



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL SUIT NO. 2276 OF 1998**

**PETER MBURU BURUGU.....PLAINTIFF**

**VERSUS**

**MARGARET NJERI MBURU.....DEFENDANT**

**RULING**

There are two applications coming up for determination. The first application is dated 24/5/2010 filed by the Defendant who seeks orders that the Plaintiff be arrested and committed to imprisonment for disobedience of the Court's order, and further that the Court does order the removal of all barricades or obstacles of any kind to the access road between L.R. No. 4859/18 and L.R. No. 4859/9. The application is premised on grounds that on 18/1/1999 the Court issued an injunction restraining the Plaintiff from barricading, closing or digging trenches on the access from parcel of land known as L.R. No. 4859/18 and L.R. No. 4859/9. The Defendant contends that by a consent order dated 25/1/1999 the parties agreed to maintain the status quo by leaving the road and bridge in the state they were and desisting from planting trees or or taking further action thereon. It is the Defendant's averment that the Plaintiff has barricaded the access road and planted trees thereon thus denied it access. Therefore the obstruction is made in breach of the Court order. The application is supported by an affidavit sworn by the Defendant on 24/5/2010 wherein she reiterated the contents of the application that since the beginning 2010, the Plaintiff has denied her and workers have been access of the road as he has planted trees along the road thereby rendering the place immotorable despite the prevailing court orders.

The Plaintiff swore a Replying Affidavit sworn on 10/12/2010 in response to the application wherein he refuted the claim made by the Defendant that he had barricaded the road by planting trees. It was his deposition that there was no such access road since January 1999 capable of being barricaded in the alleged manner. He deposed that the status quo as expressed in the court order dated 25/1/1999 has been maintained over the years. The Plaintiff deposed that contrary to the allegations made, the Defendant has not been accessing the main road through his property but that she has been using an access road that exits through Maramba Tea Factory onto Tigoni/Limuru Road. In further support of this deposition, the Plaintiff annexed photographs which he deposed were the true reflections of the areas of the property, subject matter of the suit. It was the Plaintiff's deposition that the application was merely intended to irregularly cause an access road to be forcibly opened through his property before the issues are fully settled.

The application was canvassed by way of written submissions. A.M. Mulandi Advocate for the Defendant filed submissions dated 23/12/2010 wherein counsel submitted that the Defendant had intentionally

planted jacaranda trees on the access road to defeat the orders issued by the court. Further that the Defendant and her workers had been using the access road until 2010 when they were denied access despite a pending court order, and as a result, the status quo was not being maintained. In respect to the photographs annexed to the Plaintiff's affidavit, it was submitted for the Defendant that the same were of one section of the Plaintiff's property taken to his advantage. Counsel referred to the photographs marked (i) and (ii) submitting that the photos clearly showed the bridge had been reinforced by rafters and fastened using nails and trees planted on the footpath used by the Defendant's farm workers. Counsel referred the court to an annexed map of the area and submitted that there has been an access road even before the Plaintiff purchased the property.

P.J. Mwit Advocate for the Plaintiff filed submissions dated 24/1/2011. Counsel submitted that the consent order means that there was not to be any passable or motorable access road through the disputed portion of the Plaintiff's land and that indeed there had not been such access road since January 1999. In respect to the bridge counsel quoted the wordings of the consent, "*the bridge has been rendered impassable*" submitting that it was evident that the Defendant and her workers had no way of crossing over to the Plaintiff's property since January 1999 and therefore that the application is based on falsehoods and misrepresentations which ought to be struck out. It was also submitted that the photographs showed that there was no access road through the Plaintiff's property as alleged. In regards to the area map annexed to the Defendant's submissions, counsel submitted that the same ought to be produced at the hearing and not annexed to submissions and therefore was of no consequence at all.

The second application is a Preliminary Objection to the Defendant's application dated 24/5/2010 filed by the Plaintiff dated 26/9/2012. The Plaintiff avers that no leave was obtained by the Defendant before filing the application and therefore it does not comply with the mandatory legal requirements.

P.J. Mwit Advocate for the Plaintiff filed submissions dated 14/12/2012 in support of the Preliminary Objection. Counsel submitted that decided cases clearly laid down the Law in Kenya as making it mandatory to obtain leave of court before applications for contempt are made. Further that the law expressly provides that the Court Order forming the basis of an application for Contempt of Court must have been formerly extracted and served personally on the person against whom such application is made. In that regard, counsel submitted, that the Defendant's application is blatantly incompetent, misconceived and bad in law, and therefore ought to be dismissed.

J.W. Mugweru Advocate for the Defendant filed submissions in respect to the Preliminary Objection. It was submitted for the Defendant that the Order in question originates from consent entered into by advocates representing both parties and thus it is preposterous for the for the Plaintiff to allege that his contravention should be overlooked on grounds that the Court Order was neither extracted or served upon him personally. Further that the law on representation is clear, that is, an advocate appearing for a party in a suit is deemed to have full instructions and authority from the client and any document ratified has full effect and is binding on the client. Consequently, the terms of the consent order, ratified by the Plaintiff's advocate, are binding upon the client. Counsel also submitted that the Court ought to treat the order in question differently from other Court Orders as it is a consent order therefore incapable of being extracted. Counsel urged the court to dismiss the objection terming the same an afterthought having been filed two years after the Replying Affidavit was filed and is thus vexatious and an abuse of the court process.

Before I delve into the Defendant's application, it is proper to first dispose off the Preliminary Objection filed by the Plaintiff. It is premised on two grounds, namely: Absence of leave before filing of the application and secondly, the application does not comply with the mandatory legal requirements. On the second ground, counsel submitted that the copy of the order said to be defied was not formally extracted and served upon the Plaintiff. First, I must acknowledge that the contents of this objection befit a Preliminary Objection capable of disposing the application. I am guided by the reasoning of their lordships in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** where it was held:

**a preliminary objection consists of a point of law which has been pleaded, or which arises by clear**

**implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.**

The Plaintiff filed the preliminary objection on 26/9/2012. The law applicable at the time of filing the application was Order 52 of the Rules of the Superior Court. Part 1 Rule 2.2 required that an application for contempt made in existing proceedings must be commenced by filing an application notice seeking permission. I would like to point out that rules of procedure in England have since changed. The **Civil Procedure (Amendment No. 2) Rules, 2012** came into force on 1<sup>st</sup> October 2012 and **PART 81** thereof effectively replaced **Order 52 RSC** in its entirety. Nonetheless, in view of the change of the law occurring after the filing of the objection, the same shall be determined on the applicable rules then. Consequently, the court is prepared to uphold the objection on this ground.

This finding notwithstanding, it is quite evident that the order alleged to be defied was derived from a consent entered into by both parties. This brings me to the second ground of the objection, that is, lack of personal service. Imperatively by 2012, courts acknowledged that knowledge of the existence of an order is higher than personal service. This was the finding by Lenaola J. in the case of **Kenya Tea Growers Association v Francis Atwoli & 5 others Petition No. 64 of 2010 [2012] eKLR** where the court in a ruling delivered on 2/8/2012 before the coming into force of the Civil Procedure (Amendment No. 2) Rules, 2012, as follows:

**On this issue, our Courts seem to have moved steadily towards the position that although Order 52 Rules 3 and 4 of the Supreme Court Practice Rules of England would point towards personal service as a factor in determining contempt, in fact knowledge of an order is higher than service.**

The order, subject matter herein, having originated from a consent of the parties simply means that the Plaintiffs had knowledge thereof which in my considered view supersedes personal service. In that regard, I decline to allow the preliminary objection.

On the Defendant's application for contempt, the parties herein are registered owners of adjoining parcels of land and the dispute is an alleged access road that according to the Plaintiff is part of his parcel which the Defendants illegally use as a foot path whereas according to the Defendant, the access road is a public road which has been there since time in memorial. The court record indicates that trial is at an advanced stage and the proceedings have already been typed ready for this court to resume and conclude the hearing. The events leading to the consent order was that the Plaintiff dug up a section of the road in preparation of planting tea bushes. Following this action, the Defendant filed an application seeking injunctive orders against the Plaintiff.

The consent recorded by the parties and adopted by the court order is as follows:

**THAT status quo be maintained and it is understood that the road and bridge are to be left in the state they are now which is that portion of the road have been dug in preparation for planting and the bridge has been rendered unmotorable. No planting should take place and no further activity on the bridge until inter-partes hearing.**

It is this order that the Defendant claims the Plaintiff has breached. The Defendant avers that the Plaintiff has barricaded the road and planted trees thereon with the intention of denying them access. In support thereto, they annexed photographs of the said road. The Plaintiff refutes these allegations claiming that he has always complied with the status quo order. He too annexed photographs of the said road.

I have studied both sets of photographs and I do not see the barricade referred to by the Defendant. I do see vegetation, grass and trees that grown along the road. The consent order was entered into in 1999 whereas the application was made in 2010 a period of 11 years. The photos do not appear as if the grass and trees were planted weeks prior to filing the application, the vegetation does appear to have grown over a period of time. I therefore do not agree with the Defendant that the Plaintiff has engaged in planting trees or grass in an attempt to barricade the road.

Before I conclude, it is necessary to state that this matter has dragged partly because of the court process but more so because of the laxity of the Defendant to conclude the case. It is established that justice delayed is justice denied and whereas the courts are required to move with speed to avail justice, parties must also play their part in prosecuting their matters.

The decision of the court is thus as follows:

1. ***The Plaintiff's preliminary objection is hereby dismissed.***
2. ***The Defendant's application for contempt against the Plaintiff is also dismissed.***
3. ***The Defendant shall take steps to prosecute and close its case within 60 days from the date hereof.***
4. ***No order as to costs.***

Dated, Signed and delivered this **31<sup>st</sup>** day of **October, 2014**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr. Mwiti for the Plaintiff/Respondent

Mr Wageni for the Defendant/Applicant

Kamau: Court Clerk