

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 30 of 2003

FRANSCIS G. WAHOME

ANNE G. WAHOMEPLAINTIFFS

VERSUS

MR. NG'ANGA also known as MATHAI NG'ANG'ADEFENDANT

RULING

By a summons dated 8th July 2003, John Kamau Ng'ang'a a.k.a Mathai Ng'ang'a, the defendant herein, sought to have the order issued on 1st July 2003 stayed and subsequently set aside. The summons is supported by the affidavit of John Kamau Ng'ang'a. When served with the application, Francis Wahome and Anne Wahome, the plaintiffs herein filed grounds of opposition and a notice of preliminary objection which are both dated 22nd July 2003 to oppose the summons. They also filed a replying affidavit sworn by Francis Wahome.

When the summons came up for interpartes hearing on 31.5.2006, the plaintiff sought to argue first, the Preliminary Objection, hence this ruling. It is the submission of Mr. Gakuo advocate for the plaintiffs that the defendant should not be heard first until he purges the contempt hence this application should be stayed. The plaintiffs' advocate pointed out that the defendant was served with a court order, which he has disobeyed. On his part Mr. Muinde advocate for the defendant urged this court to reject the preliminary objection because service of the orders complained is in dispute hence the plaintiffs should have his day in court.

I have considered the rivaling submissions presented by learned advocates appearing for the competing parties. The history of this matter started sometimes on the 13th day of February 2003 when the plaintiffs filed an action against the defendant. In that suit the plaintiffs sought for declaratory and injunctive orders against the defendant over Plot No. 1700 Section III M.N.

There is no dispute that the plaintiffs obtained exparte injunctive orders on 13th February 2003. The affidavit of service sworn on 15.2.2003 by Alfred Ouma indicates that the defendant was served with the following documents on 13.2.2003: summons to enter appearance, the plaint, the verifying affidavit and a summons dated 13.2.2003 plus a supporting affidavit and a court order. The defendant in his affidavit in support of the summons, the subject matter of this ruling, admits that his workers were served with a summons to enter appearance and the plaint when he was away in Nairobi. The averments contained in the affidavit of service of Alfred Ouma have not been controverted by the defendant. I take it to mean that actually he was served with the orders made on 13.2.2003 and confirmed on 21.3.2003 restraining him. It would appear the defendant breached the orders and that conduct prompted the plaintiffs to seek for contempt of court orders against the defendant. This obviously gave rise to the orders of 1st July 2003 in which the defendant was committed to civil jail for 6 months. It is the submission of the plaintiffs that the defendant has not purged the contempt of those orders hence he should not be heard.

The defendant is saying that he was not served. After a careful consideration of the matter, I have come to the conclusion that the material placed before this court clearly shows that the defendant was aware that orders were in existence by 13.2.2003. He admits that the pleadings were served upon his workmen. I am satisfied that though he does not expressly admit service of the orders issued on

13.2.2003 and confirmed on 21.3.2003 he was aware of the existence of the orders and he chose to ignore them. It is also his evidence that the defendant has not attempted to purge the orders but he has instead concerned himself with efforts to frustrate the effect of the orders.

The end result of this matter is that I am convinced that the preliminary objection is well founded. This court has the inherent power to prevent the abuse of its process by refusing to hear contemnors who have been proven to be so until and when such a person purges the contempt. Consequently it is hereby ruled that the summons dated shall not be heard hence stayed until the defendant has purged his contempt by complying with the orders issued on 21st March 2003.

Dated and delivered at Mombasa this 29th day of September, 2006.

J.K. SERGON

J U D G E