

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 220 OF 2011

ROBERT OMARI NYANGOTO.....APPLICANT

VERSUS

PETER MACHUKA MABEYA.....DEFENDANT

RULING

1. What is before me is the plaintiff's application by way of Notice of Motion dated 26th February, 2013 in which the plaintiff is seeking an order to commit the defendant to civil jail for disobeying this court's order dated 13th December, 2011. The plaintiff's application is supported by the affidavits of the plaintiff and one, Benard Nyachio Mogeni Ratemo both sworn on 26th February, 2013. In his affidavit, the plaintiff has deposed that on 13th December, 2011 this court issued an order of temporary injunction restraining the defendant by himself or through his agents and/or servants from continuing with the erection of permanent structures on the plaintiff's parcel of land known as LR. No. Nyaribari Chache/ B/ B/ Boburia/ 1824 (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The plaintiff has deposed further that the said order was extracted and served upon the defendant and that the defendant after such service proceeded in violation thereof to fix door frames and windows on the building that he had put up on the suit property. It is for this reason that the plaintiff is seeking the committal of the defendant to civil jail.
2. Benard Nyachio Mogeni Ratemo ("**Ratemo**") the deponent of the second affidavit in support of the plaintiff's application is the chairman of Kerera village community policing program. Kerera village is the area where the suit property is situated. Ratemo has deposed that the plaintiff herein had reported to him on 8th April, 2012 that the defendant was continuing with the construction of a house on the suit property even after being ordered by the court to stop doing so. Ratemo proceeded to the suit property where he found the defendant's workers fixing grilled windows and door frames. Ratemo has deposed further that the defendant's workers aforesaid continued with the construction works on the suit property until the said building was completed and occupied.
3. The law on contempt of court is now fairly settled. The onus is upon the applicant to prove the elements of contempt complained of. The proof must be above a balance of probability but not beyond reasonable doubt. The plaintiff had a duty to prove that; the court did issue an order of injunction restraining the defendant from continuing with the construction works on the the suit property, the said order was extracted and served upon the defendant, the order had a penal notice warning the defendant that if he disobeys the same he would be liable to be punished by the court and, that the defendant did disobey the said order after such service. The plaintiff has not annexed to his affidavit a copy of the court order which the defendant is accused of having disobeyed. I have however perused the court file and noted that on 13th December, 2011 the court issued an order restraining the defendant by himself or through his agents and/or servants from in any way continuing with the erection of permanent structures on the suit property until the plaintiff's application for injunction against the defendant was heard interpartes. I have however not come across any evidence that the said court order was served upon the defendant. In his affidavit in support of the application, the plaintiff has referred to in paragraph 4 thereof to an affidavit of service of the said order upon the defendant which affidavit of service was supposed to be annexure "**RON1**" to the said affidavit. There was however no such annexure to the plaintiff's affidavit. The plaintiff did not therefore place any evidence before the court to prove that the

defendant was indeed served with the court order that was made by the court on 13th December, 2011. Upon perusal of the court file, I noted that when the plaintiff filed an application for leave to institute these proceedings, he had annexed to his affidavit in support of that application an affidavit of service sworn by one Geoffrey Migosi on 27th October, 2011. That affidavit of service was marked as annexure “**RON1**” to the affidavit in support of the said application and it is the affidavit that the plaintiff had put in to prove service of the order made on 13th December, 2011 upon the defendant. The court did not consider the plaintiff’s application for leave on merit. The same was dismissed on the ground that such leave was not necessary. The court did not therefore interrogate the said affidavit of service that was tendered in proof of service of the said order upon the defendant. I have now looked at the said affidavit carefully. I have noted that nowhere in the said affidavit of service is indicated that the process server served any order upon the defendant. Furthermore, the purported service was effected on 27th October, 2011 while the order of the court which is said to have been disobeyed by the defendant was made on 13th December, 2011. The court order could not therefore have been served before it was made. It follows from the foregoing that if this is the same affidavit of service that the plaintiff has referred to in his affidavit sworn on 26th February, 2013 in support of the application herein, it has no probative value as far as the service of the order of the court made on 13th December, 2011 is concerned.

4. The defendant did not file an affidavit in reply to the application. The defendant filed a notice of pre-liminary objection in which he contended that he was not served with the court order which he is accused of having disobeyed. As I have stated above, the onus was upon the plaintiff to prove that the defendant disobeyed the court order that was made on 13th December, 2011. As I have already observed, there was an order made by the court restraining the defendant from continuing with construction on the suit property. It is not contested by the defendant that he continued with the construction works after the date of this order. What is contested is service of this order upon the defendant. The plaintiff has failed completely to prove service of the said order upon the defendant. There is no evidence as to when and how the order was served upon the defendant. In the absence of evidence that the defendant was served or that he was personally aware of the terms of the said order but chose to disobey the same, this court cannot find the defendant guilty of contempt. The plaintiff has failed to prove the elements of a charge of contempt of court. The plaintiff’s application dated 26th February, 2013 is therefore not for granting. The same is hereby dismissed. The costs shall be in the cause.

Dated, signed and delivered at Kisii this 27th day of September, 2013.

S. OKONG’O,

JUDGE.

In the presence of:-

Mr. G.S. Okoth for G.M.Masese for plaintiff

No appearance for defendant

Mobisa court clerk

S. OKONG’O,

JUDGE.

E&LCC.NO.220 OF 2011