



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 495 OF 2011

PAUL NJAU KIMUTUA PLAINTIFF

- Versus -

DICKSON MBUGUA NJAUDEFENDANT

RULING

(1) The Notice of Motion before me is dated 2nd March 2012 and filed on 6th March 2012. The main prayer sought by the plaintiff who is the applicant is that –

“the Defendant/Respondent be committed to Shimo La Tewa Prison for a term not exceeding six (6) months for disobeying the orders issued by the Court on 2nd December 2011.”

(2) The jurisdiction to deal with the disobedience or breach of an order of injunction is set out under Order 40 Rule 3 (1) which provides-

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

(3) I am aware that the question as to whether or not the power to punish for contempt under Order 40 can be exercised without recourse to the practice and procedure required by Section 5 of the Judicature Act may not be fully settled. However The Court of Appeal in **Nrb Civil Appeal No. 134 of 1994 Josef Schilling & 2 Oths –Vs- Standard Investments Ltd & Another** was of the view that-

“the rule does not require that leave of the court be first obtained before taking out such summons.”

I choose to go the way of this view.

(4) In an affidavit sworn on 2nd March 2012 the plaintiff depones that the Defendant has breached the

orders of injunction granted by this court on 24th November 2011 and extracted on 2nd December 2011. The order is expressed as follows-

“An order of injunction do issue restraining the Defendant either by himself, his agents, employees, and or any other person howsoever and whomsoever claiming through him from erecting, threatening to erect, developing, leasing, advertising for leasing, selling, trespassing and/or in any way whatsoever interfering with the Plaintiff’s ownership of Sub Division No. 815/1 Section No. VI Mainland North [hereinafter “the suit property”] pending the hearing and determination of this suit.”

It is said that the order was duly served upon the Defendant on 3rd December 2011 and the process server, one Alex Philip Nzuki swore an affidavit of service to that effect. That the Defendant received a copy of the order but declined to sign in acknowledgement thereof. The served order has the following Penal Notice:-

“If any person served with this Order disobeys and or assists in disobedience of the same, he shall be guilty of contempt of Court and such proceedings may be taken against him and upon conviction thereof will be liable to imprisonment for a period not exceeding six (6) months.”

(5) The Plaintiff states that the Defendant has removed beacons erected on the suit property and has set them ablaze. The Court was shown photographs of the removed and burnt beacons. It is also alleged that the Defendant has accumulated building material on the suitland with the intention of proceeding with construction and has blocked the plaintiff from accessing it.

(6) When the application first came before me on 7th March 2011, I declined to grant it and made an order that it be heard on 22nd March 2012 and service be effected on the Defendant. The Defendant needed to be given sufficient opportunity to answer to the allegations of contempt. The Defendant never attended court on 22nd March 2012 although he appears to have been duly served and an affidavit to that effect sworn by the same process server on 13th March 2012.

(7) The Defendant has not filed a response to the application which is now uncontested. The court order was in simple and unequivocal language. The order also contained a Penal Notice and so the Defendant was well aware of the nature of sanctions that would be visited upon him in the event of disobedience.

(8) On the basis of the evidence availed to Court, the Court is satisfied that the Defendant was duly served with the order of injunction but has breached, disregarded and disobeyed it. I hereby allow the application of 2nd March 2012 and order that the Defendant be detained in Shimo La Tewa Prison for a prison term of three (3) months. The plaintiff shall also have costs of the application.

Dated and delivered at Mombasa this 16th day of May, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Omwenga for Plaintiff Exparte

No appearance for the Defendant

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**