



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
MISC. APPLICATION NO. 228 OF 2015
(FORMERLY NO. 36 OF 2015)

1. LAELI KAVEMBA
2. PETER KAVEMBA
3. JOSEPH KAVEMBA.....APPLICANTS

-VERSUS-

SAID SULEIMAN.....RESPONDENT

RULING

1. The plaintiffs who are the applicants in the application notice dated 11th September 2015 moved this Court under the provisions of Section 5 of the Judicature Act Cap 8 of the Laws of Kenya. They are seeking for an order that:

- 1. The Respondent Said Suleiman be committed to prison for a maximum period of 6 months for contempt of Court Order issued on the 9th June 2014 and extended by the Court until confirmed on 16th July 2015 in Civil Case No. CMCC No. 1046 of 2014.**
- 2. That the respondent SAID SULEIMAN personal property be attached and sequestered for contempt of a Court Order and further orders be made against the said respondent to deposit the sum of Kshs. TEN MILLION (10,000,000/-) being the value of the subject plot in the suit and now alienated by constructing thereon.**
- 3. That the costs of these contempt proceedings be borne by the respondent.**

2. The application notice is supported by the five grounds listed on its face and also the affidavit of Peter Makau Kavemba. The orders complained to have been disobeyed were issued by Honourable Gacheru SRM on 9th June 2014. The orders were also issued pursuant to the provisions of Order 40 rule 1 & 2 of the Civil Procedure Rules. It read thus, *“That the defendant by himself, his servants, agents and or assignees be restrained by an order of injunction from constructing, trespassing or in any way interfering with plot No. Mombasa/Block XIII/484 Mwangeka road original number sub-plot 32 of plot No 12 Section XIII Mombasa till the application is heard inter parties.”*

3. The applicants depose that the orders had been extended until 16th July 2015 before the same were

confirmed by the Court till the suit is heard and determined. The applicants depose further that inspite of existence of the injunctive orders which was duly served the Respondent proceeded step by step to construct a 4 – storeyed building on the suit plot. They annexed photographs of the impugned buildings.

4. The application is opposed by the Respondent vide a replying affidavit dated 1st October 2015. The Respondent denied he is the one building instead alleging it is one Hamza Mohamed Modhar. That he disclosed this information to the applicants vide his defence which he annexed to the replying affidavit. He also deposed that it is the said Hamza Mohamed Modhar who is the registered owner of the suit property although he was not enjoined in the suit at the commencement of those proceedings. The Respondent raised several pertinent issues inter alia existence of several pending applications which this Court may not be able to verify unless the lower Court file was made available. Further the original pleadings in the application from which the order was made was also not annexed. This Court is therefore unable to glean the description given of the suit property in the supporting affidavit when the application was made and initial orders given.

5. In view of the above observations, I take the humble view that I would not do injustice if I were to determine the merits or otherwise based on incomplete details presented to this Court. Under Order 40 rule 3 (1) of the Civil Procedure Act, it provides that, ***“In cases of disobedience or of breach of any such terms, the Court granting the injunction may order the property of the person guilty of such disobedience or breach to be attached or may also order such person to be detained in prison for a term not exceeding six months...”***. This order gives the Court which issued the order powers to punish for contempt where breach is proved.

6. In the case of **Ramadhan Salim vs Evans M. Maabi T/A Murphy Auctioneers Civ app No 69 of 2015 (2016) eKLR**, the Court of Appeal while appreciating the law that Section 5 (1) of the Judicature Act gave the High Court and Court of Appeal similar powers to punish for contempt of Court which powers extend to the contempt committed in the Subordinate Court. The same Court noted however that Section 10 of the Magistrate’s Court Act 2015 which became operational on 2nd January 2016 now gives the Magistrate’s Court unlimited jurisdiction to punish for contempt. Section 10 (3) provides thus: ***“Subject to the provisions of any other law, the Court shall have power to punish for contempt in cases of civil proceedings, the willful disobedience of any decree, judgement or order or other process of the Court or willful breach of an undertaking given to a Court constitutes contempt of Court.”***

7. Section 6 (c) of the new Contempt of Court Act No 46 of 2016 also bestows powers on the Magistrate’s Court to punish for contempt of its orders. Consequently in light of the above provisions of the law stated and the lower Court file not having been transferred to this Court, I decline to hear this application on its merits. Instead I return it to be heard and determined by the Court currently seized of handling MSA CMCCC No 1046 of 2014. It is so ordered.

Dated, signed and delivered at Mombasa this 26th day of July 2017

A. OMOLLO

JUDGE