



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 46 OF 2010

**SAMUEL CHARO KITSAO
KARISA MRAMBA FUNGIZA & 33 OTHERS.....PLAINTIFFS**

VERSUS

MOMBASA CEMENT LIMITED.....DEFENDANT

RULING

The Notice of Motion application dated 9th June 2010 is made under Order XXXIX Rule 2 (2) and Order L Rule 1 of the Civil Procedure Rule and Section 3A of the Civil Procedure Act. It seeks that the director of the defendant Company Mr. Hasmukh Kanji Patel and the defendant servants and/or agents, namely Katana Rua, Gambo Chaga, Charo Uramba and Gona Charo, be arrested and committed to civil jail for a period of six (6) months for being in disobedience of the court order dated 14th May 2010. It also prays that defendant be condemned to pay costs of this application.

The application is based on grounds that the court issued temporary orders of injunction restraining the defendant by himself, his servants and/or agents from entering upon the suit land and from fencing them off, cutting down trees, clearing the suit land and or preventing the plaintiffs access to the suit land or carrying out any actions on the suit land, and from compelling the plaintiff to sell the land to it and from dealing with the suit land in any manner.

The order was served on the defendant on 17th May 2010 but on 27th May 2010 and 31st May 2010, the defendant disobeyed the court's orders.

In an affidavit sworn by Samuel Charo Kitsao, it is deponed that on 27th May 2010 and 31st May 210, the defendant named agents cut down trees planted on the suit property, cleared the lands, destroyed sisal plants, pawpaw, mango, lemon trees and destroyed houses erected on the land – this was done when the court order was in force and photographs showing the destruction are annexed as exhibit SC 3 and SC4.

When the named agents ie Katana Rua, Gambo Chaga, Charo Mramba and Gona Charo were asked about their actions, they said they had instructions from the defendant's director Hasmukh Kanji Patel to do so, and that nothing would happen to them. The destruction began on plot No.31, known moved to plot No.23 – the named agents were previously then to the 1st and 23rd plaintiffs whose plots were affected and who know that these are defendant's employees.

The three named agents have sworn replying affidavits which are replicate of each other in which they state that they are not parties to this suit and the order was never served on either of them personally nor was the present application served on them personally and because of this non service, the application is totally defective.

They deny entering onto the mentioned plots or even cutting down any trees. They point out that applicants have not stated what time the alleged destruction took place nor the date and time of taking of the photographs or even the status of the plots before the purported destruction. They state that on the alleged date, they were on duty with the defendant from 8:00 am to 4:00 pm and did not visit the alleged plots nor has their employer (the defendant) given any instructions requiring them to carry out destruction. They further point out that the alleged destruction constitutes a criminal offence and if it really took place, then the applicant ought to have made a report to the police yet to date no criminal charges have ever been preferred against them, nor have they ever been called to record any statement by the police.

The matter was disposed of by way of written submissions by counsel for the respective parties. Mr. Shujaa submitted on behalf of the applicants that the order had been served on the defendant otherwise no appearance would have been entered on 21st May 2010 and he wonders how the defendant got to know of the existence of the suit and even instructed an advocate to enter appearance. He also wonders how the defendants got to know that the case was for mention on 28th May 2010 when the defendant appeared in court through its advocate.

It is his contention that the order together with the chamber summons application, summons to enter appearance and plaint were served upon defendant by a process server on 17th May 2010 as per the affidavit of service which shows that the defendant was served through the Principal Officer.

The position adopted by the intended contempnor is similar i.e that they were not personally served – it is submitted by Miss. Mango on behalf of the respondent that service was purportedly upon the Resident Manager of the defendant Company and the 1st proposed contempnor has contested that saying there is no personnel manager by the name Jason Luubuta, and in any event he is not the principal officer, secretary or director of the defendant.

Counsel has referred to Halsbury's Law of England (4th Edition) Volume 9 at page 37 paragraph 6 to demonstrate this quoting extremely as follows;

“Necessity of personal service as a general rule, no order of the court requiring a person to do or abstain from doing the act in question may be enforced unless a copy of the order has been served personally on the person required to do or abstain doing the act in question..... While the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order”

This position was restated by the Court of Appeal consisting of Cocker, Omolo and Tunoi JJA while addressing the aspect of service of an order upon a company in the case of **Nyamogo and Another Vs Kenya Posts and Telecommunication copy (1990 – 1994) EA page 464** to the effect that service on the company does not constitute service on the directors and personal service on each officer is required to be effected by law. Hasmukh Patel (the intended 1st contempnor states that he was aware of the restraining orders but denies having been personally served, and further states that at no time did he through his agents, cause any destructions on the two plots.

The matter is very simple from the affidavit of service filed, the order was not personally served on any of the persons being cited for contempt. It is abundantly clear that not having been personally served the prayers sought cannot stand. Even though 1st contempnor (Hasmukh) is aware of the orders allegedly disobeyed, he has not been personally served and the application cannot succeed. This application is almost on all fours with a matter which was handled by Nyamu J. (as he then was in the HCC Misc. Application 235 of 2007. In the matter of **Duncan Mannuel Murigi (Suing as a minor through his father and next friend Ngovi Mwasu Vs. Kenya Railways Company** so much so that I am mindful of the exact phrases he used to this effect – *“The orders still stand and it is upon the applicant to start afresh ad effect personal service upon the Managing Director of the respondent before commencing a supporting application.”* – but I doubt that the same would apply in this matter given that the applicants have left out specific vital details such as the time the alleged contempt took place, especially in the light of what the other four alleged contempnor state and the fact that applicants did not deem it necessary to file a supporting affidavit to address the issue.

The upshot then is that the application has no leg on which to stand and is dismissed with costs to respondents.

Delivered and dated this 15th day of **December 2010** at Malindi.

H. A. OMONDI
JUDGE

Registry to notify parties that ruling was delivered on 15th December 2010 after notices had been sent out.

H. A. OMONDI
JUDGE