

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 54 of 2005

MATETE WERE MUSHA..... PLAINTIFF

VERSUS

LINUS MAKANA EKESA DEFENDANT

RULING

The applicant in his application filed on 10th May 2007 is seeking orders that the defendant show cause why his property should not be attached for willful disobedience of valid court orders or in the alternative the defendant show cause why he should not be detained in prison for a term not exceeding six months for willful disobedience of court orders. The application is supported by the affidavit of the applicant sworn on 10th May, 2007.

Mr. Athung'a, counsel for the applicant submitted that on 19th September, 2006 parties herein entered into a consent that status quo prevailing then be maintained. The order was made in the presence of both counsels and the parties themselves. Counsel submitted that the defendant has disobeyed the orders and has erected houses on the suit property plot No. **BUNYALA/BUDONGA/1753**.

Counsel for the applicant further submitted that the defendant has cultivated the suit property and has planted sugar cane, maize and sweet potatoes. The orders of status quo were to last pending the hearing of the main case. Counsel argued that the circumstances of the case did not require service upon the defendant as the orders were issued in the presence of the respondent.

Mr. Ombaye for the respondent opposed the application and submitted that the ex-parte orders expired on 19/9/2006 having been extended on 29/5/2006 pending the hearing of the application for injunction during the next hearing date. He denied that the orders were to last until the suit is fully heard and determined. His position on the status quo is that it was the position before the filing of the suit. The respondent was not in court when the consent was recorded. He was not served with any court order and that the defendant denies encroaching on the plaintiff's property.

The record for 29/05/2006 before Justice G. B. M. Kariuki states that "**Interim orders are extended to the date of the next hearing.**" The matter was listed for the hearing of the application dated 1/11/05 on 19/9/2006. The court record states as follows:

Mr. Shitsama: We have a consent as follows;

"The status quo in respect of the suit property as from 19/9/06 be maintained. To-day's costs be in the cause."

Mr. Munyendo: I agree with the consent.

The court proceeded to record the consent order as follows:-

"The Chamber Summons application dated 1/11/05 is dispensed of in terms of the consent hereinabove which both counsels have recorded in court. The costs of the application shall be in the cause. It is so

ordered.”

From the record, it is clear that the status quo that was to be maintained was that prevailing as from 19/9/2006. The main issue is what was the status quo on 19/9/2006. The interim orders were extended to the next hearing date. The next hearing date happened to be 19/9/06. When recording the consent parties did not mention that the interim orders were to be extended until the case was heard and determined. The matters were made worse in that no court order was extracted. The court record does not show that the parties were in court on 19.9.2006 but indicate that the defendant was in court on 29/5/2006.

The established requirements for contempt of court is that an order must be extracted and the same should have a Penal Notice. The contemnor should be served personally and there should be proof of service. In the current situation, no court order was extracted leave alone the presence of a penal notice. Further, counsel for the applicant submits that the respondent was in court when the orders were granted and this dispensed with the need for service. With the wording that status quo was to be maintained, even if the respondent was in court on 19/9/06, it is not possible for him to know what that meant. Further, being in court when orders are being made is not sufficient to punish a contemnor. The party purported to be in breach must be served personally. This requirement is necessary as it will be possible to show before the court the contents of the order and that the contemnor was aware of the same having been served.

The interim court orders were not extracted and therefore they were not served on the respondent. The defendant cannot therefore be punished for disobeying orders which he was not aware of. On 9th October, 2006 the Plaintiff's counsel wrote to the respondent's counsel complaining about a breach of the orders recorded on 19.9.2006. On 2/11/2006 the respondent's counsel responded indicating that their client has denied that he is constructing a house on the suit land and they had advised their client.

Given the above circumstances, this court cannot issue the orders prayed for in the application dated 1st November, 2005. No order under the Court's Seal was extracted and served on the respondent with a penal notice. The application dated 1/1/2005 is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered at Kakamega this 23rd day of July, 2009

SAID J. CHITEMBWE

J U D G E