



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KWALE
ELC CIVIL SUIT NO. 88 OF 2014

ANGLICAN CHURCH OF KENYA.....PLAINTIFF

-VERSUS-

SAMUEL JINDWA.....DEFENDANT

RULING

1. The plaintiff's application for determination is dated 13.4.15 which seeks to commit the defendant/Applicant to civil jail for disobedience of a Court order. The motion is based on 9 grounds on the face of it and the affidavits of Joseph Kombo and Terrence Omondi.
2. The Applicant pleads that the Court granted temporary orders of injunction on 24.4.2014. This order was extracted and duly served on the defendant. The defendant in breach has continued to trespass, cultivate and interfere with the plaintiff's school erected upon the suit property. He urged the Court to commit the defendant to civil jail to protect the dignity and honour of this Court.
3. The defendants seemed not to have filed any documents to oppose the motion. Besides the submissions filed, there is no evidence of replying affidavit or grounds of opposition filed. I will therefore determine the motion on its merits and consider the defendant's submissions.
4. The Applicant submits that Order 40 Rule 3 (1) sets out the procedure in case of disobedience of a temporary injunction. The Applicant stated that in compliance with this procedure, the Respondent was served on 29th April 2014 personally at his residence. The defendant thus became aware of the existence and contents of the order. Further that the order contained a penalty clause. They submitted that they have discharged the burden of proof and urged the Court to commit the defendant/Respondent to civil jail.
5. The defendant on his part submitted that the order annexed refers to land parcel No 205/1984 while the affidavit of service refers to an order in respect of L. R NO 205 A/1894. In the defendant's view, these are two different parcels. The defendant submitted that the Applicant pleaded in the plaint proprietorship in respect of No Mombasa/Block/205/1984. Accordingly the defendant submits the order does not refer to the land on which the defendant lives.
6. all there were any valid orders issued on 24th April 2014. He submits that a single photograph does not prove that it is the defendant standing on the suit land or that he is not lawfully standing on his own piece of land.

7. In evaluating the submissions, there seems to be no dispute as regards service of the order. The question is whether there was a valid order served and if there has been evidence of proof on breach. In the application for injunction upon which the orders of injunction was issued exparte, the land parcel in question is indicated as L. R No 205/1984. The copy of the Order in the Court file and the one annexed as served both issued on 29th April 2014 also refers to the land L. R No 205/1984. It has a penal notice on the face of it.

8. The application for contempt refers to parcel No 205 A/1894 on the grounds which supported the application. Similarly the affidavit in support of the motion deposes about land parcel No 205 A/1894 as the suit property. There is something amiss in the pleadings seeking contempt orders as the land reference number quoted does not match the one contained in the order.

9. The defendant/Respondent submitted that the deed is founded on No 205 A/1894 which is a separate and distinct parcel from L. R No 205/1984. This is a fact which cannot be disputed from the pleadings on record. It is therefore difficult to tell whether the Plaintiff/Applicant wants the Respondent punished for disobeying orders in respect of L. R No 205/1984 of which there is no application before Court or for disobeying orders in respect of L. R No 205 A/1894 of which there were no orders issued.

10. Proof of contempt orders must be done on the standard close to standards of proof beyond reasonable doubt because it borders on criminal proceedings. In instances where there is doubt, such doubt would be decided in favour of the alleged contemnor who in this case is the Respondent.

11. In **Mwangi Wangonde vs Nairobi City Commission, Civil Appeal No 95 of 1998**, the applicant quoted the statement by the Court “..... the Court will only punish for 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 the breach of the injunction has been proved beyond reasonable doubt. In paragraph 6 of the supporting affidavit, Mr Joseph Kombo deposed “That in breach of and in complete disregard of the said order of this honourable Court, the defendant has continued to trespass, cultivate and interfere with the plaintiff's school erected upon the suit property L. R No 205 A/1894 as per photos annexed a J – 3 photos showing the defendant's continued activities on the suit property”.

12. Annexure J – 3 is in black and white copy of a photograph of a man standing holding a jembe. The photo does not indicate who the man in the photograph is and when the photo was taken. It is difficult to tell from the color of the annexure whether there is any fresh cultivation on- going on the land. I am therefore not satisfied that there is proof of the breach of the injunctive orders.

13. Consequently on the basis that there is confusion on the parcel of number referred to in the application and in the order plus the absence of proof of disobedience of the “Order”, I find no merit in the motion dated 13.4.2015. The same is hereby dismissed with costs to the Defendant/Respondent.

14. The land in Dispute is located in Kaloleni which falls within the jurisdiction of Kilifi County. This Court suo moto transmits this file to Malindi Environment and Land Court for hearing and determination.

Ruling dated and delivered at Mombasa on this 11th day of March 2016.

A. OMOLLO

JUDGE