



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA OF KISII

Civil Case 90 of 2007

BELIDINA MOKAYA PLAINTIFF

VERSUS

1. ROBERT OMBASO NYARERU)

2. GUSII COUNTY COUNCIL) DEFENDANTS

RULING

On 19th September, 2007 the defendants were restrained, by way of an interim injunction either by themselves, agents, servants and/or employees from trespassing upon, cultivating, digging trenches and/or otherwise interfering with the plaintiff/Applicant's occupation and/or use in respect of L.R.NO.KISII TOWN/BLOCK III/491, pending the hearing and determination of an application that had been filed by the plaintiff on 18th September, 2007. Subsequently, the application came up for hearing on 20th December, 2007 and it was by consent ordered that:

“(a) There be and is hereby granted interim

injunction restraining the Defendants/

Respondents, either by themselves,

agents, servants and/or employees, from

trespassing upon, cultivating and/or

otherwise interfering with the

Plaintiff/Applicant's occupation and/or

use in respect of LR NO.KISII TOWN/BLOCK

III/491, pending the hearing and determination

of the instant application.

(b) The Chamber Summons Application herein be

and is hereby listed for inter partes hearing

on the 10th day of April, 2008.”

On 18th February, 2008, the plaintiff filed an application by way of a chamber summons brought under **Order XXXIX rules 2 and 2A** of the **Civil Procedure Rules** and Section 3A and 63 (e) of the Civil Procedure Act and urged the court to cite and punish the defendants for disobedience of the court orders issued on 20th December, 2007. The court was asked to commit the first defendant and the clerk to the second defendant to jail for a duration not exceeding six months.

The court was further urged to issue an order of mandatory injunction directed against the defendants to return 12,000 bricks, 4 Jembes, 2 Matock, 2 Spades, 2 Pangas, 2 Hammers and 2 Pick-Jembes which were confiscated from the plaintiff at the said parcel of land, hereinafter referred to as **“the suit plot.”**

In an affidavit sworn by the plaintiff in support of the said application, she stated that on 7th February, 2008 the aforesaid items were ferried away by the defendants in motor vehicles registration number KWE 348 and KAT 692X, all belonging to the second defendant. Further, the defendants were alleged to have re-filled and/or blocked the foundation that had been dug on the suit plot, thus interfering with the construction works on site. The said actions amounted to willful breach of the court order aforesaid, the plaintiff stated.

Mr. Ochwangi made brief submissions in support of the application. He cited a few authorities to buttress his submissions. I shall refer to some of them later in this ruling.

The defendants filed a replying affidavit that was sworn by Wilson Kwambai Chebii, the Clerk to Gusii County Council. The first defendant is also an employee of the said County Council, the second defendant.

Mr. Chebii confirmed that he was aware of the court orders issued on 20th December, 2007. He however denied that the defendants breached the said Orders. Mr. Chebii added that motor vehicles registration numbers KWE 348 and KAT 692 X belonged to Kisii Municipal Council, a totally different entity from Gusii County Council.

In paragraph 11, the deponent stated as follows:

“THAT I have every reason to believe that

whatever transpired on 7th February, 2008

at the site of my Council’s disputed Plot

No.LR Kisii Town/Block III/491 must

have been actions by the Kisii Municipal

Council who have jurisdiction to regulate

development of plots within Kisii Township

(Plot No.Kisii Town/Block III/491 being one

of them).”

There was also no evidence that on the material day the first defendant was seen at the suit plot assisting in the removal of the plaintiff’s property or doing anything else that may have amounted to breach of the

said court order. It is not enough to state that the plaintiff's goods were carried away by the defendants, it must be proved that they are actually the ones who did so to the exclusion of any other party.

Contempt of court is a very serious offence and it must be proved to the required standard. The standard of proof that is required is higher than proof on a balance of probabilities and almost, but not exactly beyond any reasonable doubt, see **MUTITIKA VS. BAHARINI FARM LTD** [1985] KLR 227. It is possible that the Kisii Municipal Council may have been the one that did the acts complained of because of alleged breach of some by-laws or building regulations.

The law cannot countenance a situation where a man may be sent to jail for a mistake or offence that was committed

by another. That is why the burden of proof is that high in contempt applications.

In the circumstances, I hold that the plaintiff has failed to prove the claim to the required standard of proof. That notwithstanding, it is not denied that the plaintiff's properties as listed in the application have been unlawfully taken and her occupation of the suit property interfered with. The defendants alleged that it was the Kisii Municipal Council that did so. If that is the case, the Municipal Council must return the plaintiff's goods within the next seven (7) days from the date hereof and forthwith desist from interfering with the plaintiff's occupation of the suit property pending the hearing of the plaintiff's application on 10th April, 2008.

DATED, SIGNED AND DELIVERED at Kisii this 7th day of April 2008.

D. MUSINGA

JUDGE.

Delivered in open court

Mr. Oguttu for the applicant.

Mr. Bigogo for the respondent