



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 13 OF 2002

YUSSUF MOHAMED SALAT.....APPLICANT

-VERSUS

IDRIS ALI AHMED.....RESPONDENT

R U L I N G

The subject matter of this ruling is a Notice of Motion dated 19th December 2002 which was filed pursuant to leave granted on 17th December 2002 by this court. The Notice of Motion is brought under Order L rule 1 of the Civil Procedure Rules and Order 52 rule 3 of the Supreme Court Practice Rules and section 5 of the Judicature Act Chapter 8 of the Laws of Kenya.

The Motion sought for an order to commit Idris Ali Ahmed the respondent herein to civil jail for contempt of court for disobeying the order made by this court on 11th July 2002. The application sets out the grounds in which it is brought. The applicant has sworn the Supporting Affidavit.

Before considering the arguments put up by the Advocates, it is important to state the brief facts of this case. By a plaint dated 9th January 2002 and filed before the Senior Resident Magistrate's Court at Garissa, the Respondent sued the applicant and sought for a declaratory order to declare him as the lawful owner of plot No.9 Masalani and secondly for an order of injunction restraining the applicant from trespassing or interfering with the Respondent's lawful ownership and enjoyment of plot number 9 Masalani. The suit was fixed for hearing on 13.2.2002 when the same proceeded for hearing *ex parte* in the absence of the applicant and all the prayers sought in the plaint dated 9th January 2002 were granted by a judgment delivered on 27th March 2002. Being aggrieved by this judgment the applicant filed an application by way of a Chamber Summons dated 9th May 2002 before the Garissa Senior Resident Magistrate's Court and prayed for an order of Review and stay of execution of the judgment therein. This application was dismissed on 29th May 2002 and consequently the applicant appealed culminating to the existence of this appeal. The appellant then filed another Chamber Summons application dated 28th June 2002 and pleaded for an order of stay of execution of the judgment pending the hearing and determination of this appeal. Both the appellant and the Respondent appeared before the Honourable Mr. Justice D.A. Onyancha at Mombasa High Court on 11th July 2002 where an order of stay of execution of the judgment was granted upon the applicant's request with the respondent's approval. It is this order which is alleged to have been breached by the Respondent that gave rise to the current Notice of Motion. It is also imperative to note that the parties appeared in person before the trial court at Garissa and even in the High Court, Mombasa, on 11.7.2002. The appellant appointed the firm

of Mouko & Co. Advocates on the 15th day of July 2002 and the Respondent instructed the firm of Lughanje & Co. Advocates on 27th February, 2003.

It is the submission of the appellant's advocate that the respondent was served with the court orders granted on 11.7.2002 and that service was effected upon him on 30th September 2002. A copy of the Affidavit of service sworn by one Mohammed Dakota Kote sworn on 30th September 2003 was exhibit to prove that personal service took place. The Respondent admitted receiving the order in paragraphs 5 and 6 of his replying affidavit sworn on 6th February 2003. However the Respondent denied that he was served by a process server but admits he was served by a Police Constable at Masalani Police Post. The Respondent further admits also that he was present in court on 11.7.2002 when the orders of stay of execution were granted with his approval. The Respondent's excuse is that he did not understand the contents or meaning of the orders and that he is illiterate. The orders of 11.7.2002 are reproduced as follows:

ORDER

“ (on 11th July 2002, before D. Onyancha, J. at Mombasa, under Section 3A of the Civil Procedure Act and XXI rule 25 and XLI 4(2) of the Civil Procedure Rules).

UPON an application presented before this court on 26.6.2002, and **UPON** reading the Supporting Affidavit in support thereof and upon hearing the applicant in the presence of the Respondent who does not object to the application. **IT IS HEREBY ORDERED THAT:-**

(a) There be a stay of execution in S.R.M.C.C. No. 16 of 2002 in respect of the judgment by Honorable MURIUKI MUGO D.M. II Professional, until the hearing and determination of the Appeal herein.

(b) Costs be in the cause.

Dated this 11th day of July, 2002. “

It would appear this was he extracted version which was served upon the Respondent on the 30th September 2002. It is also further submitted by the appellant's Counsel that the Respondent demolished the appellant's house in the suit premises on the 21st day of October 2002 and thereafter proceeded to lease the suit premises to other third parties who put up other structures on the plot in dispute. It is also alleged by the appellant that the Respondent intends to dispose of the plot in dispute to innocent unsuspecting third parties. The Respondent's response to these allegations were general denials save for the fact that the respondent admitted at paragraph at 8 of his replying affidavit of having demolished the appellant's building on the suit premise. Paragraph 8 of the Respondent's affidavit reads:-

“That I cleared the hut that was standing on the plot but I have kept the iron sheets and the timber in a safe place for the Respondent.”

The Respondent to me seems to be taking advantage and cover on the allegation that he is 'illiterate' and therefore should be excused for any wrong doing. This sort of excuse or defence can be equated to a situation where a litigant pleads ignorance which obviously is not a defence in law. The litigants appeared in person in the High Court on 11.7.2002 when the orders the subject matter of this Notice of Motion were made. There is no indication both in the lower court and the High court files that a different language was used other than English. The Respondent filed his pleadings which were drawn in English language and duly signed by him. There is no evidence that the respondent thumb printed his signature as commonly done by illiterate litigants. I am not convinced that the respondent is illiterate. Nowhere has the respondent sought for any assistance to interpret the court orders. I am also convinced that the respondent was properly served with the court orders of 11.7.2002 and it is not just enough for a litigant to come to court and state that he did not understand the import and meaning of the court orders. These orders were clear and plain. The circumstances of this case and the conduct of the respondent betray and destroy the defence put up by the respondent.

Before making my decision it is important to state the nature of the judgment that was stayed. The Judgment of 27.3.2002 was in favour of the plaintiff, now respondent in terms of the plaint dated 9th January 2002, however the decree has not been drawn and extracted. The plaint dated 9th January 2002 had three prayers which were granted that is:-

- (a) A declaration that the plaintiff (now respondent) is the lawful owner of plot No. 9 Masalani.**
- (b) An order of injunction restraining the Defendant (now appellant) from interfering/trespassing, occupying or in any way interfering with the plaintiff's (now respondent's) lawful ownership and or enjoyment of plot No. 9 Masalani.**
- (c) Costs of the suit be born by the Defendant (now appellant)."**

Essentially these were the orders that were stayed. There is no allegation by the appellant that he was prevented from entering the suit premises. However the appellant's main complaint is that the respondent demolished his house and in away evicted him from the suit premises. It should be noted that there were no orders prayed for nor granted by the lower court to the respondent to evict the appellant or to demolish or remove the appellant's structures or houses in the suit premises. The respondent's action were acts which were not sanctioned by law. The only remaining question is; was the respondent in contempt of court" What I can say is that the respondent acted outside the law. He evicted the appellant without a lawful order, this did not render the respondent liable to be dealt with as for contempt. The appellant should seek for other remedies against the Respondent's flagrant breach of the law. In the circumstances therefore I

find that the Respondent has acted outside what was awarded in the judgment of 27.3.2002, the subject of this appeal, hence the ingredients necessary for a litigant or party to be cited for contempt have not been proved. Consequently for the above reasons the Notice of motion dated 17th December 2002 is ordered dismissed with costs to the respondent.

Read and delivered this 27th day of June, 2003.

J.K. SERGON

J U D G E

Read and delivered this 27th day of June 2003 in the presence of Mr. Gunga Holding brief for Mr. Lughanje for Respondent in the absence of Mr. Mouko for the applicant.

J.K. SERGON

J U D G E

27/6/2003:

COURT:

This is a Malindi file. It should be send back to Malindi. The Deputy Registrar is directed to do so.

J.K. SERGON

J U D G E



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