



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA Civil Appeal 109 of 2010

HASSAN ALI OSMANAPPELLANT

VERSUS

ABDULRAHMAN M. BASHEIKH

MOHAMED AHMED MOHAMED.....RESPONDENTS

R U L I N G

This is an application dated 7th June,2010 for an order of temporary injunction restraining the Defendant/Respondent, their Servants, agents and/or Licences from selling, blocking the access road constructing or in any way dealing with the access space rendering it unavailable for the use of the Appellant pending the hearing and determination of this appeal and/or application .

In a Ruling dated 14.5.2010, the Chief Magistrate's court dismissed the Appellant's application dated 30.10.2009 and set aside some temporary orders which have been granted.

The Applicant has filed this appeal having been aggrieved by the said decision which in effect discharged the orders which had been in place.

The application was supported by an affidavit sworn by Hassan Ali Osman on 7th June 2010.

The application was duly served on 11th June 2010.

The Respondents did not file any Replying Affidavit or grounds of opposition. I am satisfied that they were duly served on the basis of the affidavit of service sworn on 28th June 2010. As a result this court only has the material presented by the Appellant before the court. The Court notes that there existed temporary injunctive orders granted on 30th October 2009 and which were discharged on 14th May 2010. The Appellant upon filing the Memorandum of Appeal on 7.06.2010 filed the present application. The court declined to grant ex parte orders.

I reserved the Ruling to be delivered on 14th 07.2010. The ruling was not ready by the said date and I adjourned the matter to 21.07.2010. On 14th July 2010, a counsel instructed by the Respondents Mr. Khatib attend the delivery of Ruling. He told court that he would be coming on record and that his clients had not been served. Strictly, by then Mr. Khatib was not formerly on record for the Respondents.

I am bound by law to proceed to deliver the Ruling as per the situation and circumstances prevailing on 14.07.2010.

As I write this ruling, I am now aware that the Respondents appeared before me in a Miscellaneous Application in which an order of arrest of the delivery of this ruling was sought.

On the basis of the Orders I made in the said application, I am bound to withhold the delivery of the Ruling so as to inquire if possibly the Respondents were not served with the application and hearing notice as alleged therein.

In the meantime, I do hereby grant prayers 2 of the Notice of Motion dated 7/06/2010 pending the inter partes hearing of the Application which was presented to this court to set aside the proceedings of 28.06.2010 and stay of delivery of the Ruling herein.

Orders accordingly.

Dated and delivered at Mombasa this 21st day of July 2010.

M.K. IBRAHIM

J U D G E

21/07/2010

Coram

Ibrahim, Justice

Court clerk – Kazungu

Mr. Khatib for the Respondent

Mr. Akanga for the Appellant

Ruling Delivered

IBRAHIM, J

FURTHER ORDERS OF THE COURT

Counsel are inclined to record a consent that the application to set aside the proceedings of 28.11.2010 be allowed and they get on with the main application for injunctions of pending appeal.

That is in order. However, I think there can be no dispute now that the Notice of Motion served on the 1st Respondent now dated 7.06.2010 had NO DATE.

The 1st Respondent could only have gotten the motion from the plaintiff's process server. It had no date. There is no evidence that the 2nd Respondent's copy had a date. He has denied the same.

As a result while Counsel wish to compromise, this court must have the correct record put in place. The Process server did not serve the application with dates and he served on 16.6.2010 and not 11.06.2010 as alleged. I do hereby set aside the proceedings of 28.06.2010 by consent. The Appellant shall pay the costs of the application dated 15.07.2010, to be agreed by counsel and in default to be assessed at the next hearing. The application dated 7.06.2010 shall be heard on 23.09.2010. Only to avoid further complications the parties shall maintain the status quo prevailing today.

IBRAHIM, J