



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 3399 OF 1991

MICHAEL KILILI.....PLAINTIFF

VERSUS

RUTH MBETI.....DEFENDANT

RULING

The notice of motion dated 2nd November, 2011, is taken out by **MICHAEL KILILI**, the decree holder in this matter. It is brought under the provisions of **Section 10 of the Judicature Act (Cap 8) of the Laws of Kenya, Section 3 and 3A of the CPA Order 39 (now 40) of the Civil Procedure Rules** and the **Supreme Court Rules of England**.

The applicant seeks for an order that the respondent (judgment debtor) **RUTH MBETI**, be cited for contempt of the orders of this court made on 15th July, 2004. The applicant also seeks for orders that a mandatory order of injunction directing the court bailiffs to remove the judgment debtor from **PLOT NO. 97 MATUU MARKET** do issue.

This application is supported by the grounds stated on the body thereto and the matters deposed to in the supporting affidavit of Michael Kilili that was sworn on 2nd November 2011.

Briefly summarized, it is the applicant's case that on 15th July, 2004, judgment was entered in his favour in the following terms:

- 1. That the defendant Ruth Mbeti be and is hereby restrained from interfering with the plaintiff Michael Kilili's suit Plot No. 97 Matuu Market.*
- 2. That the defendant do pay to the plaintiff nominal damage of KShs.10,000 and costs of this suit to be taxed and certified by the taxing officer of this court.*

According to the applicant, the respondent was served with this order as well as the penal notice dated 4th January, 2006, as per the affidavit of service by **Christopher Gathui** sworn on 12th March, 2007. Notwithstanding the service of the order, the judgment debtor/respondent has continued to trespass upon the applicant's plot in breach of the court order.

Thus, according to Mr Koseyo, learned counsel for the applicant, the respondent should be punished by way of committal to civil jail so that the court can protect its own dignity and authority.

This application was opposed; the respondent filed an application on 8th November, 2011, seeking to set aside the order granting the applicant leave to institute the notice of motion. This notice of motion together with the supporting affidavit that was sworn by Mr Ray Tollo, learned counsel for the

respondent, was deemed as the reply to this notice of motion. Moreover, an application seeking for leave to commit a contemnor to civil jail in disobedience of an order of injunction issued under **Order 40 of the Civil Procedure Rules** may not be necessary. There are other points of law raised in that replying affidavit namely; service of the court order and the penal notice which are relevant to this matter. The affidavit of service which is relied upon by the applicant to show the order and penal notice was served upon the respondent reads as follows:

“2. That on 22nd January, 2007, I received two copies of an application dated 27th November 2006 scheduled for hearing on the 12th March 2007 from the firm of Koome & Mesa Advocates with instructions to serve the same upon the judgment debtor herein RUTH MBETI a resident of Matuu Town.

3. That the following day on the 23rd January 2007, I proceeded to Matuu Town where I had previously visited in the company one Mr Mweu who is a son in law to the decree holder herein and found the judgment debtor at the premises subject of the dispute herein.

4. That I introduce myself and explained to her the purpose of my visit and thereafter served her with the application dated 27th November 2006 and requested her to acknowledge receipt thereof by appending her signature on the back of my copy.

5. That she acknowledged receipt but declined to sign but instead inquired on why we had to serve her with court papers when she has an advocate on record to which I responded that the application required to be served upon her personally but she was at liberty to contact her advocates and get appropriate advice.”

From the above averments, there is no evidence that the respondent was served as required by law and as set out under **Order 52 of the Supreme Court Rules of England**. Moreover, the penal notice that was allegedly served upon the respondent was drawn by an advocate who was not qualified to do so and there is an express holding by **Okwengu, J** (as she then was) that an Advocate by the name **Koome Mbogo** did not have a practicing certificate for 2006.

For reasons that there was no prove of service and the penal notice was issued by an unqualified person, unfortunately the notice of motion dated 2nd November, 2011, is incompetent. It is hereby dismissed.

For reasons that this is an application seeking to commit the respondent to civil jail for contempt, I am not inclined to grant the respondent’s costs.

Each party shall bear their own costs.

Ruling read and signed this 30th day of March, 2012.

MARTHA KOOME
JUDGE OF APPEAL

Note:

This application was heard and concluded on 9th December, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed a Judge of the Court of Appeal. I proceed to write and append my signature thereto in my new capacity.