



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 240 OF 2009

DANIEL KARURU MWAURA.....	1 ST
PLAINTIFF	
ROSE LILIAN NYAMBURA.....	2 ND
PLAINTIFF	
PERRY WANJIKU MBUGUA.....	3 RD
PLAINTIFF	
PATRICK MUCHIRU GITHUKA.....	4 TH
PLAINTIFF	
EDWIN NJOROGE KIHORO.....	5 TH
PLAINTIFF	
WANGARI GITHIL.....	6 TH
PLAINTIFF	
MONICA WANJIRU MBARU.....	7 TH
PLAINTIFF	
WAYFARERS LIMITED.....	8 TH
PLAINTIFF	
FESTUS NJUKI.....	9 TH
PLAINTIFF	
GRACE WAMBUI NDUNG’U.....	10 TH
PLAINTIFF	
RACHEAL WANJIRU MACHARIA.....	11 TH
PLAINTIFF	
TERESIA WANGUMO MWAURA.....	12 TH
PLAINTIFF	
STEPHEN OYUGI OKERO.....	13 TH
PLAINTIFF	
V E R S U S	
EDWARD KANJABI.....	1 ST
DEFENDANT	
SAMUEL B. MBUGUA T/A MEMBLEY HOUSING SCHEME.....	2 ND
DEFENDANT	

RULING

On 15th October 2010 the Plaintiffs filed this chamber application under Order 39 rules 2(3), 3 and 9 of the Civil Procedure Rules and sections 3A and 63(c) of the Civil Procedure Act seeking to have the Defendants jailed for a term not exceeding 6 months, or to have their properties attached forthwith, for disobeying the orders of the court that were issued on 25th May 2009.

The history of the case is as follows. On 25th May 2009 the Plaintiffs filed this suit against the Defendants claiming that on diverse dates between 11th December 2002 and 15th April 2003 they had bought from, and allocated by, the Defendants 20 plots from the Defendants' parcel No. 10901/46 situate behind Kenyatta University, but that the Defendants had failed to demarcate and transfer the said plots. The suit was brought for specific performance to compel the Defendants to complete the transactions. The alternative prayer was for the refund of the purchase price with interest and general damages. With the suit was filed an urgent chamber application under Order 39 rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for a temporary injunction to restrain the Defendants from repossessing, re-demarcating, demolishing the fence and/or any structure erected by the Plaintiffs, selling, offering for sale, transferring, charging, mortgaging and/or dealing with the 20 plots. When the Plaintiffs went before Justice Nambuye she certified the application as urgent and asked that it be served for *inter parte* hearing on 8th June 2009 and that, in the meantime, *status quo* be maintained. This is the order that the Defendants allegedly disobeyed by destroying the fence and structure erected in the suit premises.

In the affidavit by the 1st Plaintiff to support the present application, it was alleged that the Defendants were served with the order on 29th May 2009 at 9.30 a.m. following which they filed a replying affidavit on 29th June 2009. There is an affidavit of service sworn by Process Server Peter Keli to say that on 26th May 2009 he served the 1st Defendant on 3rd Floor, North Wing, of Vedic House along Mama Ngina Street who acknowledged receipt by stamping and signing the back of the order. On 27th June 2009 he went to the same offices and served the 2nd Defendant who accepted service but declined to sign the order. "DMK2 A and B" refer. The replying affidavit to the present application was sworn by the 1st Defendant who says that the order in question, that is "DMK1", was not one of the documents that were served on him. He however did not deny the stamp at the back of the returned copy of order or the signature made thereon and which the Process Server attributes to him. The 2nd Defendant did not deny the said service on him as he did not swear any replying affidavit. In the Court of Appeal decision of **Mutitika –Vs- Baharini Farm Ltd [1985] KLR 227** it was held that the standard of proof in contempt proceedings is higher than proof on balance of probabilities, and almost, but not exactly, beyond reasonable doubt. Mr. Githuka for the 1st Defendant made reference to this decision in his written submissions. I accept that to be the law on basis of which I find that the Plaintiffs have demonstrated that the Defendants were each served with the order.

The order in question sought that *status quo* be maintained. In **Jacob Zedekiah Ochino And Another – Vs- George Aura Okombo And Others, Civil Appeal No. 36 of 1989 at Nairobi**, the Court of Appeal held that the court will only punish for contempt of injunction if satisfied that the terms of the injunction were clear and unambiguous. Mr. Githuka's submission was that the order was ambiguous, given the ambiguity of the alleged acts of disobedience in the application and fact that the plaint had not pleaded that the Plaintiffs have been given possession of the 20 plots.

It is clear that the temporary injunction sought by the Plaintiffs had not been granted. The order granted was for the maintenance of the *status quo*. That must have been the *status quo* as pleaded by the Plaintiffs

and deponed to in the supporting affidavit. But how would the Defendants who are served with the order know what *status quo* entails? It is true that they were served with plaint, application, supporting affidavit and the order. They were therefore put in a situation where only the order was not going to tell them what the court had directed. They were being called upon to read the plaint and the entire application to be able to estimate what the *status quo* would be. They were not being put in a clear and unambiguous situation. If the allegation against them is that they disobeyed the order of 25th May 2009, one has to look at the order, and the order alone, to be clear what it required of them. That was not the situation here.

Paragraph 12 of the plaint shows that when there was still dispute between the parties as to the sizes of the plots, the Plaintiffs unilaterally went into possession and fenced. In paragraph 13, the Defendants threatened to refund the purchase price and retake the plots from the Plaintiffs. This is what forced the Plaintiffs to come to court. It was not alleged in the plaint that the Plaintiffs had erected any structures in the plots. In paragraph 16 of the supporting affidavit of the 1st Plaintiff he alleged that they had erected a fence to surround “the suit plots.” In the affidavit he swore to support the present application he stated:-

“4. *THAT, at the time of the said order was issued the status quo was as follows:-*

(a) That I and my co-applicants were in possession of the suit plots.

(b) The suit premises had been fenced by I and my co-applicants.

(c) There was a structure erected in the suit premises by I and my co-applicants.”

The structure had not been mentioned at the time the order was obtained.

But the more fundamental issue is that the same affidavit in paragraphs 8 and 9 shows that the Plaintiffs did not witness the Defendants causing the alleged destruction of fence and structure. They went to the scene following a call and found the destruction already undertaken. They were then informed by a watchman one Peter Mutemi Maanzi that about 15 people led by the Defendants were the ones who had destroyed the property. The watchman did not swear an affidavit to say he saw the group causing the destruction. I find that, even assuming the order that was served was clear and unambiguous, the Plaintiffs have not established that it was the Defendants who damaged or destroyed the fence and structure.

In conclusion, I dismiss with costs the application dated 15th October 2010 by the Plaintiffs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E