



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Civil Suit 36 of 2004**

**RANSA COMPANY LIMITED.....PLAINTIFF**

**=VERSUS=**

**1. HATIBU  
ABDALLA  
JUMA**

**2. MANCA  
FRANCESCO**

**3. KASSIM  
SHARIFF**

**4. THE  
SETTLEMENT  
FUND**

**TRUSTEE.....DEFENDANTS**

**RULING**

By a Notice of Motion dated 23<sup>rd</sup> July 2009 made under Order XXXIX Rule 2A(2) and (3) of the Civil Procedure Rules, Section 63(c) and 3A of the Civil Procedure Act, the applicant seeks for orders to issue for the attachment of the 2<sup>nd</sup> defendant/respondent's movable and immovable assets to the tune of Kshs. 20,000,000/- (twenty million).

**2. That the Court do grant orders committing the**

**2<sup>nd</sup> defendant/respondent to six (6) months jail.**

**3. The 2<sup>nd</sup> defendant/respondent be condemned to pay the costs of this application.**

It is based on grounds that:

**(a) On 13<sup>th</sup> December 2005, the court gave orders of injunction restraining the defendants herein from trespassing on parcel No. 671 Watamu and from disposing, mortgaging charging or in any other way dealing with the land parcel Kilifi/Jimba/439.**

**(b) The 2<sup>nd</sup> defendant/respondent, in blatant disregard of the said orders, has been disobeying the**

**same by trespassing into parcel No. Watamu 671 registered in the plaintiff/applicant's name and has generally been destroying the barbed wire fence every now and then, putting up beacons, demarcating and partitioning the land and interfering with the plaintiff's quiet enjoyment thereof.**

**(c) The said acts of the respondent impact negatively on the dignity of this court and the general administration of justice.**

**(d) That the court should take punitive measures and punish the 2<sup>nd</sup> defendant/respondent for purposes of restoring its dignity and integrity.**

The application is supported by the affidavit sworn by Luigi Gislotti who is a director of the plaintiff/applicant. He states that on 24-9-04, the plaintiff filed an application seeking injunctive orders against the defendants who were trespassing and interfering with the plaintiff's parcel No. Watamu 671. The interim injunctive orders were granted on the same day and confirmed on 13<sup>th</sup> December 2005 to the effect that:

**“That pending the hearing and determination of this suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants and or agents jointly and or severally, or anyone of them, be and are hereby restrained by order of injunction from trespassing upon the plaintiff's piece of land known as portion No. 671 Watamu which piece of land with the dimensions abutals and boundaries thereof are delineated on the Deed Plan Number 168706 annexed to grant registered as CR 23596/1.**

**(ii) That pending the hearing and determination of this suit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants and/or agents jointly and/or severally or any one of them be and are hereby restrained by order of injunction from disposing, mortgaging, charging or in any other way dealing with the title to the land known as Kilifi/Jimba 439.**

**(iii) That the penal notice shall be in effect from the date hereof.**

**4) The ruling order of 13<sup>th</sup> December 2005, was delivered in the presence of all the parties except the 4<sup>th</sup> defendant.**

**5) While the orders are in existence, pending hearing and determination of the suit, the 2<sup>nd</sup> defendant/respondent, filed a Judicial Review Application in Mombasa, seeking to cancel parcel No. Watamu 671 as encroaching on his purported Parcel No. Kilifi/Jimba 439, which suit was maliciously filed to defeat and circumvent the orders issued in this matter – the Judicial Review matter was subsequently transferred to Malindi and is now Misc. Civil Appl. No. 7 of 2007.**

**6) While the Mombasa suit was pending for determination, and after the applicant had filed responses to the 2<sup>nd</sup> defendant/respondent's Judicial Review application, the 2<sup>nd</sup> defendant/respondent in collusion with the then advocate acting for the Commissioner of Lands, and the registrar of Lands Mombasa, purported to cancel by consent, the plaintiff/ applicant's title No. 671 Watamu.**

The plaintiff/applicant moved to court for the setting aside of the said orders and a stay of the consent orders was given on 31-10-06 in Mombasa Misc. Cause No. 924 of 2006, though the application to set aside consent was eventually dismissed – from that, the applicant has appealed to the Court of Appeal and on 19-12-08 orders of stay were granted to the application pending hearing and determination of the appeal. It is against that background that the applicant contends the orders of 13<sup>th</sup> December 2005 are subsisting and in force.

On many occasions, the respondent has trespassed on parcel No. 671 Watamu, and destroyed the barbed wire fence of the plaintiff. On 17<sup>th</sup> June 2009 the 2<sup>nd</sup> defendant/respondent trespassed into the suit premises and broke the barbed wire fence and destroyed everything while in the company of about twenty (20) youths who were armed and a report was made to Watamu Police Station vide OB No. 15/17/06/09.

On 25<sup>th</sup> June 2009, the 2<sup>nd</sup> defendant/respondent again brought in about 20 youths who together with him, trespassed into the suit premises and started subdividing and demarcating the same and put up beacons.

On 17<sup>th</sup> July 2009, soon after the barbed wire was repaired by the applicant, the 2<sup>nd</sup> defendant/respondent again damaged the cemented poles in the same style he has always done and in the company of approximately 20 (twenty) youths who this time even carried a power saw to cut off the poles and barbed wire fence, together with the 2<sup>nd</sup> defendant/respondent. Another report was made to Watamu Police Station, who informed the applicant that the case was already registered with them and advised the applicant to move to court on grounds of contempt of court orders as the matter was civil in nature.

Now applicant fears that respondent's actions may eventually lead to a blood bath as he (applicant) also has workers on the suit premises. While making a report at the police station the 2<sup>nd</sup> defendant/respondent went there and there was an exchange of words as he insisted that the suit land was his and that the court order of 13 – 12 – 05 did not exist and the documents applicant held were fake.

He challenges the 2<sup>nd</sup> defendant/respondent's documents of title No. Kilifi/Jimba 439 saying it is based on forged documents as per the letters by the commissioner of Lands dated 6-10-06 and is subject of criminal complaint pending at the Coast Police Criminal Investigations Department (CID) Headquarters Mombasa. The applicant has annexed a bundle of documents and receipts as LG1 to support his application.

The application is opposed and in the replying affidavit dated 5<sup>th</sup> September 2009, Respondent denies having committed any contempt. He avers that the plaintiff ceased to exist legally as from the 26<sup>th</sup> September 2008 when it was dissolved vide the Kenya Gazette Notice No. 9165 (annexed as FM 1)

The applicant therefore ceased to claim any right of claim to any property immediately upon its dissolution and therefore has no locus standi to litigate on the suit property in this matter.

Further, that the application is fatally defective because the order purported to have been disobeyed has not been annexed to the application and the application is brought through the wrong procedure and law.

It is the respondent's contention that the orders against trespass were only issued with regard to property parcel No. Watamu/671 whereas the respondent has been litigating and claiming interest in property Kilifi/Jimba/439 and in whose respect no disobedience has been committed or even challenged. He states that his ownership of plot 439 has not been cancelled, nor has he been barred from enjoying the same save for disposing, mortgaging, charging or in any other way dealing with the title.

So he sees the orders sought by applicant as being unenforceable through the equitable court's jurisdiction having been caught up by the doctrine of laches. Further, that the Court of Appeal has issued preservative orders to which this court is bound and this court may not issue any other order that is likely to contradict or prejudice the orders issued by the Court of Appeal.

In response to this, the applicant filed a further affidavit wherein he states that the dissolution of the plaintiff/applicant was an irregularity, mistake and/or oversight on the part of the Registrar of Companies who rectified the dissolution through a subsequent Kenya Gazette Notice dated 17<sup>th</sup> December 2008 (LG.2)

He points out that a copy of the order said to have been disobeyed is actually annexed to the application filed herein.

He denies that the application is defective and insists that from the wordings of the ruling by justice Ouko on 13<sup>th</sup> December 2005 Plot No. 671 Watamu is the same one being claimed by the respondent as Kilifi/Jimba 439 – so that the restraining order refers to one and the same piece of land and the interim

injunction was to preserve the said parcel of land and not to allow the respondent access and activities such as demarcation whenever he wished. He insists that there is a valid court order in existence which has been disobeyed and the fact that there is an appeal pending before the court of appeal is not justification for disobedience of the court order; and it is not demonstrated how the pending appeal has a bearing to this application.

At the hearing of the application, Mr. Simba submitted that Order 1 and 2 of the order under reference were directed at the 2<sup>nd</sup> defendant/respondent and either defendants not to trespass on the land and that both applicant and respondent claim the same property but with different title numbers. Mr. Sumba's argument is that if the order was intended for only plot no. 671, then it would serve no purpose. He refers this court to an application dated 2-10-06 by 2<sup>nd</sup> defendant at paragraph 3-5 and says the respondent cannot now turn around to say the orders were directed elsewhere.

With regard to the matter pending before the Court of Appeal, Mr. Sumba submits that the same relates to Judicial Review entered into by consent before Justice Wendoh and that in the absence of stay orders in this matter, the applicant is with its rights to pursue the matter and invites this court to consider the decision in *HCCC 39 of 2007 Fulvio Cossu and Another V Said Ali Bwanamkuu* and Another where the Court found parties to be in contempt and urges the court to deal likewise with the 2<sup>nd</sup> defendant/respondent.

In reply Mr. Okundi on behalf of the 2<sup>nd</sup> defendant/respondent submitted that there is no plaintiff before this court as the plaintiff company was struck off and dissolved by Gazette Notice (Ex FM1) pursuant to provisions of section 339() of the Companies Act. What about the correction by a corrigenda made by a subsequent Gazette Notice? Mr. Okundi states that the same did not cure the dissolution because once a party has been struck off then the provisions of section 339(6) of the Companies Act come into operation to the effect that such status can only be resolved by the court and not the Registrar and so the corrigenda was irregular and has no legal basis.

He further contends that 2<sup>nd</sup> defendant/respondent has not committed any breaches and in any case, the court's power to deal with such breach is under section 5(1) of the Judicature Act and the Civil Procedure Rules does not give procedure for making the application. He argues that the approach in this country when dealing with contempt of court; is to resort to the Supreme Court Rules in England. He points out that personal service of the order is crucial and the copy of the order must be endorsed with a penal orders – the terms of the order must be clear and very unambiguous and breach of that order must be proved. It is Mr. Okundi's submissions that the order by Hon. Justice Ouko is imprecise in its terms and if any party disobeys it, then it cannot be said to be a deliberate disobedience. He points out that the order is directed at property 671 Watamu and nowhere does the Honourable Judge indicate that the property is one and the same as Kilifi – Jimba 439. So he says the order is ambiguous and not capable of being complied with. He further submits that the penal notice is not addressed to anyone yet the rules require that the person to whom it is directed be specifically named and so respondent had no way of knowing who it addressed.

It is also his argument that there is no proof that the orders have been disobeyed and that the photos annexed offend provisions of the Evidence Act, as they are merely photocopies of the photographs.

Mr. Okundi confirms that the case pending before the Court of Appeal arises from orders of mandamus and prohibition in Mombasa High Court miscellaneous application no. 7 of 2007 and the court had made definite finding that the property in question belonged to the 2<sup>nd</sup> respondent – which finding was made after this case was filed and so is Res Judicata. He however concedes that the applicant has challenged that finding on appeal but argues that this court is functus officio. On Res Judicata, he refers to Legal Maxims by Herbert Brown 10<sup>th</sup> Edition and Wade on Administrative Law page 239. He explains that respondent could have filed an application for stay of proceedings, but deemed it prudent that there as a decision made by the High Court that Title No.671 was cancelled and the only proper way for applicant to ventilate his issues is before the Court of Appeal where the matter is pending. According to Mr. Okundi, the Court of Appeal declined to give any order for stay of execution.

On the issue of relevance of Penal Notice and what constitutes a proper notice, Mr. Okundi seeks to rely on the case of Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunications Civil Appeal No. 264 of 1993.

He submits that no case has been made out for contempt and draws from the decision in Isaac Wangondu v Nairobi City Council C.A No. 95 of 1988 at page 415 and Gatharia K. Mutitika v Baharini Faina C.A. No. 24 of 1985 which held that the alleged breach must be precisely defined.

Mr. Sumba insists that the orders by Ouko J were not ambiguous and in any case there can be no ambiguity by virtue of 2<sup>nd</sup> respondent's own affidavit of September and October 2006. Also that assertions about trespass are very specific regarding the dates the breaches occurred and the actions which constituted the breach. He maintains that the correction by the Registrar of Companies revived the applicant company. As for procedure, Mr. Sumba submits that Order XXXIX provides for the rules on contempt involving injunctions.

As regards the Penal Notice, Mr. Sumba submits that the annexed order has a Penal Notice and in any event that order was made in the presence of the 2<sup>nd</sup> defendant/respondent and he is fully aware and service was properly effected.

Although the photograph prints annexed to the affidavit filed in court are in original form, Mr. Sumba concedes that what was served on respondent was in photocopy, but says even without the photos, the contempt is still proved. He reiterates that there are no stay of proceedings orders issued by the High Court, and the mere fact that there is an appeal, does not sanction disobedience.

Does the applicant have locus standi in this matter? It is a fact that the applicant company had been dissolved and a notice thereto was published in the Kenya Gazette. Subsequent to that the situation was purportedly rectified by the Registrar of Company publishing another gazette notice by corrigenda to "erase as it were the appearance of the applicant in the earlier notice. Did this action by the Registrar of Companies revive the applicant and restore its legality, or should the same have gone through a court process.

Section 339 (5) of the Companies Act provides as follows;-

***"At the expiration of the time mentioned in the notice, the registrar may, unless cause to the contrary is previously shown by the company or the liquidation, as the case may be, state the name of the company off the register, and shall be dissolved"***

Section 339 (6) of the same Act reads.

***"If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register on an application made by the company or member or creditor before the expiration of ten years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of striking off carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the issue of the company to be restored and upon a certified copy of the order being delivered to the registrar .....the company shall be deemed to have continued in existence.....and the court may give such directions.***

So the applicant's status is not remedied by a simple gazette notice, there ought to be demonstrated that the Registrar's subsequent notice was propelled by an order of the court.

Then there is the issue of the procedure used in bringing this matter to court and the legal provisions cited. Should this application be under section 5 of the Judicature Act a supreme court Rules order 521 or

should it be under Order XXIX Rules 2A (2) and (3) of the Civil Procedure Rules. The contempt relates to breach of an injunction order. This application is made under the Civil Procedure Rules, precisely Order XXXIX Rule 2A (2) reads;-

***“(2) In the case of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such a person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”***

Subrule (3) then adds that the attached property may so remain for more than a year and if the disobedience or breach persists, the court can order the proceeds serve as compensation while the balance shall be paid to the party entitled.

In comparison, section 5 of the Judicature Act provides as follows;-

***“5 (1) The High Court and Court of Appeal shall have the same power to punish for contempt of court as for the time being possessed by the High Court of Justice I England, and that power shall extend to upholding the authority and dignity of subordinate courts***

***(2) An order of the High Court made by way of punishment for contempt of court, shall be appealable as if it were a conviction.....***

It would appear that Order XXXIX specifically deals with issuance of injunction and disobedience thereof and seems to suggest that it is not necessary for one to invoke section 5 of the Judicature Act which targets matters of general contempt. This position was adequately addressed by **Bosire J in the decision of Isaac Wanjohi & Aner V Macharia(Nairobi) HCCC 450 of 1995.**

***“The applicant’s legal advisors seem to be unsure, as many other legal counsel in this country, as to the procedure to be followed in moving the court for orders in the event of breach of injunction order made pursuant the provisions of Order XXXIX Civil procedure Rules. The power donated to the court by Order XXXIX Rule 2***

***(3) Civil Procedure Rules, is independent of the provisions of sect 5 of the Judicature Act. A party aggrieved by the disobedience of an injunction order made under Order XXXIX Rule 1 or 2 of the Civil Procedure Rules, appears to be excluded from invoking the jurisdiction under section 5 above. The power donated by section 5 above is only exercisable by either the High Court or Court of Appeal, to punish for contempt under that section”.***

Indeed the learned Judge in that matter then demonstrated how an application brought under section 5 of the Judicature Act is linked with Order 45 and Order 52 of the Supreme Court Practice Rules in the United Kingdom.

Very clearly then the argument that the application is fatally defective for having been brought under the wrong procedural provisions is misplaced as the order complained of was an order for injunction and its disobedience is adequately provided for under Order XXXIX and so the application is not incompetent whatsoever. Has the order by Ouko been annexed? From the bundle of documents annexed to the application, the order forms part of the documents in the bundle marked LG2 – it is dated 13<sup>th</sup> December 2005 and reads as follows **IT IS HEREBY ORDERED:-**

***1. That pending the hearing and determination of this suit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their servants and/or agents jointly and or severally or any one of them, be and are hereby restrained by order of injunction from trespassing upon the Plaintiff’s piece of land known as portion number 671***

***Watamu which piece of land with summons abuttals and boundaries thereof are delineated on the Deed Plan Number 68706 annexed to a grant registered as CR23596/1.***

***2. That pending the hearing and determination of the suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants and or agents jointly or severally or any one of them be and hereby restrained by order of injunction from disposing, mortgaging, charging or in any other way delaying with the Title of the land known as Kilifi/Jimba/439.***

***3. The penal notice shall be in***

***effect from the date hereof”***

That order is very specific – no trespass on 671 but no adverse dealing with the Title on 439. It does not mention trespass, or any physical activity on the land – indeed the genre of words used restricts the Respondent to how he deals with the Title on 439.

My reading of that order discloses two things (a) all those acts of trespass complained of by applicant are not covered.

***(a) The Honourable Judge, did not make a finding that plot No.671 was one and the same as plot No.439.***

***(b) All these acts of trespass complained of, if carried out on what 2<sup>nd</sup> Respondent believes to be 439 and applicant believes to be 671, cannot be nailed directly, because by the wording of that order, they appear to be two separate plots, and the 2<sup>nd</sup> Respondent is justified in saying that he is simply working on his plot and has obeyed the order because he has not disposed of the Title in the manner anticipated by that order.***

Due to the fact that contempt of court proceedings are quasi-criminal in nature, it requires a higher standard of proof due to the issue of an individual’s liberty being at stake – this was set in **Gatharika M. Mutitika and 2 others V Baharini Farm Limited (1982-1988) KLR 863**, so it was up to the Plaintiff to specify the property he intended the defendants to be restrained from trespassing by stating before the court which issued the orders that 671 and 439 were one and the same parcel on the ground. It is difficult to detect that on the face of the record. This therefore left a gaping hole in the order and indeed the **Gatharia** case quoted above stated that in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined, but it must also be proved to a standard higher than proof on a balance of probabilities.

Then there is the Penal Notice which is attacked on grounds that it is not addressed to any, specific person. I think Mr Okundi is splitting hairs here, the order was directed at the defendants and so definitely it would be addressing the same parties referred to in the order. What is pertinent is that the order must be served personally on the individual to whom it is intended. The Appeal referred to seems to address the Judicial Review matter and the orders do not seem to touch on whatever orders were given by Ouko, but I think that is non issue as I have already addressed the issue of difficulties in a party complying with the orders in the manner drafted.

The upshot then is that applicant has not established the contempt alleged and the application fails and is dismissed. Costs of this application are awarded to the 2<sup>nd</sup> Defendant/Respondent.

Delivered and dated this 23<sup>rd</sup> day of **November 2009** at Malindi

**H A OMONDI**

**JUDGE**