



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Commercial Civil Case 57 of 2006**

**1 AKBER KHAN SARDAR KHAN MOHAMED KHAN**  
**2. AMIR KHAN SARDAR KHAN MOHAMED**  
**3. AMIR KHAN SARDAR**  
**(as personal representative of Suleiman Sardar Khan).....PLAINTIFFS**

**VERSUS**

**1. MBARUK KHAMIS MOHAMED**  
**2. ZIREDI MBARUK MOHAMED (as trustee of the Wakf of Sheikh Mbarak Bin Rashid Salim El-Mazrui)**  
**3. COMMISSIONER OF LANDS.....DEFENDANTS**

**RULING**

On 29<sup>th</sup> July, 2005, the applicants Akber Khan Sardar Khan Mohamed Khan, Amir Khan Sardar Khan Mohamed Khan and Amir Khan Sardar Khan obtained a temporary injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, among things, restraining them from proceeding with any development or dealing in any manner whatsoever with the suit land. The applicants also obtained a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendants restraining them from evicting and or removing the plaintiffs from or in any manner whatsoever from interfering with the plaintiffs' quiet possession of the suit land pending the final determination of this suit and or further orders of the court.

The matter was placed before Njagi J on 3<sup>rd</sup> July, 2008, who ordered that the status quo be maintained till the next hearing date. The hearing date was to be fixed within 60 days. As it came to pass, a hearing date was not taken within the 60 days appointed by Njagi J on 3<sup>rd</sup> July, 2008.

The record shows that on 5<sup>th</sup> November, 2008, the applicants lodged an application seeking mainly an order of mandatory injunction directed at the defendants requiring of them to forthwith vacate the suit land and render vacant possession to the plaintiffs pending the hearing and determination of the application dated 18<sup>th</sup> July 2005. The application dated 5<sup>th</sup> November 2008 as compromised in a consent order recorded on 20<sup>th</sup> November 2008 as follows:-

**“By consent the parties to maintain the status quo ante as at 3<sup>rd</sup> July 2008.**

**By further consent the plaintiffs do have free access to the portion in their possession i.e. (CR 7339) and occupation.**

**By further consent the Preliminary Objection filed by the defendants dated 14<sup>th</sup> March 2007 be marked as withdrawn.**

**By further consent the applications dated 18<sup>th</sup> July 2005 and 5<sup>th</sup> November 2008 be marked as settled.**

**Parties do settle all preliminary matters within 90 days from today.**

**Mention on 24<sup>th</sup> February 2009.”**

Having set out the background of this matter, I can now consider whether the applicants are entitled to the relief sought in the present application lodged on 1<sup>st</sup> December, 2008 which is for committal of the 1<sup>st</sup> Defendant, Mbaruk Khamis Mohamed to Civil Jail for a period not exceeding six (6) months for being in contempt of orders made on 29<sup>th</sup> July, 2005, 3<sup>rd</sup> July, 2008 and 20<sup>th</sup> November, 2008.

In view of the consent order recorded on 20<sup>th</sup> November, 2008, I agree with the 1<sup>st</sup> defendant that the relief sought in this application in respect of the orders of 29<sup>th</sup> July, 2005 and 3<sup>rd</sup> July, 2008 is not available to the plaintiffs at this stage. I say so because the consent order recorded on 20<sup>th</sup> November, 2008, concluded any dispute in respect of the orders that had been made before the consent order as recorded.

The plaintiffs were however, entitled to move the court as they did if there was breach or disobedience of the terms of the consent order. In this regard the 1<sup>st</sup> two orders on the consent order are pertinent. I will state them again.

**“By consent the parties to maintain the status quo ante as at 3<sup>rd</sup> July 2008.**

**By further consent the plaintiffs do have free access to the portion in their possession i.e. (CR 7339) and occupation.”**

The 1<sup>st</sup> defendant can therefore only be cited for contempt if it can be demonstrated satisfactorily that he has disobeyed the orders contained in the first two limbs of the consent order. It is apparent from a plain reading of the two limbs of the order that the plaintiffs were already in possession of a portion of CR 7339 and by the consent order they were entitled to have free access to that portion in “*their possession*” and “*Occupation*”. So, if the plaintiffs were in possession of a portion of the suit property on 20<sup>th</sup> November, 2008, did it not imply that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in possession of some portion of the suit property? If they were, the consent order would appear to have recognized that status. In any event, the letter dated 21<sup>st</sup> November, 2008 addressed to counsel for the defendants by the plaintiffs’ advocates put the issue beyond dispute. The letter warned that unless the 1<sup>st</sup> defendant vacated the suit property, contempt proceedings would be commenced against him. It is illustrative that if the 1<sup>st</sup> defendant was in possession of a portion of the suit land, that portion was not possessed or occupied by the plaintiffs at the time of the consent order. The letter dated 21<sup>st</sup> November, 2008 would suggest that the 1<sup>st</sup> defendant was required to vacate the entire suit land. That would not be in consonance with the consent order. It is also illustrative that the said letter was demanding that the 1<sup>st</sup> defendant vacate the suit property even before the consent order was served. For contempt proceedings to succeed, the plaintiffs had to demonstrate with clarity the portion to which they may have been denied access, remembering that the consent order did not mention vacating the suit property by the 1<sup>st</sup> defendant or indeed anyone else.

In the premises, I have come to the conclusion that the plaintiffs have not proved to the required standard that the 1<sup>st</sup> defendant has disobeyed the consent order of 20<sup>th</sup> November, 2008.

Before concluding this matter, I should dispose of what should have been raised as a preliminary objection in point of Law. Counsel for the 1<sup>st</sup> defendant argued that this application is incompetent as it is *res judicata* and that the provisions of section 5 of the Judicature Act had not been complied with. With regard to the *res judicata* plea, I have already found that breach of the terms of the consent order would attract contempt proceedings. There have been no previous proceedings of contempt in respect of the consent order. Clearly therefore the contention of the 1<sup>st</sup> defendant is misconceived.

With regard to alleged non-compliance with section 5 of the Judicature Act, I note that the plaintiffs have moved the court under the provisions of Order XXXIX Rules 2A (2) and (3) of the Civil Procedure Rules. To my mind, those rules, including Rule 9, of the same order adequately deal with the manner of proceeding where disobedience of an order of injunction is alleged. It is plain to me that a party aggrieved by such disobedience may, by Chamber Summons, apply that the offending party be detained in prison for a term not exceeding six months. The jurisdiction to punish for disobedience of an order of injunction under Order XXXIX Rule 2A (2) appears therefore to be independent of the jurisdiction donated by section 5 of the Judicature Act. The Rules Committee did not envisage compliance with the English Procedure by a party invoking the jurisdiction of the court under Order XXXIX Rule 2 (A) (2) of the Civil Procedure Rules.

I would not therefore have dismissed the application for failure to comply with the provisions of section 5 of the Judicature Act. I have however found that the plaintiffs have not demonstrated to the required standard that the 1<sup>st</sup> defendant is guilty of contempt of court. This application is without merit and is dismissed.

I however make no order as to costs in the special circumstances of this case.  
Order accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JUNE 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the absence of the parties the date having been taken in court.

**F. AZANGALALA**

**JUDGE**

**23<sup>RD</sup> JUNE 2010**