



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Case 14 of 2009

RICHARD OMARI NYAMATURA PLAINTIFF

VERSUS

DANIEL OMBACHI MOGENI DEFENDANT

RULING

In a Plaint filed on 26th January, 2009 and amended on 3rd February, 2009 the Plaintiff stated that he was the registered owner of **L.R.WEST MUGIRANGO/SIAMANI/2257** whereas the Defendant is the owner of land parcels **Nos.WEST MUGIRANGO/SIAMANI/2178 and 2256**. The plaint goes on that there was between them **HCCC No.349 of 1996 at Kisii** which recognized them as owners of the above plots. Despite that, the Defendant claims the Plaintiff's land and has proceeded onto it and demolished the Plaintiff's house and occasioned damage worth Kshs4,500,000/=. The Plaintiff claims that the actions of the Defendant are unjustified and unlawful. He sought a permanent injunction to restrain the Defendant, his agents, servants and employees from interfering with his parcel of land. He sought a declaration that the damage to his property was illegal and asked for compensation for the damage and also sought a rent of Kshs.10,500/= per month beginning 1st October, 2008.

With the plaint was filed a Chamber Application under **Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules** and **sections 3A and 63(e)** of the **Civil Procedure Act** for temporary injunction.

The Defendant filed a replying affidavit in which he deponed that the High Court case above was determined in his favour. He swore that the court found that the Plaintiff had constructed on his **L.R. WEST MUGIRANGO/SIAMANI/2256**. Following the order of that court, the Plaintiff was duly evicted. It was further pleaded this suit was *res judicata*.

On 26th February, 2009 the parties appeared before the **Hon. Justice Musinga** and the following order was made:

“This application will be heard on 19th May, 2009. The status quo as it exists today should be maintained.”

On 17th March, 2009 the Plaintiff filed a Notice of Motion under **Orders 39 rules 2A(2) and (3) and 50 rule1 and sections 3, 3A, and 63(e)** of the **Civil Procedure Act** seeking that the Defendant be committed to jail for a period of six months for being in contempt of the order above.

In the Grounds and Supporting Affidavits, the Plaintiff alleged that subsequent to the court order the defendant had on 27th February, 2009 begun construction on the land by putting sand thereon. He stated that between 1st and 5th March, 2009 the Defendant had removed bricks from the land in question and that he was still working thereon. In his Reply to the application, the Defendant denied that he was in contempt. He denied that he had committed the acts alleged by the Plaintiff. He even sought that the court visits the land to confirm what he is stating.

When the application came up before me on 28th April, 2009, the Plaintiff was represented by **Mr. Nyagwencha** and the Defendant by **Mr. Nyariki**. **Mr. Nyariki** took issue with the Supporting Affidavit. He relied on **section 35(1) and (2)** of the **Advocates Act Cap 16** of the **Laws of Kenya** and sought that the Affidavit be found to be incurably defective

because it had not indicated who had drawn it. The Affidavit did not also indicate the address of the firm that had drawn it. It is material that all the time the Plaintiff was represented by **Mose, Murugu and Rigoro Advocates**. **Mr. Nyagwencha** thought that the issue **Mr. Nyariki** was raising was only technical and did not go to the root of the application. However, it would appear from the decisions in **Barclays Bank of Kenya Limited vs. Dr. Sollomon Otieno Orero, HC (Milimani Commercial Courts) Civil Case No.1736 of 2001** and **Ochieng Sese vs. Johnson Ocharo HCCC.NO.65 of 2003 at Kisii** that, because under section 35(1) it is an offence not to make the endorsement above, the failure is a substantial matter that goes to the root of the application. I will strike out the Affidavit, which means the application has no evidential basis. It will equally be struck out with costs.

Even if it were to be held that the objection to the Affidavit is technical, there will be the issue of what the *status quo* was when the order subject of this complaint was made. I must reiterate what was said in **Refrigerator & Kitchen Utensils Limited vs. Gulabchand Popatlal Shah & Others Civil Application No.39 of 1990 at Nairobi** that it is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. It is because of this that courts will not condone deliberate disobedience of their orders and will not shy away from their responsibility to deal firmly with proved contemnors. It is the requirement of law that the Plaintiff in this case proves beyond doubt that the Defendant is guilty of contempt (**Jacob Zedekiah Ochino & Another vs. George Aura Okombo & others Civil Appeal No.36 of 1989 at Nairobi**).

According to the Plaintiff and Affidavit sworn to support the injunction application, the Plaintiff was complaining that the Defendant had gone to the suit premises and demolished his house and destroyed his property worth Kshs.4,500,000/=. He complained that the Defendant had cleared the material left by the demolition and fenced the property. The Defendant had then started accumulating building materials in the property. The order made on 26th February, 2009 must be read with that in mind. The Plaintiff is saying that since the order the Defendant has removed his (Plaintiff's) bricks and has gone ahead and put sand on the land in preparation to build. The Defendant is saying that what the Plaintiff is complaining about is what had happened by the time the suit was filed and therefore the same position was obtaining at the time of the order. I reiterate that the Plaintiff alleged that the Defendant had removed the material left behind by the demolition of the house and had assembled his materials in readiness to build. On the evidence, I am unable to find that the Plaintiff had beyond doubt established the claims he made against the Defendant.

DATED at **KISII** this 12th day of May 2009.

A. O. MUCHELULE

JUDGE

Delivered in open Court in the presence of:

Mr. Nyagwencha for the Plaintiff

Mr. Minda for Mr. Nyariki for the Defendant.