



REPUBLIC OF KENYA
THE HIGH OF KENYA AT KISII
CIVIL CASE NO 90 OF 2007

BELDINA MOKAYA PLAINTIFF/APPLICANT

VERSUS

ROBERT OMBASO NYARERU)

GUSII COUNTY COUNCIL) DEFENDANTS/RESPONDENTS

AND

ISAAC GITHUI)

COUNTY CLERK,)

GUSII COUNTY COUNCIL) INTERESTED PARTY/CONTEMNOR

RULING:

By an application dated 7th November, 2008, the applicant urged the court to cite the second respondent and more particularly the interested party for contempt of court for disobeying the lawful court orders of temporary injunction issued on 11th July, 2008 restraining the respondents by themselves, agents, servants and/or employees from trespassing upon, cultivating and/or otherwise interfering with the plaintiff's occupation in respect of L.R. NO. KISII TOWN/BLOCK III/491 (hereinafter referred to as "**the suit land**") pending hearing and determination of a suit she had filed.

The court was further urged to commit the interested party to civil jail for a period not exceeding six months.

In an affidavit sworn by the applicant in support of the application, she stated that upon grant of the injunctive orders on 11th July 2008, the same were extracted and served with a penal notice indorsed thereon. The service was effected upon the defendants and the interested party on 25th July, 2008. That notwithstanding, the interested party wrote a letter dated 16th October, 2008 warning her from entering and/or constructing on the suit land. In the said letter, the interested party had warned that if the applicant put up any structure on the suit land it would be demolished. The applicant contended that the said letter amounted to contempt of court. The second respondent had on 15th October, 2008 dispatched council officers to block the applicant from working on the suit land. The council officers chased away the

applicant and her workers from the suit land.

That also was an act of further contempt of court, the applicant stated.

In a further affidavit sworn on 17th November, 2008, the applicant deposed that on 14th November, 2008, council officers led by Richard Makori and Peter Magwaro went to the suit land and demolished a wall fence that had been put up by the applicant around the suit land.

The applicant informed the council officers that there was a court order restraining them from interfering with her occupation of the suit land but they refused to heed her plea. The applicant exhibited photographs of the demolished wall.

The interested party, **Isaac Githui**, filed a replying affidavit and stated that he was posted to Gusii County Council on 9th July 2008. He said that upon joining the said county council it was not brought to his attention that this court had issued any orders in respect of the suit land. He alleged that he became aware of the said orders on 12th November, 2008 when he was served with the contempt application. He further stated that on 25th July, 2008 he was at Nairobi attending the 5th Annual General Meeting of the Local Authorities Pension Trust at Safari Part Hotel. That is the date when he was allegedly served with this court's orders given on 11th and issued on 17th July, 2008.

Mr. Githui went on to state that on the morning of 16th October, 2008, one Willys Oseko, who described himself as a son to the applicant herein burst into his office and with extreme fury demanded that the county clerk and the county council should stop forthwith troubling his mother over the suit land.

That prompted the clerk to draft the letter of 16th October, 2008 which he gave to the said Willys Oseko to deliver to the applicant. He added that by that date he had not met the council's advocate to brief him about some legal issues, including the proceedings in this suit.

With regard to the applicant's further affidavit, the county clerk stated that he was not involved at all in the demolition of the wall on 14th November, 2008 and neither had he mandated anyone to demolish the same. He added that he had interrogated Mr. Richard Makori and Mr. Peter Magwaro and they denied having trespassed into the suit land.

Richard Makori Mose and Jared Magwaro Ondieki swore affidavits and denied having gone to the suit land on 14th November, 2008 and demolishing the perimeter wall as alleged.

They alleged that they were in their respective offices on the material day.

It is not in dispute that on 11th July, 2008 this court issued injunctive orders restraining the defendants, their agents, servants and/or employees from trespassing upon the suit land or interfering with the applicant's occupation and/or use of the same pending the hearing and determination of this suit.

The ruling was delivered in the presence of Mr. Ochwangi, advocate for the applicant and Mr. Bigogo, advocate for the defendants/respondents.

By that date, Mr. Githui, the interested party was the county clerk, Gusii County Council. There is no affidavit by Mr. Bigogo stating that he did not write to his client and inform them of the court ruling.

Mr. Oguttu submitted that on 25th July, 2008 Mr. Githui and Mr. Robert Ombaso Nyakeru were duly served with the said orders by a process server known as David Okumu Ojill. That was denied by the aforesaid persons. Mr. Githui stated in his affidavit that on 25th July, 2008 him and Robert Ombaso were attending a meeting at Nairobi. He annexed to his affidavit a letter dated July 5, 2008 inviting him to the said meeting.

There was, however, nothing to prove that they actually attended the meeting, the invitation letter notwithstanding. One may be invited for a meeting and fail to attend. No vehicle work ticket, Airline ticket or Bus ticket was annexed to the affidavit to prove that the deponent actually travelled to Nairobi. Where it is stated in an affidavit that on a particular date a person was served with a court order by a court process server, if the person alleged to have been so served denies such service, the strictest proof ought to be produced to challenge the averments in the affidavit of service. The process server was not even cross examined on the contents of his affidavit.

But even if I were to assume that Mr. Githui was not served with the court order on 25th July, 2008, there is sufficient evidence that as at 16th October, 2008 when he was writing a letter to the applicant he knew or ought to have known about the court proceedings relating to the suit land and in particular the court orders in issue. He had been in office since 9th July, 2008 and as the Chief Executive Officer of Gusii County Council, he must have been briefed by his predecessor about this dispute which was filed on 9th August, 2007. Even if for any reason he was not briefed, due diligence required that he familiarizes himself with the council administrative and legal affairs, among others.

In any event, on 16th October, 2008 the applicant's son went to his office and complained to him that the county council was harassing his mother on account of the suit land. That was after the applicant and her workers had been chased away from the suit land on 15th October, 2008. As a result of the visit to his office by the applicant's son, Mr. Githui wrote the following letter:

“COUNTY COUNCIL OF GUSII

COUNCIL OFFICE

P.O. BOX 90,

KISII, KENYA.

16TH OCTOBER, 2008

REF. NO: GCC/MKT/199.

M/S BELDINA MOKAYA

P.O. BOX 2257

KISII.

RE: ILLEGAL CONSTRUCTION ON PLOT

NO. BLOCK III/491 KISII MUNICIPALITY.

It has been reported to me that you have commenced construction on the above detailed plot which belongs to the County Council of Gusii, facts which are well within your knowledge.

Please note the allocation you claim to have been given of the said property was unlawful and cannot therefore pass a good title of ownership to you.

You are therefore instructed to stop any further construction forthwith, failure to which the council will have no alternative but to demolish the structure, and charge you in court accordingly.

Yours faithfully,

(SIGNED)

ISAAC GITHUI

COUNTY CLERK,

COUNTY COUNCIL OF GUSII.

CC: District Commissioner

Kisii Central District.

The OCPD

Kisii Central.

The Town Clerk

Municipal Council of Kisii.”

Mr. Githui could not have written the above letter out of the blues. He must have referred to the relevant file before he wrote the same.

The applicant had, prior to the issue of the injunctive orders aforesaid, demonstrated to the court that she was the registered proprietor of the leasehold interest comprised in the suit premises. That certificate of lease was issued on 21st October, 2003. The County Council of Gusii is the one that leased the suit land to the applicant for a term of 99 years from 1st August, 2001. The court found that the applicant had established a **Prima facie** case and proceeded to issue the aforesaid orders of injunction.

That being the case, the letter of 16th October, 2008 was not only **sub-judice** but also amounted to contempt of this court's orders.

Shortly after the aforesaid letter, the applicant's wall fence was demolished by people who were said to be officers from the county council of Gusii who were allegedly led by Richard Makori, a Revenue Officer and Peter Magwaro, a Committee clerk. The two officers denied the applicant's averments. It is however not in doubt that the said wall was demolished.

It could only have been demolished by people who were acting on instructions of the county council. The council had threatened to do exactly that. There is no proof that Richard Makori Mose and Jared Magwaro Ondieki were personally involved in the demolition exercise but the county council through its clerk, Isaac Githui, must have authorized some people to move to the suit land and demolish the wall. Mr. Githui as the Chief Executive Officer of the council cannot fake ignorance of the law, having authored the letter of 16th October, 2008.

In **HADKINSON –VS- HADKINSON** [1952] 2 ALL ER 567 it was held that there is an unqualified obligation upon every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it is discharged. Disobedience of such an order is punishable by a court of law.

Such punishment is intended to protect the dignity of the court and to ensure that people do not undermine the rule of law in a manner that encourages the general populace to employ crude methods in resolution of their disputes.

I find Isaac Githui, the County Clerk, Gusii County Council and the county council in itself to be guilty of contempt of court. I now order that Isaac Githui be summoned to this court as soon as possible to mitigate, if he will so choose, before sentence is passed against him and the county council.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

1/4/2009.

Before D. Musinga, J.

Ruling delivered in open court in the presence of:

Mobisa –cc

Mr. Oguttu for the applicant

Mr. Bigogo for the respondent

D. MUSINGA

JUDGE.

Mr. Bigogo:

Mr. Githui left last evening to pick his daughter from Nyeri after they closed school. I have briefed him about the ruling. He has instructed me to mitigate on his behalf. He has official duties in Nairobi tomorrow and Friday. If the court wants him to be present personally, he will come. I however have instructions to mitigate on his behalf and on behalf of the county council.

D. MUSINGA

JUDGE.

COURT: Since Mr. Bigogo has expressly been authorized by Mr. Githui and the County Council to mitigate on their behalf, he may proceed to do so.

D. MUSINGA

JUDGE.

MITIGATION: On behalf of Mr. Githui, he is very remorseful. Indeed he acted out of ignorance.

He had not been briefed by his predecessor. He regrets having written the letter to the plaintiff. Mr. Githui is married to a wife who is not working. He has two sons in University and a daughter in standard 8.

He also has high blood pressure. If he is sent to jail, his health is likely to deteriorate. Mr. Githui is a civil servant, if he is jailed he will lose his job. The county council also regrets about what happened. My clients pray for non custodial sentence. Both of my clients are very remorseful.

D. MUSINGA

JUDGE.

COURT: It must be understood by all that when courts issue orders, they must be obeyed. If any party is not satisfied with a court decision, he can either apply for review of the same or exercise his constitutional right of appeal. Breach of court orders can easily lead to break down of the rule of law, if those who consider themselves financially stronger than others will choose to disregard lawful orders. The Gusii County Council had no right to pull down the plaintiff's perimeter wall, even if it believed that she had no right to do put it up. The council ought to have moved to court. The County Council ought to have also consulted its advocate, which I am not sure was done.

I sentence the first contemnor, Isaac Githui, to a fine of Kshs. 50,000/= in default 6 months imprisonment. As against Gusii County Council, I sentence it to a fine of Kshs. 100,000/=.

The County Council shall also rebuilt the plaintiff's perimeter wall that it pulled down. That should be done within 60 days from the date hereof, failing which the plaintiff will be at liberty to file a claim for compensation and/or monetary value of the demolished wall.

D. MUSINGA

JUDGE.

Mr. Bigogo:

I pray for 14 days to enable my clients comply with the orders of this court.

D. MUSINGA

JUDGE.

Court: The fines payable by the 2 contemnors should be paid within 7 days from the date hereof failing which warrants of arrest to issue against Mr. Githui in his personal capacity and as the Chief Executive Officer of the Gusii County Council.

D. MUSINGA

JUDGE.

Mr. Bigogo: I pray for typed proceedings and leave to appeal.

D. MUSINGA

JUDGE.

COURT: Leave to appeal is granted. Proceedings to issue upon payment of the requisite fees.

D. MUSINGA

JUDGE.