



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT 83 OF 2005

EVELYNE CHELANGAT CHEBOLE.....PLAINTIFF

VERSUS

HOSEA KIBET RUTO1st DEFENDANT

ANGELINE CHEPKOECH CHERWON.....2nd DEFENDANT

RULING

This is an application under the provisions of Order 39, Rules 2A (2 & 3) and 9 of the Civil Procedure Rules for, *inter-alia*, the following Orders:-

1. That Hosea Kibet Ruto, the 1st Defendant be arrested and detained in prison for a term not exceeding Six (6) months for disobeying lawful orders made by this Honourable Court on 8th September 2005.
2. That the property of Hosea Kibet Ruto, the 1st Defendant herein, be and is hereby attached.

This Court had granted ex-parte orders on 8th September 2005 against the Defendants in the following terms:-

1. That the application herein be and is hereby certified urgent to be heard during this summer vacation.
2. That there be temporary Orders of Injunction to restrain the Defendants by themselves or by their agents, servants, employees and/or any other person acting under them, from selling, transferring, charging, mortgaging, offering as security, leasing, letting, sub-dividing, evicting the Plaintiff from, dealing in and/or in any other manner interfering with all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 8/350 pending the hearing of this application inter parties and/or pending determination of this application.
3. That *inter-partes* hearing be on 19th September 2005.

It is the Plaintiff's application for Contempt of Court asking for the punishment of the First Defendant for disobedience of the said Court orders that:-

- That the Defendants were served.

- That the 1st Defendant upon service of the said orders upon him entered the suit land Eldoret Municipality/Block 8/350 and commenced demolition of the developments thereon in blatant disobedience to the Court Order.
- That the 1st Defendant was aided in the said demolitions by persons unknown to the Plaintiff.
- That the said demolitions were in complete violation and disrespectful of the Court's orders granted on 8th September 2005.
- That it is just and fair that those disobeying a Court order be punished accordingly.

The Application relied upon the Affidavit of Service of one Jackson B. Webaale a process server who deponed that on 16th September, 2005 accompanied by the Plaintiff he went to the suit premises where he met the 1st Defendant at around 9.08 a.m. He claimed that he effected service upon him of the Summons to enter Appearance, Plaint, Court Order dated 9th September 2005, Verifying Affidavit, Certificate of Urgency and Chamber Summons dated 20th August 2005 coming for hearing on 19th September 2005. That the 1st Defendant accepted service and retained the documents but declined to sign on the said copies of documents.

The 1st Defendant in opposition to the application filed a Replying Affidavit sworn on 12th October, 2005. He said that an old man went to his place on 16th September, 2005 at around 10.30 a.m. He later learnt that the old man was a process server. He said that the said process server threw some papers at him and left. Later in the day on his advocates advice he went and collected the papers where they had been thrown. He says that he stopped any works of demolitions on his land which was going on at the request of the Plaintiff herself.

When the matter was placed before me I found that the Court through Justice Dulu and later Justice Gacheche had given orders for the examination of both the process server and the 1st Respondent. Although the 1st Defendant had taken up and raised Preliminary Objection vide a notice dated 27th March, 2006 on jurisdictional grounds; the court directed that the examination of the parties takes place first after which the application and the preliminary objection was to be argued together.

As a result, I will deal with the jurisdictional issue which was that:-

“.....the Respondent should challenge the competence of the application dated 1st November, 2005 during its prosecution on the ground that the same was filed without leave of the Court contrary to the provisions of section 5 of the Judicature Act and Order 52 of the Supreme Court Rules.....”

In support of the said ground the 1st Defendant/Respondent's Counsel Mr. Kuloba relied on the decision of my brother Justice Sergon in ***AWADH v MARUMBU (2004) KLR 454*** in which it held as follows:-

“It should be noted that the substantive law governing proceedings in respect of contempt of court is under Section 5(1) of the Judicature Act. In other words, we have to turn to the practice and procedure in England in order to discover how the power to punish for contempt of court is exercised. The procedure is clearly stated under Order 52 of the Rules of the Supreme Court of England. An Applicant must seek leave by making an ex parte application which must be supported by a statement setting out the name and description of the applicant, description and address of the person sought to be committed and the grounds on which his committal is sought and accompanied by a Verifying Affidavit.

It is also a pre requisite that the Applicant must give notice to the Deputy Registrar of this Court of the intention to seek leave not later than the preceding.”

In the said case, the Applicant had actually filed a Motion after obtaining the requisite leave.

In the present case the application is not made under the Judicature Act Chapter 8 of Laws of Kenya. The application is made under Order 39, Rules 2A (2) and (3) which read as follows:-

“2 (A)

(1)

(2) In cases of disobedience, or in breach of any such terms, the Court granting an Injunction may order the properties of the person guilty of sole disobedience or breach 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) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.”

It is my view that the aforesaid provisions gives the Court issuing an Injunctive Order jurisdiction and power to punish a party who disobeys the Court order by either attachment of his property or imprisonment. From a careful reading of the provisions of the Order 39 of the Civil Rules, it would appear that the provisions relate to or apply to parties in “the suit” or perhaps their agents, servants and/or agents. The provisions particularly are intended to deal with breaches or disobedience by a Defendant in a suit.

Applications under Rules 1 and 2 of Order 39 shall be made by summons in Chambers as expressed in Rule 9.

Rule 2A was inserted as a result of an amendment through Legal Notice No. 36 of 2000. I do hold that while there was no corresponding amendment as in respect of Rule 9 as to procedure for filing an application under Rule 2A (1) and (2), this omission can be cured by the Court accepting that applications under Rule 2A (1) or (2) may also be by way of summons in chambers.

I do hold that over and above, this option to institute contempt proceedings under the Judicature Act which is more general and covers all types of contempts including those in the face of court during proceedings but also outside court by even persons who are not parties to any particular suit e.g media, members of parliament, public servants, private individuals e.t.c, the right given to a party to make an application under Rule 2A (2) and (3) above, of a special nature and jurisdiction.

Section 5 (1) of the Judicature Act provides as follows:-

“5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as it for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of Courts.”

As stated earlier in any event, the Applicant did not invoke the provisions of the Judicature Act for this court to consider whether leave was or was not a pre-requisite or required. The present application was made under Order 39 Rule 2A (2) or (3) and this Court has the Jurisdiction and power to consider the same to ensure that the Injunction Order granted by the Court is obeyed and if not, the violator is punished. The procedure by way of summons, in Chambers on the basis of the interpretation, I have given hereinabove, namely that the Rules Committee must have omitted to make an amendment to Rule 9 to include the new Rule 2A.

In the light of the foregoing, I do hereby dismiss the Preliminary Objection. I shall now consider the application on its merits. The questions I have to ask myself and then determine are:-

1. **Was the 1st Defendant served with the Court Order dated 9th September 2005?**
2. **If so, when was he served?**
3. **If he was served did he disobey the Court Order in any manner?**
4. **If so, should he be imprisoned for 6 months or his property attached?**
5. **Who shall pay the costs of the application?**

I will consider the above questions.

The Process Server in his affidavit of service depones that he served the 1st Defendant on 16th September 2005 on the suit property at 9.30 am. He says he was accompanied by the Plaintiff. He said that he saw no demolitions going on at the property. Any buildings on the land were incomplete. He saw workers on the land but saw nothing else going on.

The Plaintiff testified that the Court order was served on 16th September, 2005. She stated that service of the process was in the morning. That After service, the 1st Defendant started removing the fence and demolishing her structures. She said that the buildings were intact on 15th September, 2005 and the morning of 16th September, 2005.

The 1st Defendant on his part testified that he saw the process server on 15th September 2005 but did not know that he was a process server as he did not identified himself. He says he was developing his house on the land. He added that on 16th September 2005 he met the process server. By this time, the 1st Defendant had come to learn who Mr. Webaale the process server was. He stated that he did not receive the papers from the process server. That the process server got annoyed and threw the papers at him and left them at the gate.

The First Defendant testified that he got worried and went to see his advocates who advised him to retrieve the documents. He claimed that the Plaintiff herself removed the fences and flowers. That she had started removing the greenhouse and plants in August, 2005. That they had agreed she would move out.

I have considered the application, the supporting affidavit, the replying affidavit, affidavit of service, the testimonies of the process server, the Plaintiff and the First Defendant. I have also considered the submissions by both Counsels. It is clear from the evidence before the court that the applicant was served or his attention drawn to the court papers. It is also clear that he was served on 16th September 2005. However, I am afraid that the quality of service may not discharge the standard of service & proof thereof required to criminally punish the accused.

Court orders are sacrosanct and must be obeyed. Disobedience of court order is a challenge to its authority. This type of disobedience is punished at once. Although court orders said to have been disobeyed arise in civil proceedings, its disobedience is taken gravely serious as to bring it within the realm of criminal law for purposes of punishment. The evidence in respect of the actions of the 1st Defendant from the date when he was served (16th September 2005) is not clear enough to conclude that he is in contempt of court. I, therefore hold that there is no sufficient evidence showing that he disobeyed the Court Order in any manner and therefore he can neither be jailed for six months nor his properties attached for contempt. There must be cogent and clear and incontrovertible evidence for one to be punished for contempt of a court order.

The result is that the application for contempt must be and is hereby dismissed. Costs shall be in the cause.

Dated AND signed at Nairobi on this 21ST Day of
AUGUST 2012.

M. K. Ibrahim

Judge

DATED AND Delivered at Eldoret on this 19TH day of SEPTEMBER 2012.

F. AZANGALALA

Judge

In the presence of :Ms Khayo for the plaintiff