



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 692 of 2008

BONIFACE KEVIN OMONDI.....1ST PLAINTIFF
STEPHEN ANTHONY FOSTER2ND PLAINTIFF

VERSUS

MARLBOROUGH PROPERTIES LIMITEDDEFENDANT

RULING

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1. The Chamber Summons dated 30th October 2009 is brought under the provisions of **Order 39 Rules 2(a), (2), (9)** of the **Civil Procedure Rules** among others. The Applicant is seeking for an order to commit the Defendant or to fine them such sums of the money as the court may deem fit for disobedience of the order made by this court on 7th September 2009. This application is premised on the grounds that on 7th September 2009 **Khaminwa J**, issued an order of injunction restraining the Defendant either by themselves, their agents or servants from alienating, disposing, charging, mortgaging or creating a lien on property known as LR. NO. 330/375 BLOCK D UNIT D1 pending the hearing and determination of this suit.

2. This application is supported by the affidavit of Boniface Kevin Omondi sworn on 27th October 2009, and an affidavit of service sworn by Chrispin Orengo on 28th October 2009. It is contended that the order issued by this court on 7th October 2009, together with the penal notice were served upon the Defendant's advocates on record. However the defendant has disobeyed the court order and alienated the suit property. The Defendant is aware of the court order but they have flagrantly disobeyed it which undermines and threatens the very foundation of the administration of justice. The Applicant seeks this court to punish the Defendant. Counsel for the Applicant also relied on written submissions and quoted several decisions to support the contention that the court should uphold its dignity by punishing those in contempt of court orders so as to uphold the rule of law.

3. This application was opposed; counsel for the Respondent relied on the replying affidavit sworn by Nicholas Stock on 24th November 2009. Counsel also relied on detailed written submissions and urged the court to dismiss the application on that grounds that the injunction order was granted on 28th July 2009, but it was not issued until on 7th September 2009, and served on the advocates for the respondents on 25th October 2009. By that time, the Defendant had disposed of the property to a third party because the plaintiff defaulted in the payment of the balance of the purchase price. Due to the default by the applicants, the contract was terminated and the property was sold to a third party according to the agreement dated 21st November 2008 and a lease in favor of the third parties which was registered on the 17th April, 2009.

By the time the property was sold and transferred to the third party, there was no order of injunction, thus nothing barred the defendant from disposing the property. Since the property left the hands of the Defendant it was not possible for the defendant to do anything with the property and this was communicated to the Plaintiff.

4. In this application, the court is asked to determine whether the Defendant has committed contempt of court by disobeying a court order. There is ample jurisprudence from our courts that have set out the principles to guide the court when dealing with the issue of contempt of court. The first element to determine is whether the order and the penal notice were served upon the parties sought to be punished. I have gone through the affidavit of service sworn by **Chrispin Orengo** it is not clear when the order was served upon the Defendant as he deposes on paragraph 2 of the affidavit as follows:-

“That on 25th October 2009 I received copies of an order dated 7th September 2009 from Deputy Registrar High Court of Kenya Milimani Commercial courts with instructions to serve the same upon the Defendants directors and their Advocates

on record.”

Yet under paragraph 6 and 7 the same deponent states that:

“That on 21st October 2009 I was informed by the 1st Plaintiff that he was meeting one of the directors of the Defendant company one Nicholas Stock at the Stanley Hotel.

That I proceed to the Stanley Hotel’s Thorn Tree Restaurant where I met the 1st Plaintiff with a person whom he identified to me as Mr. Nicholas Stock.”

5. In this case I find there is uncertainty as to when the order was served. Service of an order in an application for contempt is crucial. Besides that, it is contended by the Defendant that by the time the order of injunction was issued, the horses had bolted. The property had already been transferred to a third party. The defendant annexed a copy of a lease with a third party which was made on 31st March 2009 and was registered at the Lands office on 17th April 2009. Thus the Applicant has not been able to prove that the Defendant willfully disobeyed the court order. The court order was issued after the property had been transferred.

6. For the aforesaid reasons the application for contempt fails, costs of this application will be in cause.

RULING READ AND SIGNED ON THE 1ST OCTOBER 2010.

**M. K. KOOME
JUDGE**