

REPUBLIC OF KENYA

High Court of Kisii

Civil Case 220 of 2011

ROBERT OMARI NYANGOTOI.....PLAINTIFF

VERSUS

PETER MACHUKA MABEYA.....DEFENDANT

RULING

1. Before me is an application by the plaintiff brought by way of Notice of motion dated 25th April, 2012. The application is brought under **Section 3 and 3A** of the **Civil Procedure Act, Cap. 21 Laws of Kenya**. In the application, the plaintiff is seeking leave to institute contempt of court proceedings against the defendant for disobeying an order of the court made on 13th December, 2011. The application is supported by the affidavit of the plaintiff sworn on 25th April, 2012 in which he has deponed that on 13th December, 2011 this court issued an order of a temporary injunction restraining the defendant by himself or through his agents and/or servants from erecting permanent structures on the plaintiff's parcel of land known as Nyaribari Chache/B/B/Boburia/1824 pending the hearing and determination of this suit. The plaintiff has deponed further that the said order was duly served upon the defendant who despite of such service disobeyed the same on 8th April, 2012 by sending his employees to fix door frames and windows on a building on the suit property which is the subject of the said injunction. The plaintiff has not annexed a copy of the order that was served upon the defendant but has annexed to his affidavit in support of the application an affidavit of the court process server who is said to have served the said order and another affidavit of a person who is said to have witnessed the acts complained of.

2. In his submission, **Mr. G. Masese advocate** for the plaintiff reiterated the contents of the plaintiff's affidavit in support of the application and prayed for the orders sought to be granted. I have considered the plaintiff's application and the affidavit in support thereof. My view on the matter is that, it is not necessary to obtain leave of the court before instituting contempt of court proceedings arising from a breach of an order of injunction. Prior to the revocation of the old civil procedure rules and the enactment of the Civil Procedure Rules, 2010 which came into effect on 17th December, 2010, there were conflicting decisions from the High Court as to whether or not leave was required to institute contempt of court proceedings for breach of an injunction order that was then issued under order 39. This debate arose from the interpretation of the provisions of **Section 5** of the **Judicature Act, Cap. 8 Laws of Kenya** which provides that, the High Court and the Court of Appeal's power to punish for contempt is the same as the power for the time being possessed by the High court of justice in England. We therefore have to look at the procedure obtaining in England as and when we want to punish for contempt. In England, an application to punish for contempt is initiated by an application for leave. This is where our procedure of seeking leave before instituting contempt of court proceedings originated. Whereas some of the judges were of the view that the provisions of Section 5 of the Judicature Act, Cap. 8 Laws of Kenya applies to punishment of all forms of contempt, the other judges were of the view that the section does not apply to applications for committal for breach of an order of injunction issued under the civil procedure rules as this is specifically provided for under sections 63 (c) of the Civil Procedure Act, Cap. 21 Laws of Kenya. In my view, this debate was laid to rest by insertion of Order 40 Rules 3(3) in the Civil Procedure Rules, 2010 which provides expressly that any application to court arising from disobedience or breach of an order of injunction shall be made by way of notice of motion in the same suit. There was no similar provision in the old Civil Procedure Rules. We now have section 63(c) that confers jurisdiction upon the court to punish for disobedience of an order of injunction and order 40 rule 3(3) which provides for the procedure of moving the court. It follows therefore that, the law and procedure in England provided for under **Section 8** of the **Judicature Act, Cap. 8 Laws of Kenya** will apply to other forms of contempt other than contempt arising from a breach of an order of injunction the procedure for punishment of which is expressly provided for in **Order 40 Rule 3(3)** of the **Civil Procedure Rules, 2010**.

3. Due to the foregoing, the application before me has been made without due regard to the recent developments in the law. Most of the recent decisions of the High court are unanimous that leave is not necessary before instituting contempt of court proceedings for breach of an order of injunction. In this regard, I would refer to the ruling of my sister judge **Hon. Lady**

Justice P. Nyamweya in the case of **Bernard Ondieki Moseti & Another –vs- Ghengdu Guangling Kenya Ltd. & Another [2012] e KLR** that was delivered on 18th January, 2012 and her other ruling in the case of **Naftali Ruthi Kinyua –vs- Patrick Thuita Gachure & Another [2012] eKLR** that was delivered on 10th May, 2012 with which I am in full agreement. For the reasons, I have given, the plaintiff's application is not for granting. The same is dismissed. The costs shall be in the cause.

Dated, signed and delivered at Kisii this 8th day of February, 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:-

Mr. G. Masese for the plaintiff
N/A for the defendant
Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**