



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 276 & 277 (Consolidated) of 2004

OMAR SAID MWATAYARIPLAINTIFF

VERSUS

BHARATKUMAR NATHALAL SHAH1ST DEFENDANT

VIPINKUMAR NATHALAL SHAH2ND DEFENDANT

SOUTHCOAST BEACH PROPERTIES LTD.3RD DEFENDANT

AND

COASTLAND PROPERTIES LTDNECESSARY PARTY

R U L I N G

Bharatkumar Nathalal Shah, Vipinkumar Nathalal Shah and South Coast Beach Properties Limited, being the 1st, 2nd and 3rd Defendants herein, took out the notice of motion dated 25th July 2008 in which they sought for the following orders:

- 1) That such punitive orders be issued by this court as are deemed just and appropriate against the Plaintiff and the Necessary Party for willful disobedience of the earlier orders of this Honourable Court of the 23rd June 2008.**
- 2) That the orders of this Honourable Court of the 23rd June 2008 be varied to the extent that the Defendants be substituted in place of the Plaintiff and the Necessary Party in so far as the order of demolition of Kwale/Galu Kinodno/55 (formerly Kwale/Galu Kinondo/733 and Kwale/Galu Kinondo/734) is concerned and the exercise be under the protection of the Officer Commanding Station of Diani Police Station.**
- 3) That all costs be provided for.**

The motion is supported by two affidavits sworn by Syed Kassim Shah and a replying affidavit of Ramji Dhanji Gami. When served with the motion, Omar Said Mwatayari, the plaintiff herein and Coastland properties Ltd the intended Necessary Party herein filed the replying affidavits of Rama Masudi Hussein, Salim Ali Mwangumi, Oscar Odienga Osewe, Stephen Oddiga, Rama Chokwe, Omar Said Mwatayari

and a notice of Preliminary Objection to oppose the motion.

When the motion came up for interpartes hearing on 1st August 2008, this court declined to hear Mr. Oddiaga and Mr. Mkan learned advocates for the plaintiffs and the necessary party respectively unless the fine imposed against them was paid. On the 18th day of September 2008 the motion was finally heard when there was confirmation that the fine imposed against the plaintiff and the necessary party had been paid. The only issue which now remains for my decision is prayers (ii) and (iii) of the motion.

It is the submission of Mr. Khagram, learned advocates for the defendant that the plaintiff and the necessary party have refused to demolish the structures standing on the suit premises within the period fixed by this court in its ruling of 23.06.2008. It is averred that the Respondents have continued with construction as if there was no order stopping further developments on the suit premises. Attached to the affidavit of Syed Kassim Shah sworn on 25th July 2008, are correspondences between firm of Stephen Oddiaga Co. Advocates and Sailesh Dhanani and Bharat Bhatt showing that the learned advocate questioned the validity of the order stopping further constructions on the suit premises. The letter dated 9th July 2008 reads in part as follows:

“All this you did on the strength of a court order which you claimed gave you power to evict our clients and to stop them from constructing on their lawful site.”

It is the submission of Mr. Khagram that Mr. Oddiaga encouraged the necessary party to disobey the court order. It is alleged he even prevented the police from enforcing the court order. For this reason the learned advocate urged this court to exercise its inherent power to ensure that the court orders are obeyed and enforced to preserve its dignity.

The plaintiff and the necessary party opposed the motion. They admitted that the order directing the demolition of the structures standing on the suit premises has not been complied with. The plaintiff is of the view that since he has parted with the proprietary interest over the suit premises then he can no longer enter into the suit premises to enforce the order. In other words he was saying that he will be trespassing on the suit property hence he cannot enforce the court order. It is the plaintiff's argument that it is only the Necessary Party who can enforce the order because it is the only party which is on site. The building standing on the suit property belongs to the necessary party. The plaintiff accused the defendants of material non-disclosure. Correspondences were shown indicating that the firm of A.B. Patel & Patel Advocates were communicating with the Necessary Party Contractor hence it encouraged the Necessary Party to continue with the constructions despite knowledge of the fact that there was a court order freezing further constructions.

Mr. Mkan, learned advocate for the Necessary Party was of the view that the defendants have filed the motion with unclean hands. The Necessary party averred in the affidavit of Rama Chokwe sworn on 9th September 2008 that Gami Quarries Ltd, the Contractor and the Architect M/s T. Gaal Associates and the firm of A.B. Patel & Patel Advocates negotiated a settlement between the parties and agreed that constructions should continue.

I have considered the material placed before this court. I have also considered the submissions presented by learned advocates from both sides. It is not in dispute that this court issued the orders of 23rd June 2008 directing the plaintiff and the Necessary Party to pay a fine of Kshs.250,000/- and a further order directing them to demolish the structures standing on Kwale/Galu Kinondo/55 (formerly Kwale/Galu Kinondo/733 AND Kwale/Galu Kinondo/734). It is also not denied that the parties are aware of the existence of those orders. There is no dispute that the order of demolition has not been complied with. The plaintiff claims he cannot comply with the order because he parted with the proprietary interest over the property and that the structure standing on the suit property belongs to the Necessary Party. The Necessary Party states that it cannot comply with the order of demotion because it was encouraged to continue with the constructions. In sum, the Respondents are saying that they are not willing to comply with the court order of demotion. The defendants have beseeched this court to allow them to actualize the order in exercise of its inherent power. One of the peculiar features of the inherent

jurisdiction is that a court must enjoy such powers in order to enforce its rules of practice, actualize its orders and decrees and to suppress any abuse of its process and to defeat any attempted thwarting of its processes. A court must have such powers in order to maintain its character as a court of justice. I have anxiously considered the issues raised and argued before me and I am convinced that this court should in this case exercise its inherent power by granting the orders sought. The Respondents have expressly shown that they are not ready to obey the court orders. They do not say they are unable to carry out the orders but instead they are unwilling. The defendants are ready, willing and capable of enforcing the orders. I allow the motion dated 25th July 2008 as prayed.

Dated and delivered at Mombasa this 31st day of October 2008.

J.K. SERGON

J U D G E