REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 34 of 2004

ZAKIUDDIN ANVERALI

MRS. JENNY HELKIERI…...……..PLAINTIFFS

VERSUS

RAJAB AUNI

HASSAN MWANIKI WAWERU…….DEFENDANTS

RULING

On 20th September, 2004, the applicants moved the Court by way of Chamber Summons seeking that the respondents be restrained by an order of injunction from erecting any structures or bringing construction material onto portion Nos.10833,10832 and 10831 pending the hearing of the application. The orders sought were granted an temporary basis pending the hearing of the application which was slated for 4th October, 2004.

On 10th February,2005 while the interim orders were still in force, the applicants brought an application seeking leave to cite the respondents for contempt of the Court's orders issued on 20th September, 2004.

The application for contempt was eventually filed on 1st March 2005. It seeks to commit the 1st, 2nd and 3rd respondents to civil jail for a period of 6 months for disobeying Court orders. The application is based on the grounds set out in the application itself and the first applicant's supporting affidavit.

It is alleged, in those grounds, that the respondents having been duly served with injunctive orders of the Court issued on 20th September 2004, continued to erect structures and to bring construction material on the suit premises, in disobedience of the aforesaid orders. That by so conducting themselves the respondents are in violation of the Court's authority, respect and reputation.

It is confirmed that the respondents were duly served with the orders in question and that as a result they have entered appearance. In their replying affidavit sworn by the 1st respondent on behalf of the other two respondents, it is averred that the respondents have not disobeyed any Court order. That the order they were served with was complied with. It is, however pointed out that Plot Nos. 10831, 10832 and 10833 are not known to the respondents who maintain that their activities have been confined to plot No.

10830 which was sub-divided into 58 portions and sold to members of Amani/Umoja Self Help Group through the firm of M/s A. Okuto & Co. Advocates. The three respondents are members of the self-help group. The 1st respondent acted as an agent in the sale of the portions. In his submissions, Mr.Okuto for the applicants argued that the respondents know the three plots in question. That having been served with a Court order restraining them from carrying out any development on land, they ought to have known the land in question or they ought to have made inquiries regarding the same.

According to counsel, the order which was served upon the respondent contained a clear penal notice. On their behalf Mr.Mouko submitted that the respondents cannot be cited and committed for contempt as there is confusion as to which plot the respondents are developing and which one they have been restrained from erecting structures on. A technical point was taken that the orders alleged to have been breached was not served on the three respondents; that the applicant has failed to show how, by who and when the contempt was committed.

I have considered these submissions. I have also read the only authority I was referred to by Mr.Okuto.

Reading past and most recent decisions on the subject of contempt of Court and the applicability of Section 5(1) of the Judicature Act and Order 39 Rule 2A(2) of the Civil Procedure Rules, leaves no doubt in my mind that these cases have not developed a common ground and a uniform approach on how to deal with such applications. Whereas all the cases I have read on this subject agree that contempt under Section 5(1) of the Judicature Act and Order 39 rule 2A (2), C.P.C. fall under the general power to punish for contempt and power to punish for contempt for disobedience or breach of an injunction respectively, there is no agreement as to the procedure to be followed in the latter case.

So that under Section 5 (1) of the Judicature Act, the High Court and the Court of Appeal are enjoined to exercise the same power to punish for contempt as those exercised by the High Court of Justice in England. Elaborate procedure is set out in Order 52 of the Rules of the Supreme Court of England. There is no similar provision for the application of contempt proceedings under Order 39 Rule 2A (2) of the C.P.C. Due to the absence of a clear procedure in this regards, Courts have tended to develop their own rules depending on which school of thought the presiding judge subscribes. The result is that some cases such as the often cited case of **Isaac J. Wanjohi & Isaiah Kirindi Wambugu Mutonyi V Rosaline Macharia**, H.C. Civil Case N0. 450 of 1995 (V.R), it was held that in cases of breach of orders of injunction order 39 rule 2A(2) CPR shall apply and no recourse shall be had to the Supreme Court Practice Rules in England, so that in such a case there will be no requirement to give notice to the Attorney-General; The applicant will also not be required to seek leave of the Court before instituting contempt proceedings.

On the other hand there are cases which have held that in both situations – under Section 5 of the Judicature Act and Order 39 the Courts must fall back to the Supreme Court Practice Rules in England for procedure.

See **Andalo and Another V James Gleen Russel Ltd** (1990) KLR 54. However these authorities are in agreement in one thing – namely – that there is need to stream line the law in this area. In particular,Mr.Justice Ojwang in a Ruling his Lordship delivered in January 2005 ordered specifically that:-

"**3. Through the Deputy Registrar, and with the approval of the His Lordship the Chief Justice, this ruling shall be availed to the office of the Honorable the Attorney General and that of the Chairman of the Kenya Law Reform Commission, to appraise them of the unsatisfactory state of the law relating contempt jurisdiction of the Courts in Kenya."**

For my part I will develop my position on the facts of this case. The application before me is brought under Section 3A of the C.P.A. (cannot be invoked where there are clear provisions), Order 4 rule 1 (the relevance is unclear as it deals with institution of suits by plaint),

Order 39 rule 2A(2) of the Civil Procedure Rules and Section 5 of the Judicature Act. Essentially the

application is brought under both Section 5 of the Judicature Act and Order 39 of the Civil Procedure Rules. My position is that this is not tenable. Different considerations apply depending under which provision the application is brought.

Power to punish for contempt of Court under Section 5 of the Judicature Act is independent of those under Order 39 rule 2a(2) of the C.P.R. In other words contempt in this context can be punished in two ways depending on whether the breach relates to disobedience of an injunction or any other breach not being an injunction.

The applicant by invoking the two provisions have ended up with a muddled application. There was no requirement to apply for leave before instituting the application. It was also not necessary to prove personal service (although in this case it was not a dispute) as the application is not based on Section 5 of the Judicature Act. It relates to a breach of an injunctive order.

It is common ground that a suit or application not commenced in the prescribed manner is incompetent. This application was improperly instituted and is therefore fatally defective.

That disposes of the application – but I wish, in case I have arrived at a wrong conclusion, to consider whether the applicant has shown that the respondents are in breach.

Contempt proceedings being quasi – criminal in nature required that the contempt be informed with sufficient particularity what exactly he is said to have done or omitted to do which constitutes a contempt of Court, for which he stands to be punished. It is like a charge in criminal trial where the person charged must be informed in a language understood by him all the particulars of the offence he has been charged with to enable him prepare his defence. However, unlike criminal trial, the standard of proof in contempt of Court Proceedings is to

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

See **Gatharia K. Mutitika & 2 others V. Baharini Farm Ltd (now called Nakuru House Development Co.Ltd.** (1982-1988)KLR 863.

The injunction issued on 20th September, 2004 restrained the respondent from doing certain acts on Plot Nos. 10831,10832 and 10833. The respondents have vehemently denied having done anything on the said three plots and that they have concentrated their activities on plot No. 10830.

In his supporting affidavit the 1st applicant has confirmed that the original plot which was sub-divided was N0. 307 Malindi in which his father was one of the owners. After sub-division he was allocated portion Nos.10831,10832 and 10833.

This is in sharp contrast with his assertion in his further affidavit filed on 18th April, 2005, in which he averred that plot No. 10830 was sub-divided into 10831, 10832 and 10833. There is a missing link. Who owns 10830? It runs in sequence with the other three plots. It was for the applicants to show beyond the balance of probabilities that the respondents' activities are on the three plots in contravention and disobedience of the Courts' orders.

This has not been shown. For this and other reasons in this ruling the Notice of Motion dated 18th February, 2005 is dismissed with costs.

Dated and delivered at Malindi this 21st day of July 2005.

W.OUKO

JUDGE

21.7.2005

Ruling delivered in the presence of Mr.Gekanana for Mr.Mouko.

Mr.Ole Kina for Mr.Okuto.

C.C. Matu

W.OUKO

JUDGE