REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 450 OF 1995

ISAAC J. WANJOHI & ANOTHER.....PLAINTIFF

versus

ROSALINE MACHARIA.....DEFENDANT

R U L I N G

This is an application by the plaintiffs by way of Chamber Summons under order 39 2(3) of the Civil Procedure Rules seeking orders that the defendant, her servants and agents be detained in prison for a period of six months for disobedience of the order of this court made on 24th July, 1995; that the defendant do demolish or cause to be demolished all construction work undertaken on the plaintiffs' plot in disobedience or breach of the said order and that the defendants property and property belonging to or comprising the City Cabanas Hotel, Nairobi adjacent to the plaintiffs' plot be attached and in default of compliance with the said order within such a period as this court may fix, be sold and proceeds thereof be applied to defray the loss or damage resulting from her disobedience of the order.

The application is supported by an affidavit sworn by one Isaac Wanjohi annexed thereto. The same is opposed and grounds of opposition and a replying affidavit have been filed. Both learned counsel have also addressed the court on the application.

I propose to first address ground No.4 of the grounds of opposition wherein the application is said to have not complied with the mandatory provisions of order 50 Rule 7 of the Civil procedure Rules. The learned counsel for the defendant cited C.A. NO 211 of 1996 National Bank of Kenya Limited -v- Ndungu Njau and Misc. Civil Application No. NAI 142 of 1997 Pelican Engineering & Construction Company Limited -v- Nairobi Golf Hotels (Kenya) Limited.

It is true that in both cases the court held that the application is required to set out in general the grounds upon which it is based. The omission so to do is fatal. Nevertheless, in the broad interest of justice the court in the National Bank case allowed counsel to argue the application while in the Pelican case the learned Judge implied that if the grounds can be found by cross-reference to the affidavit in support of the application then the applicant may not be locked out of the court. Applying the same approach, I find that the application is properly before the court to be decided on merits.

On 24th July, 1995, Bosire J. (as he then was) issued an injunction order against the defendant restraining her from being or remaining on the plot known as L.R. 209/12052, Nairobi, and from undertaking any construction, erection of any structures or other work of whatever nature in the said plot until the determination of this suit or further orders of this court. There was another order which does not concern us in this present application.

The defendant was then said to have breached the said court order whereupon the plaintiffs commenced contempt proceedings. In his ruling delivered on 19th March, 1996, Bosire J. (as he then was) dismissed the application with no order as to costs. I observe at this stage that there was no appeal

from that ruling or any application to review the same.

In the present application, the plaintiffs say, the defendant being fully aware of the terms of the order of injunction made on 24th July, 1995 and the subsequent ruling delivered on 19th march, 1996 where the court found the defendant to be in flagrant disobedience or breach of the said court order but declined to commit her to prison on the ground of procedural defect of the plaintiff's application for committal, she has continued in her wilful disobedience of the said order culminating in the commencement of excavation works on the plaintiffs property on 6th April, 1998.

I have entertained some doubt if this latest acts of alleged disobedience can be founded on the original order, though still subsisting, because the move to commit the defendant then, was dismissed by the learned judge. The present application is not for review but a fresh application and so the motions of procedure have to be addressed afresh.

Section 5 of the Judicature act Cap. 8 Laws of Kenya provides:

> ***"5 (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High court of Justice in England, and the power shall extend to upholding the authority and dignity of subordinate courts"***

In the present application the plaintiffs moved the court under Order 59 Rule 2(3) which provides:

> ***" O 39 R 2(3). In cases of obedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."***

As we have to follow the procedure and practice in England, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. - See C.A. No. 36 of 1989 Jacob Zedekiah Ochino & Another -v- George A. Okembo & Others.

In Civil appeal NO. 95 of 1988 Mwangi Wangondu -v- Nairobi City Commission. the court of Appeal pointed out:

> ***" This requirement is important, because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt"***

See also Civil Application No. NAI 264 of 1993 - Nyamodi Ochieng - Nyamogo and Another -v- K. P. & T. Corporation.

In ve Bramblevale Ltd (1970) Ch. 128 Lord Dening M.R. said at p.137 (A):-

> ***"A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt....."***

I have related the foregoing principles of law to the material before me. With respect, there is not on record any averment by way of affidavit or otherwise that the defendant was personally served with the order and penal notice endorsed thereon. It is not enough to say the defendant was aware of it. If such an

averment leads to deprivation of personal liberty by imprisonment or attachment of property then that is an obvious miscarriage of justice. This alone is enough to dispose of this application. But there is more.

By the time the present complaint was raised by the plaintiffs, a lot of water had passed under the bridge. The order made by Bosire J. (as he then was) was before the defendant had filed a defence. Indeed, I am told from the bar, that even summons to enter appearance had not been served. The defendant has since filed a defence and raised a counterclaim. She has stated that she is the owner of plot NO. L.R. No. 209/11293/1 while plot NO. L.R. 209/12502 claimed by the plaintiffs was created on a road reserve thereby denying her the privilege of enjoying the frontage to Mombasa Road.

In her said defence and counterclaim she is challenging the creation of the plot L.R. NO. 209/12502 in a Road/Reserve/buffer Zone. She has applied to join the Commissioner of Lands as a party to this suit and that application is still pending for hearing. Above all, and quite instructive, after the ruling of Bosire J. (as he then was) the defendant says, the commissioner of Lands entered into negotiations with the parties and allocated the plaintiffs an alternative piece of land.

The defendant has annexed the correspondence and the relevant documents. It is significant to note that the plaintiffs have not denied neither have they disclosed this in the present application.

These are material facts which the plaintiffs ought to have disclosed. That they did not, makes me believe that there is more to this matter than meets the eye. And so, how can the court grant the orders sought in a case where the Commissioner of Lands himself says the allocation of the land claimed by the plaintiffs was a mistake?

Some of the prayers in the defendant's defence and counterclaim are that a declaration be made that the creation of L.R. 209/12/052 by the Commissioner of Lands was irregular and illegal and an order that the plaintiffs do deliver up the Title of L.R. No. 209/12052 to the Registrar of Lands for cancellation.

If committal and attachment orders were to be made at this stage and the defendant succeeds in obtaining the orders sought, the damage would be irreversible.

In the end, I find that the plaintiff's application lacks juridical basis and is unmeritorious. Accordingly the same is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 14th day of July, 1998

A. MBOGHOLI MSAGHA

JUDGE

Mrs Okata for Muthoga for applicant

Mrs Opati for the defendant/respondent