



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CIVIL CASE NO. 16 OF 2009**

**ELIAB MUSHA IMBIAKHA..... PLAINTIFF**

**V E R S U S**

**RODGERS ORATA KWEYU.....DEFENDANT**

**R U L I N G**

1. I note from the record that on 27.4.2010 I granted the following orders in the interim;

1. ***“That service of this application be and is hereby certified as urgent.***
2. ***That pending the hearing of this application inter-parties there be an order restraining and/or inhibiting any registration, dealings with title number BUTSOTSO/SHIKOTI/5147 and 1814.***
3. ***That pending the hearing of this application inter-parties, the Defendant/Respondent his agents, relatives, servants and/or employees or any one acting under his direction be and are hereby restrained by a temporary order of injunction from interfering, uprooting or in any other way dealing with the Applicants crops on land parcel No. BUTSOTSO/SHIKOTI/1814 as existed before 23rd February, 2010 and the status quo pertaining before 23rd February, 2010 be maintained.***
4. ***That there be inter-parties hearing on 22nd July, 2010.”***

2. Before the Chamber Summons could be heard and determined, the Applicant filed a Notice of Motion dated 16.6.2010 and premised on the provisions of section 5 of the Judicature Act seeking orders as follows;

1. ***“That this application be certified as urgent and be heard exparte in the 1<sup>st</sup> instance.***

2. *That leave be granted to the Applicant to cite the Respondent for contempt of court for disobeying court orders.*
3. *That upon prayer 2 being granted the Respondent RODGERS ORATA KWEYU be cited for contempt of court and be imprisoned for a term not exceeding six (6) months or such period that the Honourable Court may deem expedient and that his Respondent's property be attached and disposed off as this Honourable court may so direct.*
4. *That this Honourable court be pleased to order that the Respondent RODGERS ORATA KWEYU shall be heard in respect of the proceedings herein until he purges his contempt.*
5. *That the Respondent be condemned to pay the costs of this application*
6. *That the costs of this application be provided for."*

3. The grounds in support of the Motion are that;

1. *"That the Respondent has disobeyed court orders made on 27.04.2010 despite having been served properly with the said orders together with the penal notice.*
2. *That the Respondent's action amounts to contempt of court orders.*
3. *That the Respondent insists on disobeying the said court order.*
4. *That the authority, dignity and integrity of this Honourable court will be watered down if the respondent is not cited for contempt and punished.*
5. *That besides the Respondent being in contempt has been threatening the Applicant herein whose life is at risk in view of the Respondent's action.*
6. *That it is just and fair that the authority and dignity of this court be preserved."*

4. From the Supporting Affidavit sworn on 1.6.2010, the complaint regarding the alleged disobedience is contained at paragraphs 5 and 6 of the Supporting Affidavit where he depones as follows;

1. ".....
2. ....
3. ....
4. ....

5. ***That it is within my knowledge that in flagrant violation of the said court order, the Respondent has continued with his illegal activities on my parcel of land by uprooting my crops, digging terraces and trenches, constructing structures, uprooting valuable stones, making concrete which actions are continuing unabated. Annexed hereto are copies of photographs showing the Respondent and his agents at work marked 'EMI 2(a) & (b).***

6. ***That to the best of my knowledge, my effort to have the Respondent stop the actions referred to above has been frustrated by his arrogance and has been threatening to harm me in the event I try to stop him over this action and my life therefore is in danger. Annexed hereto is a letter to his Advocate marked 'EMI 3'.***

5. In response the Respondent in a Replying Affidavit sworn on 5.11.2010 depones that he resides and works in Mombasa and that on the date the alleged service of the order was made, he was in Mombasa. That therefore the purported service on him was a lie and that he has “*not stepped on the Applicant’s land*” and neither has he “*uprooted his crops or trees or done anything wrong thereon, ever since [the] suit was instituted.*”

6. That what is in dispute between the parties is a road of access which had been fixed by the Land Registrar and District Surveyor and so there ought to be no dispute over the matter.

7. I have considered the matter and with respect to the Applicant, the Motion does not meet the threshold for grant of the orders sought for the following reasons;

8. Firstly, it is alleged that the Applicant was served with the order which he is alleged to have disobeyed. It is a cardinal principle of law that before one is punished for disobeying a court order, he must be personally served with the order and or the very least, it must be shown that he was otherwise aware of the order – see Awadh vs Manimbu (No.2) [2004]I KLR 458. In the instant case, I have seen no Affidavit of Service properly filed on record, indicative of such service. What I have seen however is an annexure, “*EMI (6)*”, to the Applicant’s Supporting Affidavit purporting to be an Affidavit of Service, by one Athanas Arthur Musambayi. An Affidavit of Service is returnable to court indicating service and not to a party.

9. In any event, at paragraph 4 of that purported Affidavit, it is deponed as follows;

***“4. That I have been informed by my Advocates on record which information I verily believes to be true that the Respondent herein together with his Advocates on record were duly served with the Honourable court’s order. Annexed hereto and marked 'EMI1 (a) & (b) is a copy of the said Order, Penal Notice and Affidavit of Service.”***

10. I have looked at the alleged order and what I have seen is a photocopy which is in no way the court order that was being served and I am not certain where the document emanated from.

11. Without proper service of the order, I am not certain that there is anything on which the contempt proceedings can stand on.

12. But suppose in fact there was service and the Respondent was not in Mombasa as he alleged, a matter not responded to by the Applicant? In that case, I am not satisfied that there was any fact laid before me to enable me make a finding that there was any action by the Respondent which can properly be said to be in contradiction of the order. When did he for example uproot the Applicant's crops and what crops were there? How did he otherwise interfere with the Applicant's land and how did he deal with that land in a way that can be said to be injurious to the Applicant? I have reproduced the relevant paragraphs of his Supporting Affidavit and I am not satisfied that they are detailed enough to show contempt of court.

13. Contempt of court proceedings can lead to the loss of liberty by the alleged contemnor. Proof thereof must be beyond speculation and conjecture, and in fact, has been held to be beyond reasonable doubt. The present Application falls far short of that threshold.

14. In the end, I see no merit in the Application dated 16.6.2010 and I will dismiss it with costs to the Respondent.

15. Orders accordingly.

*Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of April, 2011*

**ISAAC LENAOLA**

**J U D G E**