



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 230 of 2010

MARGRIT SOMMER CHARO.....PLAINTIFF

VERSUS

ISAAC NJUGUNA NJOROGE.....DEFENDANT

RULING

On 9th July, 2010, the plaintiff appeared ex-parte before me on her application dated 7th July, 2010 and I granted prayer 2 of the application for fourteen (14) days pending the hearing of the application, inter parties. The order was then served upon the defendant. The plaintiff by her present Notice of Motion seeks the committal of the defendant to prison for six (6) months for disobedience of the said order of 9th July, 2010. the application is expressed to be brought under section 1A, 3A and 63 (c) and (e) of the Civil Procedure Act, Order XXXIX Rules 2A and 2 of the Civil Procedure Rules and all other enabling provisions of the Law. The application is predicated upon the primary ground that the defendant is in flagrant breach of the said order and continues to act in impunity. There is a supporting affidavit sworn by the plaintiff which elaborates the ground for the application.

The application is opposed and there is a replying affidavit sworn by the defendant. It is deponed in the said affidavit, *inter alia*, as follows:- that the said order was obtained without disclosing material facts of the claim; that he has been the one in situ and in continuous occupation of Magisa Guest House, Bar & Restaurant since 2003 to date; that he occupies the said property with the knowledge, consent, authority, approval and encouragement of the plaintiff and single handedly rebuilt the initial structure using his own resources and artistic input and stocked the facilities single handedly; that he has lived with the plaintiff as his girl friend from 2002 to date and that the house on the suit property was refurbished by him single handedly; that apart from the suit property he owns other properties jointly with the plaintiff and has filed HCCC No. 220 of 2010 seeking orders barring the plaintiff from dealing with the properties in any manner she pleased; that he has never been an employee of the plaintiff but has been her friend and business partner for nearly a decade and that he is a highly qualified automobile engineer and a car salesman, apart from running the Guest House, Bar and Restaurant for the last eight (8) years; that the allegations of fraud are a red herring to divest him of his interest in the suit properties.

The application was canvassed before me on 21st July, 2010 by Mr. Mkan, Learned counsel for the plaintiff/applicant and Mr. Akanga, Learned counsel for the defendant/respondent. Counsel substantiated their clients' stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. When the plaintiff appeared ex-parte, he sought and obtained the following order:

“That pending hearing and final determination of this application inter partes this Honourable Court be pleased to issue an injunction restraining the defendant/respondent herein whether by himself, his servant and/or agent from in any manner whatsoever dealing with or disposing or in any other manner alienating all that parcel fo land situate on plot Nos. sub-division No. 1538 (Original 651/11) section 111 Mainland North and sub-division No. 1539 (Original No. 651/12) section 11 Mainland North Mombasa together with plot No. L.R. 539/397 known as Magisa Guest House, Bar & Restaurant and/or interfering with the plaintiff's quiet enjoyment and use of the said properties.”

So the plaintiff sought and obtained an ex parte prohibitory temporary injunction. The order was granted primarily because, prima facie, I was persuaded that the defendant may have committed forgery. The plaintiff in her affidavit in support of the application for the temporary injunction gave the impression that the defendant was her employee and had used that position to assume ownership of the suit properties. That position is no longer crystal clear. The defendant has deponed that he is not and has never been an employee of the plaintiff

to the contrary, he had an affair with the plaintiff and they lived together as friends which relationship developed into a business partnership leading to acquiring property jointly and running business as partners. He has supported that deposition with documentary evidence of joint proprietorship in respect of some of the properties. Of particular significance, are Title Deeds for Mombasa/Mwembelegeza/1067 and 1068 which are in the joint names of both the plaintiff and the defendant. Those titles were issued on 6th February, 2007. It is illustrative that the plaintiff did not, in her application for injunction, refer to these titles at all. She has also not filed any further or supplementary affidavit to rebut the defendant's averments in his replying affidavit. In those premises, a mandatory injunction would not have been available to the plaintiff. The plaintiff obtained a prohibitory injunction and not a mandatory injunction when he appeared ex parte before me. It is apparent that she is applying the prohibitory injunction as a mandatory injunction.

Contempt proceedings are special proceedings and proof of the contempt is at a higher standard of proof than that of proof on a balance of probabilities. The logic is obvious as a finding in favour of the applicant can result in committal to prison of the respondent. A party should only lose his/her liberty in clear and obvious cases. This is not such a case in view of the affidavit evidence adduced before me.

I am alive to the uncompromising general rule requiring obedience of an order made by a court of competent jurisdiction until the order is discharged, whether the person affected by the order believes it to be irregular or even void. (See **Hadkinson – v – Hadkinson [1952] 2 All ER 567**). But here for the defendant to comply with the order given ex parte he would have in effect to vacate the property to which prima facie he claims joint proprietorship. The effect would infact be executing a mandatory injunction disguised as a prohibitory injunction. A court of justice would not countenance that result.

In the end the plaintiff's application by Notice of Motion dated 12th July, 2010 is declined with no order as to costs.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF SEPTEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Akanga for the Defendant and Mr. Obara holding brief for Mr. Mkan for the Plaintiff/Applicant.

F. AZANGALALA

JUDGE

16TH SEPTEMBER 2010