



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC CIVIL APP NO. 10 OF 2013

GULAM RUSAL MIRDAT.....1ST APPLICANT

KAMALKHAN HASSANRAZA NAWAZKAN.....2ND APPLICANT

=VERSUS=

SAID KHAMISI SAID.....RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Applicant's Application dated 24th January 2014 seeking for the following orders.
 - (a) **THAT the Respondent namely SAID KHAMISI SAID be cited for contempt and be detained in prison for a term of six months for disobeying and/or being in flagrant breach of the orders of the Honourable Court issued on 9th day of March, 2012 by the Senior Resident Magistrate Court Kilifi in SRMCCC No. 235 of 2011.**
 - (b) **The costs of this Application be paid by the said contemnor.**
2. The Application is premised on the ground that on 7th August, 2012, the 1st Respondent, in total disobedience of the order of the court in Kilifi SRMCC No. 235 of 2011 moved to the suit property being plot number 7 group V and advertised it for sale and further gave his phone as 0723-23761 being the contact person.
3. It is the Applicant's case that in further complete disobedience of the court order, the 1st Respondent colluded with his mother to dispose of the suit property to a third party; that the Respondent was served with the injunctive orders on 9th September 2011 and that in disregard of the court order, the Respondent colluded with his mother who executed a sale agreement and purportedly disposed of the suit property.
4. The Respondent's sister was served with the Application on 19th March 2014. The Respondent did not file any response to the Application.
5. In view of the serious implications of the orders being sought by the Applicant, the Respondent in this matter should have been personally served with the Application. I am not convinced that the process server made a reasonable number of attempts to serve the Respondent as required by Order 5 Rule 12 of the Civil Procedure Rules and the service of the Application on the

- Respondents' sister was improper in the circumstances of this case.
6. In any event, the order that the Respondent is said to have disobeyed was issued by the magistrate in Kilifi SRMCC No. 235 of 2011. The Application that gave rise to the said orders in the lower court was filed pursuant to the Provisions of Order 40 Rules 2, 3 and 4 of the Civil Procedure Rules.
 7. Where an injunction is granted by the court under Order 40 Rules 1 and 2 of the Civil Procedure Rules, and the same is disobeyed, the court which granted the order may commit the Respondent to jail for a period not exceeding six months for the disobedience.
 8. The punishment for a party disobeying an injunctive order is meted out pursuant to the provisions of Order 40 Rule 3(1) of the Civil Procedure Rules and not section 5(1) of the Judicature Act. It is the trial court that is supposed to enforce injunctive orders issued under the Civil Procedure Rules.
 9. If the lower court issues an injunction order pursuant to Order 40 of the Civil Procedure Rules, the law provides that it is the same court that should enforce such an order by punishing whoever disobeys it. Such an Application cannot be filed in the High Court as in this case.
 10. A distinction has to be made by litigants and advocates in respect to injunctive orders made under the Civil Procedure Rules and the other orders of the court. Other than the orders issued under Order 40 Rule 1 and 2 of the Civil Procedure Rules, it is only the High Court (and this court) that can entertain an Application for contempt if the orders are disobeyed.
 11. However, the lower court, being the trial court, has the jurisdiction to commit a contemnor to jail or attachment of his property if the contemnor disobeys an injunctive order issued under Order 40 Rule 1 and 2 of the Civil Procedure Rules. The current Application should have been filed in Kilifi SRMCC No. 235 of 2011 and not in this court.
 12. In the circumstances, the Application dated 24th January, 2014 is not properly before this court and the same is struck out with no orders as to costs.

Dated and delivered in Malindi this **10th** day of **October**, 2014.

O. A. Angote

Judge