



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CIVIL NO. 108 OF 2009**

**MARGARET ELIZABETH LAWRENCE..... PLAINTIFF**

**VERSUS**

**JUMA KITI KASHERO .....DEFENDANT**

**RULING**

The plaintiff's Notice of Motion filed on 26<sup>th</sup> September, 2011 is brought to enforce the orders of this court issued against the defendant, in the first instance on 8<sup>th</sup> July, 2011 and subsequently extended on 20<sup>th</sup> July, 2011 and 14<sup>th</sup> September, 2011.

The relevant part of this order was in the following terms:

3. THAT temporary injunction is hereby issued that the motor vehicle registration number KBF 741E now lying at the Malindi Police Station be determined and the defendant/respondent be restrained by himself, his agents, servants and/or representatives from selling, leasing, disposing or in any manner dealing with the suit motor vehicle pending inter partes hearing.

The plaintiff's complaint is that in violation the said order which was served upon him, the defendant, her former lower, has proceeded to lease and collect rent from the properties which are the subject matter of the order.

The defendant did not put in a replying affidavit but has filed grounds of opposition and submissions. The defendant raises a two-pronged response.

1. The material orders were not served on the defendant.
2. There is no evidence that the defendant has leased the premises.

Having carefully considered the entire record of this matter as well as material placed before me in respect of the present application, I take the following view.

The affidavit of service sworn by the process server, Samson Kimbeja on 19<sup>th</sup> July, 2011 and filed in court on 20<sup>th</sup> July, 2011 (annexture MEL3 to present application) clearly shows that the defendant was served not only with the plaint and summons to enter appearance, but also with the order issued by the court on 8<sup>th</sup> July, 2011. The service was effected on 15<sup>th</sup> July, 2011. The defendant has not filed an affidavit to dispute this service.

I am satisfied that the defendant was personally served with the court order of 8<sup>th</sup> July, 2011.

It is the contention by the plaintiff, supported by annexures MEL4 that the disputed premises are being leased out to third parties by the defendant.

Again the defendant has not filed a replying affidavit to controvert the plaintiff's depositions and annexure evidence. It is not enough to merely demand that the plaintiff furnishes proof; which in my view has been satisfied. He should specifically respond to the statements, if indeed it was his intention to dispute them. I am convinced that the disputed premises are being used by third parties, most likely with the authority of the defendant, who has counterclaimed for the same. Such usage is detrimental to the interests of the plaintiff who has laid a claim to the same. In **MITITIKA V BAHARINI FARM LTD [1985] KLR** the court stated inter alia:

***“A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such person has by his conduct obstructed justice.”***

The circumstances giving rise to this case are unique even though not strange in this part of the republic. The plaintiff, a foreign national allegedly became romantically involved with a young local man, the defendant in 2007-8. It is the plaintiff's case that she wired to the defendant large sums of money to purchase property in Malindi, on her behalf. The eventual intention, at least on the part of the plaintiff was to settle down in a marriage with the defendant. The plaintiff now complains that soon after the properties were purchased the defendant attempted to shake her off, claiming that his family was against their intended marriage and would kill her if she returned to Kenya. The plaintiff did return and brought this suit as a way of laying claim to the disputed properties, which she maintains were purchased with her funds. To date, the defendant has not filed a replying affidavit to the initial applications, which is yet to be heard *inter partes*.

The standard of proof required in proceedings for contempt of court is higher than a balance of probabilities (see **Mutitika's Case**). That is because the punishment prescribed in respect of contempt of court under Order 40 rule 3 of the Civil Procedure Code touches upon the liberty and property of the contemnor. In the present case however, the suit property is claimed by the plaintiff by virtue of raising the purchase price. I think that while this may not be an appropriate situation to order the imprisonment of the alleged contemnor, it is clear that the defendant has shown little regard of this court's order.

I do therefore find it meted and just to order the attachment of the property which forms the subject matter of Order No. 3 of the orders issued on 8<sup>th</sup> July, 2011, pending *inter partes* hearing of the application filed on 8<sup>th</sup> July, 2011.

Costs will be in the cause.

Delivered and signed on this 2<sup>nd</sup> day of **March, 2012** at Malindi in the presence:

**C. W. Meoli**  
**JUDGE**