



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

**Misc Civil Appli 116 of 200**

**RODOLFO GRECCHI.....PLAINTIFF**

**VERSUS**

**RIMONDI GABRIALLA.....DEFENDANT**

**RULING**

By a Notice of Motion dated 13<sup>th</sup> December 2006, pursuant to the provisions of section 5 of the Judicature Act (Cap 8 Laws of Kenya) and order 52, Rule 3 of the Rules of the Supreme Court of England, the applicant seeks orders:

- 1. That the contemnors named herein be committed to jail by virtue of their flagrant contempt of this court's orders issued at Malindi by the Hon. Mr. Justice William Ouko on the 17<sup>th</sup> day of November 2006 and on the 20<sup>th</sup> November 2006**
- 2. That the contemnors be condemned to pay the costs of this application.**

The application is based on the grounds stated in the statement of the plaintiff dated 22<sup>nd</sup> November 2006 and filed on the 23<sup>rd</sup> day of November 2006 and further on the grounds.

- 1. That on the 17<sup>th</sup> day of November 2006, an order of injunction was issued by the Hon. Mr. Justice Ouko at Malindi whereby the 1<sup>st</sup> contemnor was personally and/or through her agents, servants or workmen enjoined firstly from denying the plaintiff entry into and/or aggress from the suit premises known as Kilima Jua and secondly from unlawfully harassing, intimidating and/or in any way interfering with the applicant/plaintiff's peaceful and/or quiet enjoyment of the suit premises pending the hearing of the chamber summons filed herein on the same date at Mombasa on the 1<sup>st</sup> day of December 2006.**
- 2. That on the 20<sup>th</sup> day of November 2006, further orders of injunction were issued by the Hon. Mr. Justice Ouko at Malindi whereby the 2<sup>nd</sup> contemnor was personally and/or through his agents, servants or workmen enjoined firstly from denying the applicant/plaintiff entry into and/or aggress from the suit premises known as Kilima Jua and secondly from unlawfully harassing, intimidating and/or in any way interfering with the applicant/plaintiff peaceful and/or quiet enjoyment of the suit premises pending the hearing of the chamber summons filed herein on the same date at Mombasa on the 4<sup>th</sup> day of December 2006.**
- 3. That the injunctive order of this court issued on the 17<sup>th</sup> November 2006 were duly served upon**

*the 1<sup>st</sup> defendant at or about 4.15 pm on the said 17<sup>th</sup> day of November 2006.*

*4. That the injunctive orders of this court issued on the 20<sup>th</sup> November 2006 were duly served upon the 2<sup>nd</sup> defendant at or about 8.30 am on the 21<sup>st</sup> day of November 2006.*

*5. That at or about 4.15 pm on the 17<sup>th</sup> day of November 2006, the applicant/plaintiff while in the company of the aforesaid court process server and his friend and agent, one JARED OCHIENG OPIYO, on attempting to gain entry into the said suit premises was nevertheless denied entry therein and kept waiting at the gate for well over half an hour by the said 1<sup>st</sup> defendant who was then in the company of and being assisted by the 2<sup>nd</sup> defendant as well as one Tukero Ole Kina Esq. advocate and also one Fernando Vischi, a well-known resident of Malindi a.k.a as Masharubu.*

*6. That the 1<sup>st</sup> defendant then drove away from the suit premises and with tongue in cheek having asked the applicant/plaintiff to deal with the 2<sup>nd</sup> defendant who remained behind but himself adamantly and forcefully maintained that he would certainly not permit the applicant/plaintiff to gain entry into the suit premises on the ground that the court order issued on the 17<sup>th</sup> day of November 2006 was only directed to the 1<sup>st</sup> defendant and not to himself the 2<sup>nd</sup> defendant who at the material time was not a party to this suit.*

*7. That however at or about 8.30 am on the 21<sup>st</sup> day of November 2006 having duly served the 2<sup>nd</sup> defendant who was then in the company of the 1<sup>st</sup> defendant with a copy of the court order issued by this court on the 20<sup>th</sup> November 2006 as well as the chamber summons dated 20<sup>th</sup> November 2006 and amended originating summons of even date, the 2<sup>nd</sup> defendant expressly told the applicant/plaintiff and the process server that the applicant/plaintiff should then proceed to the suit premises and into which the applicant/plaintiff would no longer be denied entry.*

*8. That at 9.00 a.m. on the 21<sup>st</sup> day of November 2006 whilst accompanied by the process server, the applicant/plaintiff went to the suit premises to find out whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants had already arrived as they had earlier promised to do in order to open the gate to allow the plaintiff access into the suit premises at Kilima Jua but found out that the defendants had not yet arrived but had instead given instructions to their staff that the gate not be opened to allow the applicant/plaintiff entry therein..*

*9. That at 2 p.m. on the 21<sup>st</sup> day of November 2006, the applicant/plaintiff again went to the suit premises in the company of the process server but upon reaching at the gate thereof the defendants' workmen raised an alarm and alerted the Sentry Response Security Limited who came immediately whilst holding dangerous weapons in apparent readiness for combat and informed the plaintiff that he was certainly not allowed to enter the suit premises and thereupon the plaintiff was again forced to leave.*

*10. That at 4.00 pm. on the 21<sup>st</sup> day of November 2006, the applicant/plaintiff again made a visit to the suit premises where he was again confronted by the security personnel of the defendants as before who purposefully continued to deny the plaintiff entry into the suit premises whilst acting upon the instructions of the defendants and the plaintiff was finally forced to leave at or about 4.15. pm.*

*11. That it is essential therefore to duly punish the contemnors by committal and/or by the imposition of a hefty fine upon each one of them jointly and severally for purposes of upholding the authority and dignity of this honourable court.*

The application is predicated upon the annexed affidavit of Rodolfo Greechi sworn on the 17<sup>th</sup> day of November 2006. The applicant relied wholly on the contents of the said affidavit and by way of oral submissions of counsel.

At the hearing the defendant/respondents raised preliminary objection, by a Notice thereof dated 23<sup>rd</sup>

May 2007, on the grounds that:

- 1) ***The application is incompetent and has no basis in law.***
- 2) ***The application is an abuse of the process of the Court.***
- 3) ***The application has been brought under Rules of the Supreme Court (England). There is no such law in England or elsewhere. The Rules of the Supreme Court were repealed with the coming in force of the Civil Procedure Rules. The defendants cannot therefore be tried and the court has no jurisdiction to try the defendants under a law that does not exist.***
- 4) ***This court has no jurisdiction or power to hear any aspect of this suit and it had no jurisdiction to hear the applications for injunction against the defendants for the reason that the defendants are the registered proprietors of the suit premises. The suit premises are registered under the Registration of Titles Act, (Cap 281 Laws of Kenya. This court is expressly barred under section 23(1) of that Act from challenging the defendant's title.***
- 5) ***This court has no jurisdiction under order 36 of the Civil Procedure Rule to hear and determine any aspect of this suit for the reasons that the plaintiff is not an executor, administrator, trustee, creditor, devisee, legatee, heir or legal representative or a cestui que trust or assignee of the defendants.***
- 6) ***Originating summons are suits and cannot be commenced by way of miscellaneous civil applications. This court has no jurisdiction and had no jurisdiction to issue orders of injunction in a miscellaneous civil application. Miscellaneous civil applications are not suits.***
- 7) ***Any order issued by court without jurisdiction is an illegal and an unlawful order. Such order cannot be enforced by way of contempt of court proceedings.***
- 8) ***The orders alleged to have been disobeyed are orders requiring an act to be done. An order requiring an act to be done cannot be enforced by way of contempt of court proceedings unless it specifies the period within which the act must be done.***
- 9) ***No notice was given to the Registrar and the Attorney General before leave was sought. The notice purporting to have been served was served on the same date that the application for leave was filed.***
- 10) ***The second defendant is not a party in these proceedings and no leave of the court was sought or granted under order 1 rule 10(2) of the Civil Procedure Rules and was improperly joined in these proceedings without an order of the court to that effect. Any orders made against the second defendant are therefore incompetent.***
- 11) ***The application has not been served upon the defendants and a hearing notice thereof has similarly not been served. An application for an order of committal must be served personally upon the person sought to be committed.***

The first point of law taken is that the Rules of Supreme Court of England are no longer good law even in England. That the same were repealed on 1998 by the coming into force of the Civil Procedure Rules of England. That the last time the Rules of the Supreme Court were printed was in 1997.

That the Judicature Act (Cap 8) at section 5 donates the Law on Contempt. It requires the courts to be guided by the law and procedure for the time being in England. That to the extent that this application is made under the provisions of section 5 of the Judicature Act (cap 8) as read together with order 52 of the Supreme Court Rules, to that extent is the Notice of Motion incompetent and bad in law.

The second point of law taken is that the court lacks the requisite jurisdiction to hear any aspect of the

suit because the property is registered under the RTA.(cap 281) Law of Kenya. That this is discernible from the affidavit and pleadings and the title document. That section 23(1) of the RTA provides that to title issued under the RTA cannot be challenged except on the grounds of misrepresentation. That section 30 does not apply because this is not an R.L.A. title where trust can be imported.

The third point of law taken is that the court lacks the requisite jurisdiction under order XXXVI of the Civil Procedure Rules. In that the plaintiff is not an executor, administrator, trustee, creditor, devise legatee or heir, legal representative or assignee. Unless the plaintiff is a trustee he cannot move the court. The suit is thus incompetent.

The fourth point of law taken is that an originating summons cannot be commenced by a miscellaneous civil application. An originating summons is a suit within the meaning of the Civil Procedure Act. The form of the originating summons shall be in for 13 or 13A of appendix D. The originating summons herein is not in the form aforesaid.

The fifth point of law taken is that an order made by a court without jurisdiction is unlawful. In this regard counsel referred me to the authority of ***SAID BiN SEIF***, a minor by his next friend and duly appointed Guardian ***SIR ALI BIN SALIM CIVIL APPEAL NO. 29 OF 1938***: 1940 (EACA) vol. 19 at page 9.

The sixth point of law taken is that the orders alleged to have been disobeyed are orders requiring an act to be done. Such an order cannot be enforced by contempt of court proceedings unless it specifies the period within which the act must be done.

The 7<sup>th</sup> point of law taken is that Notice on the Registrar and the A.G. before leave to commence contempt of court proceedings was taken cannot be proved in the absence of an affidavit of service upon the Attorney General and the Deputy Registrar.

The 8<sup>th</sup> point of law taken is that the second defendant is not a party to these proceedings by reason of the fact that no leave was sought or obtained under order 1 Rule 10(1) to join the second defendant. Accordingly the order sought against the 2<sup>nd</sup> defendant is invalid.

Last but not least that counsel took the point that the O. S. was served upon the first defendant. Two days later, the plaintiff filed an amended miscellaneous originating summons adding the second defendant without any order of the court. True, amendment can be made at any time but it must be by leave of the court. In any event the persons sought to be added must as a matter of law be served personally with the Notice of Motion and the Penal Notice within 14 days.

For the respondent it was argued that hanging on illegality of Supreme Court Rules is to no avail. The Judicature Act (Cap 8) Laws of Kenya was amended by L.N. N0. 14/997. Since then the Courts have been deciding on applications brought under order L1 of the Supreme Court Practice Rules and hence the decisions made by our Courts since then are binding in as much as the same have legal efficacy. Decisions such as that of ***REPUBLIC V GACHOKA & ANOTHER (1999)*** E.A. 254 (CAK) have since been made on the basis of the amendment as aforesaid and is good law. In any case the time when the Supreme Court Rules and the law that repealed the same came into force has not been cited by the applicant.

That section 23(1) of the RTA (Cap 281) Laws of Kenya has no application because what is before the court is a contempt proceeding. The issue of ownership should await another day. In any case section 23(1) of the RTA (cap 281) Laws of Kenya gives the court special jurisdiction. The High Court is thus possessed of jurisdiction under order XXXVI Rule 1 as the applicant is a *cestui que trustee* in that he paid the purchase price of Sh. 10 million. Moreover the court has jurisdiction by virtue of section 77(8) of the Constitution of Kenya to deal with the contempt proceedings and section 5 of the Judicature Act. In this connection I was referred to ***HARDKINSON VS. HARDKINSON*** (C.A) Vol. 2567 for the proposition of law that a party who knows of the existence of an order whether regular or irregular is under a duty to obey the same. That an order requiring an act to be done can be enforced by contempt proceedings.

That notice was served on the Attorney General is unchallenged. The second defendant was properly served and hence leave was not required to amend the originating summons as pleadings had not been closed.

Last but not least that there is an affidavit of service sworn by Samson K. Kibenja on 22<sup>nd</sup> November 2006 which is proof of service of the originating summons, court order, and chamber summons, and certificate of urgency and amended originating summons.

I have carefully considered the application, the affidavits filed herein together with the annexures thereto. I have equally analysed and considered all the arguments of both counsel and the various authorities cited before me. I have taken everything into account.

In my view the most crucial issue in this application is whether the originating summons herein dated 17<sup>th</sup> November 2006 and the Notice of Motion it is based on respect of contempt application is competent. It is the axis upon which the whole application and the suit revolves.

Order XXXVI Rule 7 provides:

***“The originating summons shall be in form No. 13 or 13A of Appendix B with such variations as the circumstances may require, and shall be prepared by the applicant or his advocate and shall be filed in court, service where necessary shall be affected in accordance with order V”***

From No. 13 of appendix B provides for the entering of appearance to the originating summons. To my mind, the originating summons excluded by the said mandatory requirement are those under order XXXVI Rule 1 of the civil procedure rules or statutes such as the Advocates Act, the Chattels Transfer Act etc. ***See CHRISTINE NYAGITHA MILLER VS. G.S. SAGOO & 3 OTHERS H.C. MISC.CIVIL CASE NO. 695 OF 1989 (unreported)***

None-compliance with the mandatory provisions of order XXXVI Rule 7 renders the application a nullity ***See RE PRITCHARD (DECEASED) (1963) ALL ER PAGE 873 AT PAGE 883 WHERE LORD RUSSEL OR KILLOWEN*** held that where an originating summons has not been issued out of the central office as required by the R.S.C.54, Rule 4 R, which is couched in mandatory terms, the originating summons is a nullity. That omission is not a mere irregularity but a fundamental defect, which the defendant could not waive.

It is instructive to note that both Form 13 and 13A of appendix B require summons to be taken out and served in accordance with order V of the Civil Procedure Rules. Clearly, therefore, summons must issue and must be served. It cannot be a mere irregularity where that is not done. ***IN CRAIG VS. KANSTEN (1943)*** 1 KB at pages 262 their Lordships had this to say in similar circumstances.

***“The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion it is beyond question that failure to serve process where service of process is required, is a failure which gives to the root of our conception of the proper procedure in litigation. Apart from proper ex-parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is effected by a fundamental vice, is an argument which in my opinion, cannot be sustained.”***

I adopt those words of wisdom.

***Halsbury’s Law of England, volume 30 at paragraph 685*** has this to say on appearance in originating summons:

***“685: Appearance to originating summons: Except where appearance is not required, the parties***

***served with originating summons must enter appearance and give notice thereby”***

At foot-note K of paragraph 685 of the Halsbury’s Laws of England (supra):

***“Appearance is not required to the originating summons specified in RCS ordinance, 54 Rule 4F”***

The subject originating summons is taken under the provisions of Rules 3,4 and 5 of the Civil Procedure Rules. It reads:

***“Let Rimondi Gabriella of via Piero Haroncelli No. 2, Bolagnoi Italy and also of plot No. 10674/2 Malindi within 15 days of service of summons on her enter appearance to this summons which is issued on the application of Rodolfo Greechi who claims to be entitled a cestui qui trust to entered access into and egress from the matrimonial home of both plaintiff and defendant being the one half undivided portion of plot No. 106742/2 Malindi and which half portion is registered in the sole name of the defendant for the following declaratory orders.....”***

It is clear to me that the originating summons herein requires the entry of appearance within 15 days. Accordingly, the originating summons contemplated was that under Form No. 13 of 13A of Appendix B.

It is clear to me that the said originating summons was neither issued nor served in these proceedings.

In the foregoing circumstances the fact that the applicant did not take out the summons to enter appearance and equally failed to serve the same renders the whole proceedings a nullity. The application for contempt based on an originating summons which is a nullity is equally a nullity.

Accordingly I strike out the Notice of Motion dated 13<sup>th</sup> December 2006. It is a nullity in law.

**DATED and delivered at Malindi this 7<sup>th</sup> day of November 2007.**

**N. R. O. Ombija**

**JUDGE**

***Mrs. Mwadilo for Khaminwa } for plaintiff***

***Mr. Kamundi } for defendant.***