

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO 146 OF 2010

ROHAMO MOHAMED IBRAHIM 1ST PLAINTIFF
MUMINA OSMAN LOITOS 2ND PLAINTIFF
HASSAN ABUBAKAR BAJWED 3RD PLAINTIFF
VERSUS
IBRAHIM SULEIMAN MAALIMO.....DEFENDANT

R U L I N G

The Plaintiffs are the respective registered leasehold proprietors of plots GARISSA MUNICIPALITY/BLOCK III/465, GARISSA MUNICIPALITY/BLOCK III/466 and GARISSA MUNICIPALITY/BLOCK III/467. They each have a Certificate of Lease issued under the Registered Land Act (Cap.300). When they jointly filed this suit on 17th September 2010 their complaint was that the Defendant had wrongfully entered into the plots, taken possession of the same and thereon erected temporary structures which he was threatening to rent out to third parties. The suit was filed for injunction, general damages for the trespass and costs. Along with the suit was filed a chamber application under Order 39 rules 1, 2 and 2A of the Civil Procedure Rules and sections 3A and 63(c) of the Civil Procedure Act for a temporary injunction to restrain the Defendant by himself, his servants, employees, agents or otherwise howsoever from remaining on or continuing in occupation of, entering, trespassing on, alienating, renting out or in any other way interfering with the Plaintiffs possession and use of the properties pending the application and suit.

On 20th September 2010 the application came *ex-parte* and under certificate of urgency before Justice W. Karanja who allowed the interim prayer. On 29th September 2010 the application came for *interparte* hearing. The parties were represented and by consent adjourned the matter to 23rd November 2010. They agreed to extend the interim orders until then.

On 19th October 2010 the Plaintiffs filed the present motion under Order 39 rule 2A seeking that the Defendant be committed to civil jail for a term of 6 months or for such other period that the court may determine for being in contempt of the orders issued on 20th September 2010 and 29th September 2010. It was alleged that the orders had been extracted and served personally on the Defendant who had defied them by telling the process server that the orders amounted to nothing and by insisting he would remain in occupation and continue to rent out the structures on the properties whatever happened. He had allegedly remained on the properties and continued to rent the structures thereon to third parties.

It is material to point out that the Defendant had on 15th October 2010 filed a defence to the suit and a replying affidavit to the application by the Plaintiffs for injunction. His case was that he had on 23rd April 2010 applied to the Garissa Municipal Council to construct food/cosmetics kiosks along Kismayu road opposite Jamaa building which the council had allowed him. The application is annexure B and the minutes of the Town Planning Committee allowing him are annexure C. The occupancy was allowed to be purely on temporary basis. The Defendant had gone ahead and constructed modern kiosks which he had rented to 33 tenants. He stated that he had not entered the Plaintiffs properties but was operating on a public road reserve on which he had constructed the kiosks. He further stated that he had constructed, completed and rented out the kiosks to the third parties by the time the injunction orders were served on him. He opposed the application and wondered why the tenants had not been made parties to the suit and application.

The Defendant admits that he was personally served with the injunctive orders. There is an affidavit of service by a process server to confirm the fact of service. It is not alleged that the injunctive orders were unclear or ambiguous in their terms. The Plaintiffs are saying that the Defendant has entered onto their

registered proprieties on which he has erected the kiosks which he has leased to tenants. The Defendant states that he was allocated on temporary basis an area on a road reserve on which he has erected the kiosks. The Plaintiffs are saying the area claimed to be a road reserve on which the kiosks have been erected is actually on their registered properties. The court will determine, following hearing, the respective rights of the parties in relation to the area occupied by the kiosks. In the meantime, however, the injunction order restrained the Defendant by himself, his servants, employees or agents from remaining on, continuing in occupation of, entering, trespassing, alienating, letting out or in any other way interfering with the plots pending the hearing of the application *interpartes*. Now that the Defendant was in occupation and had allowed tenants on the premises, the order asked him not to remain on the properties or to allow his tenants to continue in occupation. His advocate did on 29th September 2010 consent to the order to remain in place until the application was heard *interpartes*. The effect of the order may have been drastic and amounting to a mandatory injunction, but the Defendant had the unqualified and uncompromising obligation to obey the injunction order until it was discharged or varied. This principle was indicated in the case of **HADKINSON –V- HADKINSON [1952] 2 ALL ER 567** and has been accepted by the courts in Kenya.

Mr. Onono for the Defendant thought that because the kiosks had been constructed, completed and rented out by the time the injunction was issued then the order was in vain. He further submitted that because there is a dispute as to the location of the properties vis a vis the place where the kiosks are, then there was no contempt committed. The answer is that the injunction was issued on the basis that the kiosks had been erected on the Plaintiffs properties. That is what the plaint and the injunction application indicated. The order was wide enough when it asked that the Defendant and the tenants should not remain or continue to be in occupation. I am aware of the standard of proof in contempt proceedings as was indicated in the case of **MUTITIKA –V- BAHARINI FARM LTD [1985] KLR 227**.

In short, I find that the Defendant was in contempt of the orders of 20th September 2010 and 29th September 2010. He is hereby directed to appear before this court on 26th September 2011 to show cause why he should not be punished as is required by the law. He will pay the costs of this application.

DATED, SIGNED AND DELIVERED AT EMBU THIS 19TH DAY OF SEPT. 2011.

**A.O. MUCHELULE
J U D G E**