



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Suit 31 of 2009

GORDON WASWA MUNJUMA.....1ST PLAINTIFF

JOHN SIMIYU MUNJUMA.....2ND PLAINTIFF

~VRS~

WILBERFORCE MAINA MUTENDE.....1ST DEFENDANT

EMMANUEL OTIANGALA t/a

KURONYA AUCTIONEERS.....2ND DEFENDANT

RULING

On 28/4/ 2009 the Plaintiffs filed this suit claiming to be the sons of the deceased Munjuma Njiule Maina whom they stated to be the registered proprietor of plot no.Bungoma Township/226 situated in Bungoma town. It comprised four shops on the front side and a storey building with shops on the rear side. The Plaintiffs claimed to be the occupants of the four shops at the front part. The shops were said to have their tenants. It was alleged that on or about 20/4/2009 the Defendants had descended on the suit premises and demolished the shops with all the goods therein and in so doing brought the business to total paralysis. The actions, it was alleged, were without any lawful authority. The suit was brought for a permanent injunction and damages.

With the suit was brought a chamber application under Order 39 rules 1,2 and 3 of the Civil Procedure Rules and sections 3 and 63 of the Civil Procedure Act. The application went before Justice Ibrahim who, on ex-parte basis, granted prayers (a) and (b). Prayer (b) had sought a temporary injunction to restrain the Defendants from further demolishing or re-entering the suit premises by unlawful means or constructing pending the hearing and determination of the application inter-partes.

On 7/5/2009 the Plaintiffs filed the present application by way of chamber application under Order 39 rule 2A (2) of the Civil Procedure Rules and sections 3A and 63 of the Civil Procedure Act seeking the arrest and imprisonment of the 1st Defendant for deliberately disobeying the order of injunction. Another prayer was that the Deputy Registrar be directed to visit the scene and confirm the continuing demolitions and constructions that were going on. 1st Plaintiff swore a supporting affidavit to say that the orders had been extracted and served personally on 1st Defendant on 30/4/2009 by private process server Elias Wesonga. It was alleged that the 1st Defendant had accepted service but had refused to sign on the document saying that the Plaintiffs ought to have sued his brother Maina Munjuma. It was alleged that

upon the service of the said orders the Defendants had:

“resumed fresh demolitions and sealed the entire premises for on-going construction work.”

It was alleged that the entire building had been brought down and fresh constructions had commenced.

The 1st Defendant swore a replying affidavit to deny these allegations of contempt. He denied he had been served the orders as alleged, or at all. He stated that on 30/4/2009, when he was allegedly served by Elias Wesonga, he was in Kampala in Uganda. He produced a copy of Temporary Permit (“WMM2”) and Mukwano Guest House Limited accommodation receipt (“WMM3”) to show that he was in Kampala at the time.

It does appear that there is a background to this dispute which the Plaintiffs withheld from the court when they filed the suit and the application for injunction. This background is from the proceedings in Bungoma CM CC no.129/2009, Bungoma HCCC No.28/2009, Bungoma HC Misc. Appl. No.89/2009 and Bungoma PM SUCC Cause No.54/92. These cases were disclosed by the affidavits of the 1st Defendant. The proceedings in these cases show that the Plaintiffs are the brothers of one Sylvester Maina Munjuma. The suit property was among the properties of their father Munjuma Njiule Maina. Upon his death, succession proceedings were commenced which culminated in the property being inherited by Sylvester who had petitioned for letters. The Plaintiffs unsuccessfully sought the revocation of the grant that had been confirmed to Sylvester. Sylvester became the registered proprietor of the suit property. In 1997 he used the title to secure a loan of Ksh.1.2 million from National Bank of Kenya Limited which he was unable to service. The Bank sought to sell the property in exercise of its statutory power of sale. The 2nd Defendant, an auctioneer, was the one authorized to sell. The property was ultimately sold by private treaty to the 1st Defendant who became its registered owner on 17/11/2008.

When the Plaintiffs came to court in this suit and application they pleaded and swore that the suit property was in the name of their deceased father. That, of course, was not true as the property was in the name of the 1st Defendant and this was known to them. It is with this background that the court has to decide whether or not the Plaintiffs can be believed when they swear that the 1st Defendant was personally served as alleged by the process server. This is because the 1st Defendant says that he was in Kampala at the time of the alleged service and has produced uncontroverted documentary evidence in this regard. It is of critical importance in contempt applications that the persons sought to be condemned should be shown to have been personally served. It was held in **Mutitika v Baharini Farm Ltd [1985] KLR 227** that the standard of proof in contempt proceedings is higher than proof on balance of probabilities, and almost, but not exactly, beyond reasonable doubt.

When a witness has deliberately not told the truth on a material aspect of his case, he cannot be trusted to be telling the truth on another aspect of the same case. This is why, on the material before the court, I am unable to find that it has been proved that the extracted order was personally served on the 1st Defendant. This finding is sufficient to dispose of the application.

On the allegation of the disobedience of the court order, the Defendants each swore an affidavit to deny the same. The 2nd Defendant stated that he had obtained a distress order on instructions of the 1st Defendant after the tenants in the premises had failed to make payment to him. When the 2nd Defendant went to the premises, he found that the tenants had vacated but after they had removed their steel doors and carried away all their goods. The 1st Defendant swore that he was the owner of the property and entitled to develop it. The Defendants denied destroying or demolishing the property. The photos that the Plaintiffs exhibited indicate that they were men on top of the building. It is not clear whether they demolishing or re-building the property. The Deputy Registrar visited the site and found the property was being developed. Such developments can only be by the 1st Defendant who is the registered proprietor. If it has not been demonstrated that he was served with the order of injunction, he was, as the owner, entitled to use and develop the property.

In conclusion, I find that the application is not merited and is hereby dismissed with costs.

Dated and delivered at Bungoma this 7th day of November, 2011 in the presence of Mr. Makokha for the Plaintiff and Mr. Onchiri for the Defendants and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE