



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 196 OF 2015

1. CAMPUS CITY LIMITED

2. DAVID SLATER

3. CHRIS GONTIER

4. ANTHONY HEWITT-STUBBS & 45 OTHERS.....PLAINTIFFS

=VERSUS=

1. GABRIEL BARAKA THOYA

2. JOHN MUTAZA

3. JOEL KAZUNGU YAA MANGI

4. NAYENI MIBUYUNI SQUATTERS.....DEFENDANTS

R U L I N G

Introduction:

1. On 23rd February, 2016, this court allowed the Plaintiffs' Application dated 28th October, 2015 by the consent of the parties.

2. In the said Application, the court restrained the Defendants, its agents, employees, or servants from interfering with the quiet enjoyment of the various subdivisions within L.R. No.1705/233 (CR.27007) situated within Kilifi County, Mbuyuni Bofa area pending the hearing of the suit.

3. The OCPD, Kilifi Police Division was required to provide the security to oversee the peace and security of all the Plaintiffs

4. The Plaintiffs have now filed an Application dated 11th April, 2016 in which they are seeking for the following orders:-

(a) THAT GABRIEL BARAKA THOYA, JOHN MUTAZA, JOE KAZUNGU YAA MANGI, OCPD KILIFI POLICE DIVISION and OCS KILIFI POLICE STATION be committed to prison for a period of six months or such other period as this honourable court

may decide for deliberately violating clear, unequivocal orders of this honourable court issued on the 18th day of October 2015 and the consequent orders issued on 9th November 2015, 24th November 2015 and 23rd February 2016 respectively.

(b) THAT this Honorable court fines GABRIEL BARAKA THOYA, JOHN MUTAZA, JOE KAZUNGU YAA MANGI, OCPD KILIFI POLICE DIVISION and KILIFI POLICE STATION the sum of Kshs. Two million each or such other sum as this Honourable Court may decide for deliberately violating, unequivocal orders of this honourable court issued on the 28th day of October 2015 and 23rd February 2016 and in default of payment of such fine all movable and immovable assets of the Defendants/Respondents including land and buildings be attached and sold in execution of this order to satisfy the penalty for contempt.

(c) THAT this Honourable court grants such further or other relief it may deem just and expedient to grant; and

(d) THAT cost of this application be provided for.

The Plaintiffs/Applicants' case:

5. The Application is premised on the ground that on or about 25th September, 2015, 2nd October 2015, 3rd October 2015 and 4th October, 2015, the Defendants, their agents and or servants trespassed and ambushed the residences of the Plaintiffs and destroyed mature trees, destroyed and carted away the gate guarding some properties and have generally been seen patrolling the Plaintiffs' land.

6. According to the Plaintiffs, on or about 24th November, 2015, the Defendants, accompanied by about 100 rowdy members of the public, forcefully invaded the suit properties within Mbuyuni Bofa Area, denied the Plaintiffs' members access to the suit property and threatened the Plaintiffs' members with actual bodily harm.

7. It is the Plaintiffs' case that the actions of the Defendants are contemptuous of the court; that the authority of the court continues to be exposed to ridicule and disrepute and that the orders sought in the Application ought to be granted since the rule of law has to be upheld at all times.

The Defendants'/Respondents'

8. In his Replying Affidavit sworn on 22nd April, 2016, the 2nd Defendant deponed that it would be unfair and prejudicial for the Applicants to accuse the Defendants every-time something happens on the suit property; that if any invasion on the suit property happened, the same was not orchestrated by the Defendants and that it is the Applicants who have been harassing them with the assistance of the police.

9. The 2nd Defendant deponed that the Plaintiffs' allegations have been rendered unfounded by the court of law in Kilifi Criminal Case Number 636 of 2015 where the members of Nayeni squatters were acquitted after being charged with trespassing and destroying the Plaintiffs' property.

The Plaintiff's Further Affidavit:

10. In his Supplementary Affidavit the 1st Plaintiff's director deponed that Kilifi Criminal Case Number 636 of 2015 was not dismissed but withdrawn pursuant to section 87(a) of the Criminal Procedure Code for lack of evidence; that the 2nd Defendant is facing charges in Kilifi Criminal Case Number 160 of 2015 whose hearing is scheduled for 21st June, 2016 and that it is not true that the criminal activities are solely perpetuated by the 1st Defendant.

11. The parties' advocates appeared before me on 12th May, 2016 and made oral submissions. I have considered the submissions and the authorities that were filed in this court.

Analysis and findings:

12. It is true that the court granted to the Applicants injunctive orders restraining the Defendants from interfering with the Plaintiffs' quiet enjoyment of the various parcels of land within Land Reference Number 1705/233 (CR 27007) situated within Kilifi County, Mbuyuni Bofa Area and its environs pending the hearing and determination of the suit.

13. The Plaintiffs Application is premised on the ground that on 24th November, 2015, the Defendants, accompanied by one hundred rowdy members of the public forcefully invaded the suit properties notwithstanding the injunctive orders that were in place.

14. The Plaintiffs have annexed photographs depicting the destruction that was purportedly occasioned by the Defendants on 24th November, 2015.

15. The photographs that have been annexed on the Application show trees and shrubs that appear to have been cut. However, there is no single photograph showing the person or people who cut down those trees.

16. The orders that the Plaintiffs are seeking in the current Application will deny the alleged contemnors their liberty if granted. Consequently, the Plaintiffs ought to prove that indeed it is the alleged contemnors who invaded the suit property or that the people who invaded the suit properties did so on their instructions. Such evidence has not been placed before this court.

17. In the absence of evidence to show that it is the 1st, 2nd and the 3rd Defendants or their agents who invaded the suit property on 24th November, 2015 or at all, I am unable to order for the committal of the alleged contemnors to civil jail.

18. Although the Plaintiffs also wants this court to find that the Kilifi OCPD and OCS should also be committed to civil jail for not enforcing the orders of this court, the evidence before this court shows that some of the people who allegedly trespassed on the suit properties have been charged in court. That means the police are undertaking their duties by charging people who trespass on the land.

19. In the circumstances of this case, and considering that the Plaintiffs have deponed that other than than the Defendants, other members of the public also invaded the suit property, I cannot hold the OCPD and the OCS to have been in contempt of the orders of this court.

20. The most I can do is to implore the police to maintain law and order and to protect the property of every person by arresting and charging people wherever they trespass on the suit property.

21. For the reasons I have given above, I dismiss the Plaintiffs' Application dated 28th October, 2015 with no orders as to costs.

Dated, signed and delivered in Malindi this 27th day of May, 2016.

O. A. Angote

Judge