

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION 145 OF 2002

DAVID KYULI KAINDI :::::::::::::::::::: APPLICANT

VERSUS

MASAKU COUNTY COUNCIL :::::::::::::::::::: RESPONDENT

RULING

By an application dated 12.9.2002 and filed in court on 16.9.2002 the plaintiff/applicant seeks orders that the court do grant him leave to bring contempt proceedings against the respondents and that the 1st and 2nd respondents be committed to civil jail for breach of court's order issued on 25.4.2002, extended by court on 28.5.2002 to 28.6.2002 and the further order made on 28.6.2002 or that the respondents property be attached for breach of court's order or disobedience of the same. The grounds upon which the application is brought are found on the face of the application. The application is supported by the affidavit of the applicant David Kyuli Kaindi and annexures thereto. The application was opposed and Bonface Wakiboi the County Clerk of the 1st Respondent swore an affidavit in opposition. The application was brought under 39 Rule 2A (2) Civil Procedure Rules, Section 3A Civil Procedure Act and Section 5(1) Judicature Act.

The applicant filed a suit against the respondents in S.P.M.C.C. 319/2002 Machakos seeking orders of injunction against the defendant and on 25.4.2003 the court granted an order that the defendant by themselves, their agents, servants and cronies be and are hereby restrained from entering, interfering, working on, constructing or allocating and alienating the plaintiff's plot Wamunyu No. 101 till the application is heard and determined. The application was later heard and the court extended the orders when as per order (JAM B') dated 12.9.2002 it was ordered that the injunction remain in place till the suit is heard and determined. The respondents do agree that the said orders were made by the court, they were served with them and that by this letter dated 30.4.2002 addressed to all allottees of Council stalls at Wamunyu Market and copied to the Chief Wamunyu Location, Area Councillor and Revenue Clerk, they advised them of the court order and penal notice. The letter is annexed as BMKI.

The applicant depones that he fenced his plot on 8.6.2002 with barbed wire and wooden posts but on the same day one Peter Mbunga who is a crony of the defendant cut the barbed wire with consent and authority of the 2nd defendant and entered the plot and carried away the posts and barbed wire. This, the defendants deny authoring the said Peter Mbunga. Apart from the allegation contained in the applicants affidavit that the said Peter Mbunga was allowed by the respondents to enter the said plot, the applicant has not demonstrated to court that indeed that authority was given or that the said Peter Mbunga was an agent, servant or crony of the defendants. Further at paragraph 10 of his affidavit the applicant contends that the respondents have instructed their employees, agents and allottees to enter the plot and construct structures. Again there is no evidence that such instructions have been given express or otherwise.

If indeed stalls have been constructed in the said plot the respondents must be aware of it but if they have brought the court order to the notice of the parties concerned that is what they should have done. I doubt that they would post their askaris to guard the land. If Peter Mbunga and others have trespassed on the said plot, the applicant should take the necessary steps to have them prosecuted in their individual capacities as there is no evidence that they are agents, servants or cronies of the respondents.

Accordingly I find no merit in this application. It is dismissed with costs to the respondents.

Dated, read and delivered at Machakos this 26th day of April, 2004.

R. V. WENDOH

JUDGE