



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 254 OF 2000

JOB KIPNANDI CHEBON.....PLAINTIFF

VERSUS

MAKANA TRANSPORTERS LIMITED.....1ST DEFENDANT

TRUST BANK LTD.....2ND DEFENDANT

GARAM INVESTMENTS.....3RD DEFENDANT

M. K. MWANGI & MARY WANGUI KIRUMBI

T/A FANITA COMMERCIAL AGENCIES.....4TH DEFENDANT

AND

GEOFFREY MAKANA ASANYO.....1ST THIRD PARTY

TABITHA MORAA ASANYO.....2ND THIRD PARTY

COMMISSIONER FOR LANDS.....3RD THIRD PARTY

RULING

By a Notice of Motion made under the provisions of **Section 3A Civil Procedure Act** the Plaintiff has moved this Court seeking the orders of this Court to direct the Officer Commanding Station, Nakuru to enforce the order issued on the 2nd of October 2003 by this Court. The Plaintiff has further sought that the maize crop cultivated by the 1st and 2nd Third parties in contempt of the Court orders of the 2nd October 2003 be surrendered to the state. The grounds in support of the application are that the police had declined to enforce the orders issued by the Court because they alleged that the said order was not directed at them. The Plaintiff further stated that the 1st and 2nd Third parties were in contempt of Court and violently resisted the implementation of the said Court order. The Application is supported by the annexed affidavit of John Kipnandi Chebon, the Plaintiff. The Application is opposed. The 1st and 2nd Third parties have filed grounds in opposition to the Application and also filed an affidavit in reply to the Application sworn by Geoffrey Makana Asanyo, the 1st Third party.

When this application came up for hearing, Mr Kiplenge, Learned Counsel submitted that by consent of the Plaintiff and the Defendants the Defendants and all other third parties were restrained from taking possession of the suit land and dealing in any way whatsoever with the suit land pending the hearing and determination of the suit. The Plaintiff submitted that in breach of the said Court order, the 1st and 2nd Third parties had entered the suit land, ploughed the same and planted crops thereon. The Plaintiff

submitted that his effort to have the police enforce the said order has been in vain as the police had declined to enforce the same. The Plaintiff submitted that the 1st and 2nd Third parties had sought to evade the Court process and be served with the order of the Court so as to frustrate the orders of the Court. The Plaintiff submitted that he should be put in possession of the suit land so that *status quo ante* may be restored. He prayed that his application be allowed.

Mr Kagethe, Learned Counsel for the 1st and the 2nd Third parties submitted that the Application filed by the Plaintiff was not maintainable in law. It was his submission that the Application had been filed under the wrong provisions of the law which could not avail the Plaintiff the orders that he seeking from the Court. Learned Counsel submitted that the Police did not have authority to deal with the enforcement of Civil Orders. Mr Kagethe further submitted that this Court did not have jurisdiction to grant the said orders sought. Learned Counsel submitted that the Plaintiff ought to have made the application under the provisions of **Order XXXIX Rule 2 or Order XXI Rule 28 of the Civil Procedure Rules** to enforce breach of the orders of the Court. Mr Kagethe further submitted that at the time the order was made, the 1st and 2nd Third parties were not parties to the suit. Learned Counsel submitted that the 1st and 2nd Third parties were joined to the suit on the 16th of November 2001 and therefore they could not be bound by orders issued against the Defendants in this case. The 1st and 2nd Third parties further submitted that they were not served with the orders of this Court. They further submitted that they could not have evaded service of the Court order because no evidence had been placed before the Court to prove that the 1st and 2nd Third parties had indeed been served with the orders of the Court or that they had evaded service.

In reply, Mr Kiplenge, Learned Counsel for the Plaintiff submitted that this Court should consider the conduct of the parties in this case and particularly the conduct of the 1st and 2nd Third parties. Learned Counsel urged this Court to uphold its dignity by enforcing its orders. Mr Kiplenge submitted that the Court must look beyond legal technicalities in order to enforce its orders and uphold the dignity of the Court. The Plaintiff submitted that the 1st Defendant Company was owned by the 1st and 2nd Third parties and therefore the veil of who the directors of the 1st Defendant Company should be lifted in order to enforce the orders of the Court. The Plaintiff submitted that he had brought his application before Court under the proper provisions of the law.

I have considered the rival arguments made by the Counsel for the Plaintiff and the Counsel for the 1st and 2nd Third parties. I have also read the pleadings filed in Court in respect of this application. The order that is said to have been breached was issued on the 20th of July 2000 by consent of the Plaintiff and the Defendants. The said consent order restrained the Defendants from taking possession of the suit land known as *Nakuru Municipality/Block 16/64* pending the hearing and determination of the suit. The Defendants were further restrained from transferring the said suit land or allowing third parties to trespass on the said parcel of land pending the hearing and determination of the suit filed by the Plaintiff. The 1st and 2nd Third parties were not parties to the suit at the time. The 1st and 2nd Third parties did not consent to the said order being entered against the Defendants. From the record of the proceedings of this Court, the 1st and 2nd Third parties were joined to this suit with the leave of the Court on the 16th of October 2000. The 1st and 2nd Third parties were therefore joined to this suit after the said consent order had been entered into.

The Plaintiff, in this application, now allege that the 1st and 2nd Third parties have breached the said order issued by this Court. The Plaintiff has not established that he served the 1st and 2nd Third parties with the order in question. No affidavit of service was filed in Court as proof that the 1st and 2nd Third parties were served with the said order. The Plaintiff has submitted that the 1st and 2nd Third parties have evaded service of the said order of the Court. There is no evidence before this Court that an attempt was made to serve the 1st and 2nd Third parties with the said order or that they thwarted or resisted service. The allegations made by the Plaintiff were made from the bar and no evidence whatsoever was put before the Court to support the submission by the Plaintiff to the effect that the 1st and 2nd Third parties had resisted service.

The Plaintiff has further submitted that the 1st and 2nd Third parties, being the owners of the 1st Defendant Company, should be presumed to have been aware of the Court order and further that they

participated in the consent that was entered in Court in respect of the application for injunction filed by the Plaintiff. The Plaintiff however has not put any evidence before this Court in his application to establish that the 1st and 2nd Third parties are the owners of the 1st Defendant Company. If that were the case, this Court would not have hesitated to find that the 1st and 2nd Third parties were aware of the said Court order. The Plaintiff has not proved that the 1st and 2nd Third parties were aware of the order of this Court that they are alleged to have breached. Neither did the Plaintiff prove that the 1st and 2nd Third parties were served with the said order. It is trite law that a party cannot be punished for contempt of Court unless it is proved that such a party was served with the order, warned of the penal consequences of disobeying such order and further that such a party had breached the said Court order. In the instant case, the Plaintiff has not established the three prerequisites that would enable this Court punish the 1st and 2nd Third parties for contempt of Court.

Finally, the Plaintiff brought this application under the wrong provisions of the law. The Plaintiff could only invoke the provisions of **Section 3A of the Civil Procedure Act** where no specific provision of the law. The Plaintiff alleged that the 1st and 2nd Third parties breached an order of injunction issued by this Court. The Plaintiff therefore ought to have brought an application under the provisions of **Order XXXIX Rule 2 A(2) and (3) of the Civil Procedure Rules**. This Court cannot ignore the blatant breach of procedure by the Plaintiff even if it is to uphold the higher ideal of upholding the dignity of the Court. In the premises therefore and for the reasons stated above, the Plaintiff's application lacks merit. The same is dismissed with costs to the 1st and 2nd Third parties.

DATED at NAKURU this 9th day of November 2004.

L. KIMARU

AG. JUDGE