviction was effected by court bailiffs and vacant possession was handed over to the applicant. However it is alleged that even after such eviction the respondent returned to the suit land and continued to utilize it prompting the applicant to return to the subordinate court seeking to have the respondent cited for contempt of court orders. The learned magistrate citing lack of jurisdiction referred the matter to the High Court. Leave was granted to commence proceedings for contempt by Hon. Ibrahim J (as he then was) on 15th April, 2011. Thereafter **Hon. Lady Justice Mary Kasango** directed that the District Land Registrar submit a report in order to establish whether the plot occupied by the respondent is the very same plot belonging to the applicant in respect of which eviction orders were made. Clearly if the respondent was in occupation of a different plot then he cannot be said to be in contempt of orders relating to the applicant’s plot. The order from the Kwale court refers to the disputed parcel of land as Kwale/Mwanguda/436. Thus it is plot 436 which the applicant owns and from which the respondent was evicted.

The District Land Registrar did on 14th July, 2012 file his report dated 30th August, 2012 in court. His findings were that the respondent was in occupation of plot 440 and **not** plot 436 which the applicant claims. The applicant argues that plot 440 was carved out of plot 436 by way of sub-division but this is refuted by the District Land registrar. His findings were that plot 440 is an original number and is **not** the result of any sub-division. That being the case then the respondent cannot be said to have encroached on the applicant’s land which is plot 436. This is the plot in respect of which the lower court made orders. It is plot 436 which is the subject matter of these contempt proceedings. From the material available before me and based on the report of the District Land Registrar I find that the respondent is in occupation of plot 440 and not plot 436 to which the eviction order referred. There is therefore no basis upon which he ought to be held in contempt. I therefore dismiss this application and decline to commit the respondent to civil jail. Each party to meet its own costs.

Dated and delivered in Mombasa this 28th day of May, 2014.

M. ODERO

JUDGE

In the presence of:

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