



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)
Civil Case 163 of 2007
PETER GICHORA MWAURAPLAINTIFF

VERSUS
JOSEPH WERU NDUNGO.....1ST DEFENDANT
HOUSING FINANCE COMPANY OF KENYA LIMITED2ND DEFENDANT

RULING

1. An order was made by Lesiit J, on 27th November 2008 to the effect that parties to:-

- “1. Maintain the status quo which is that the 1st Respondent should not access the suit premises until the application is heard and determined or further orders of the court.
2. That application dated 26th November, 2008
Be heard on 1st December, 2008”.

The Plaintiff has filed a Notice of Motion under the provisions of the Judicature Act and Order XXXIX of Civil Procedure Rules seeking for orders that the 1st Defendant Joseph Weru Ndungu be committed to civil jail for a period not exceeding six (6) months or such other punitive measures the court may deem fair to meet the ends of justice.

2. This application is based on the grounds that on 27th November 2008, an order was made against the 1st Defendant stopping him from accessing suit premises namely LR NO. 14225/122 KAHAWA WEST NAIROBI. In contempt of that order, the 1st Defendant forcefully took possession of the premises and refused the Plaintiff access thereto. It is alleged that the Plaintiff with his agents descended on the suit property on 21st November 2008 and brought down structures in the premises including a school and also removed part of the roof of the main house, and purported to evict the Plaintiff. The Plaintiff contends that this was in contravention of the court order, ordering the 1st Defendant not to access the suit premises. The Plaintiff further contends that the application was served upon the 1st Defendant together with a Penal Notice on 7th January 2009, as per the affidavit of service by Peter Wandeto Njogu sworn on 8th January 2009.

3. This application was opposed by the 1st Defendant. He relied on his replying affidavit sworn on 7th December 2009. The Respondent denies having disobeyed the court order which was made on 27th November 2008. The Applicant is complaining of acts which were committed one year and three months ago. The Order was not served upon the 1st Defendant until 7th of January 2009, which is eleven months after it was issued. The Defendant has denied even having been served with a court order and a penal notice. To demonstrate the Plaintiff has not been serious with this matter, he has constantly applied for adjournments, whenever the suit came up for hearing. Moreover the Plaintiff has a duty to prove to this Court that the Order, together with the Penal Notice was served upon the 1st Defendant.

4. The above is the summary of the rival submissions which I have put into consideration. This being an application for contempt orders, it follows that there are penal consequences for disobedience of a court order, thus a higher standard of prove of service of the order and the penal notice upon the contemnor is required. In this case the process server served the order on 7th January 2009. The acts

complained about were committed on 21st November 2008. The court order was made on the 27th November 2008. The Plaintiff has not been able to clearly demonstrate to this court when the acts that contravened the court order took place.

5. It would appear the acts complained about allegedly took place on 21st November while the order was made on 27th November 2008. There are no averments on the application or in the supporting affidavit to show that since the order was made, the 1st Defendant has committed any acts in contravention of court order. For those reasons, the application for contempt is disallowed and the costs of this application shall be in the cause.

6. This matter has taken many twists and turns in this court as the court record shows it has come up for hearing on numerous occasions but the hearing has never taken off. In the interest of justice the main suit should be heard and determined so that the party's differences can be resolved one way or the other. In exercise of the powers conferred in this court under the provisions of Section 1A, of the Civil Procedure Act. I am inclined to give a hearing date which is convenient to the parties for hearing of the matter.

RULING READ AND SIGNED ON 23RD APRIL 2010 AT NAIROBI.

M. K. KOOME
JUDGE