



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 17 of 2005

**JOSEPH PETER GICHOYA MBOGO C/O STEPHEN MACHARIA KIMANI
ADV.....PLAINTIFF**

VERSUS

1. PATRICK DENNIS OK'EEFFEE

**2. ADAM JAMES O'KEEFFEE.....
.....DEFENDANT**

RULING

On 25th April, 2005 the Court issued an injunction against the defendants restraining them from erecting or continuing to erect any structures on plot No. Kilifi/Jimba/397 pending the hearing and determination of the application.

This order was served upon the firm of Muli and Ole Kina Advocates for the defendants and also upon one George Masai, an employee or agent of the defendants. The defendants, it was alleged, despite the said injunction proceeded with the construction.

Consequently the plaintiff brought an application against the

defendants for contempt of court to which this ruling relates. The application was argued by learned counsel for the plaintiff who referred the court to two authorities, **Patrick Tutui and others V Mistry Jadra Perbat & Co. Ltd. and 2 others** – Msa HCCC. No. 268 of 1994 and **Maji Safi Women Group and Pricilla Mbondu V Miriam Wanjiku & Another**, Msa H Civil Misc.Appl.No. 660 of 2003.

In opposition to the application the defendant filed grounds of opposition and a Notice of Preliminary objection which was argued in the opposition to the application. Learned counsel for the defendants raised general procedural problems in the application of the law of contempt of court in this county. The solution to these problems as have been noted time without number will only be resolved with the enactment of appropriate law. For the time being courts have not endeavoured to forge a common approach to this problem, hence the confusion in the courts' decisions.

Responding specifically to the application learned counsel for the defendants argued that they were not in contempt of court as the order issued was in relation to Kilifi/Jimba/397. This according to the defendants is not the property they occupied, hence the plaintiff's subsequent application in which the plot was said to be Kilifi/Jimba/379.

Secondly, it was submitted that the restraining order was not served upon the defendants.

I have considered these arguments as well as authorities cited.

The jurisdiction to punish for contempt of court is donated to the Court of Appeal and the High Court by dint of Section 5 of the Judicature Act.

In punishing for contempt of court the two courts are enjoined to apply the law as is for the time being applied by the High Court of Justice in England. The procedure is therefore that prescribed under Order 52 of the Rules of the Supreme Court of England.

So, although contempt for disobedience of an injunction under Order 39 rule 2A(2) of the Civil Procedure Rules is specifically provided for, the procedure for punishment remain Order 52 of the Rules of the Supreme Court of England.

The instant application relates to an allegation that the defendants disobeyed orders issued under Order 39 of the Civil Procedure Rules. The restraining orders related to Kilifi/Jimba 397. This, it would appear was not the property the plaintiff intended to restrain the defendants from developing. I say so because subsequent upon obtaining the orders in question the plaintiff moved the court again to restrain the defendants from developing Kilifi/Jimba 379.

Contempt of court proceedings being *quasi*- criminal in nature requires higher standard of proof, as the liberty of a citizen is at stake.

In **Gatharia K. Mutitika and 2 others V Baharini Farm Ltd.** (1982-1988) KLR 863, the applicable standard was set as follows:

**“.....a standard which is higher than proof on
a balance of probabilities but not as high as proof
beyond all reasonable doubt”**

The burden, in the instant application, was upon the plaintiff to specify the property he intended the defendants to be restrained from developing. The plaintiff failed to discharge this burden.

Secondly, on the issue of service, the process server, Samson B. Kimbeja in his affidavit of service has outlined how he serve one Miss Jane Matara of Muli and Ole Kina Advocates before proceeding to serve one George Masai, described as a contractor. In other words, the defendants were not served with the restraining orders at all.

Order 52 rule 3 (3) of the Rules of the Supreme Court of England makes it mandatory that the Notice of Motion accompanied by a copy of the statement and affidavit in support of the application for leave **must be served personally** on the person sought to be committed. Service was not proper.

For all these reasons I am satisfied that contempt has not been proved against any of the defendants.

It follows that the motion filed by the plaintiff on 20th May, 2005 hereby dismissed with costs.

Dated and delivered on Malindi this 28th day of February, 2006.

W.OUKO

JUDGE

28.2.2006

Coram

W. Ouko, J

Mr.Ole Kina for the defendant.

N/a for Mr.Odongo

C.C. Mr. Matu

Ruling delivered.

W.OUKO

JUDGE