



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 276 of 2004 & 277 of 2004 (Consolidated)

OMAR SAID MWATAYARIPLAINTIFF

VERSUS

BHARAT KUMAR

VIPIN KUMAR

SOUTH COAST BEACH PROPERTIES LTD.....DEFENDANTS

AND

COASTLAND PROPERTIES LTD.INTENDED NECESSARY PARTY

R U L I N G

The defendants herein, namely Bharat Kumar, Vipin Kumar and South coast Beach Properties Ltd. took out the summons dated 31.03.2008 pursuant to the provisions of Order XXXIX rules 2 and 7 of the Civil Procedure Rules in which they sought for the following orders:

1. *Further construction on the suit property be stopped forthwith and there be demolition of any and /or construction so far to be supervised by the O.C.S. Ukunda Police Station.*
2. *The present occupants on the suit property be removed by the Officer –in charge of the Ukunda Police Station forthwith.*
3. *M/s Coastland Properties Limited do have its properties attached in terms to be directed by the court.*
4. *Directions be given for service of these summons inter-partes.*

When served with the application, the firm of Stephen Oddiaga & Co. Advocates filed grounds of opposition on behalf of the plaintiffs whereas the firm of Obara & Co. Advocates filed a notice of preliminary objection on behalf of the intended necessary party to oppose the same.

The Group General Manager of South Coast Beach Properties Ltd., Samuel Johnson swore an affidavit in support of the summons. It is averred that while on a visit to the suit premises on 28.03.2008 he discovered that the suit premises i.e. L.R. No. Kwale/Galu/Kinondo/733 and Kwale/Galu/Kinondo/734 have been collectively fenced as a single larger unit property. It is alleged that the demarcation fence between the two properties had been removed thereby giving an impression one large plot which

presumably represents Kwale/Galu/Kinondo/55 which is the subject matter of an injunction from the court of Appeal. A copy of the ruling of the court of Appeal is annexed to the aforesaid affidavit. It is said that the order has been registered against title Kwale/Galu/Kinondo/55. It is alleged that the occupants therein were served with the order and that when the precursor to this application, that is the application dated 02/05/2007 came up for hearing on 15.11.2007, the court ordered for the status quo to be maintained. For the above reasons, it is said that the plaintiff and the intended necessary party are in breach of the order for any construction work to be done on the suit property. The deponent claims he saw mounds of cement, concrete, sand and coral stones together with a tank full of water. It is said that constructions were going on. The applicant avers that it is likely to suffer substantial loss and irreparable damage as the Intended necessary party, Coastland Ltd is continuing with construction work on the suit property despite the Court of Appeal orders being served on it.

It is the Submission of the plaintiff that the application is frivolous, vexatious and an abuse of the court process because the suit against the 3rd defendant is closed and hence cannot be reopened without setting aside the decree against it. It is claimed that the plaintiff having been awarded the suit property transferred it to other parties who have since then changed the plot number the subject of this suit and that plot no. Kwale/Galu/Kinondo/55 has since been closed. It is also argued that the application should have been by way of motion instead of a summons.

Mr. Mkan, learned advocate for the Intended necessary urged this court to reject the application on the ground that there is no suit against his clients. The necessary party claimed it was not served with the court of Appeal Order. It also claimed that since it has not been joined to the suit no orders should be issued against it.

I have considered the submissions of all learned counsels appearing in this matter. I have also perused the material placed before me. It is not in dispute that the court of Appeal issued the orders on 7th June 2007 in terms of prayer 2 of the notice of motion dated 2007. Prayer 2 reads as follows:

“2. That there be an injunction restraining the respondents from dealing in any manner whatsoever with the suit land being Kwale/Galu Kinondo/55 pending the hearing and determination of an intended appeal against the order.”

It is obvious that the court of Appeal restrained the Respondents i.e. Omar Said Mwatayari (Plaintiff herein) and coastal Properties Ltd (Intended necessary party) from interfering in any way with Kwale/Galu Kinondo/55. The question which must be determined is whether the plaintiff and the intended necessary party were aware of the existence of the orders of the Court of Appeal? If the answer to the above question is in the affirmative, whether they breached the said orders. As for the plaintiff, it is not denied that he was aware of those orders. In fact it is said that the title to the property i.e. Kwale/GaluKinondo/55 is no more as the same has been changed. The intended necessary party has stated that it was not aware of the existence of those orders. The record does not support those allegations. The affidavit of Rama Hassan filed in support of the Notice of Motion dated 10th August 2006 reveals everything. It knew the existence of the suit which gave rise to the filing of the appeal which in turn resulted to the court orders of 7/6/2007. It is denied by the plaintiff and the intended necessary party that the acts complained of were committed on a parcel of land previously known as Kwale/Galu Kinondo/55. It is also not in dispute that the title number has changed. What has not changed is the location. It is also not denied that the actions complained of were done in contravention of the orders issued by the Court of Appeal. The conduct of the plaintiff and the intended necessary party show that they intended to frustrate the administration of justice. The duo have flagrantly disobeyed express and unambiguous court orders. The intention of the court of Appeal was to preserve the property pending the hearing and determination of the intended appeal. That is what the plaintiff and the intended necessary party have attempted to interfere in contempt

of the court orders. In Attorney General –vs- Newspapers Publishing PLC and others [1987] 3 ALL E.R. 276 it was held inter alia:

“Where the court had made orders to preserve the subject matter of an action pending trial, a third

party who knew of those orders but nevertheless destroyed or seriously damaged that subject matter would be guilty of Criminal contempt if in doing so he intended to impede or prejudice the administration of justice.”

It is obvious from the submissions of the advocates of the plaintiff and the intended necessary party that the duo were contemptuous of the orders of the court of Appeal. It does not matter that the title numbers had been changed. Of course this court can easily infer that it was part of the process of concealing what took place before the appeal is heard and concluded.

There is a submission that the application should have been by way of motion instead of a summons. I have considered it and I do not agree with it in view of the express provisions of order XXXIX rule 9 as read with XXXIX rule 2 of the civil Procedure rules: In any case there is the saving provision of order VI rule 12 of the civil procedure rules which enjoins this court to look at the substance and to avoid technicalities in promotion of broad interest of justice.

Having found the duo guilty for contempt, an appropriate penalty must be given. I have already set out the kind of punishment the defendants have prescribed to be pronounced against the plaintiff and the intended necessary party. I direct the duo to demolish the structures put up in contravention of the injunctive orders within 30 days from the date hereof. The demolition to be supervised by the

O.C.S. Ukunda Police Station. The plaintiff and the intended necessary party to each pay a fine of Kshs.250,000/- within 15 from the date hereof.

Costs of the application given to the defendants.

Dated and delivered at Mombasa this 23rd day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Shah for the Applicant and in the presence of the intended necessary party and h/b for Oddiaga for Respondent.