



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 104 OF 2013**

**ABDULRAZAK MUHSIN SHARIFF.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**KADZO MASHA KAZUNGU**

**MORRIS MLEWA**

**JOHNSON HINZARO (AKA JAFARI).....DEFENDANTS/RESPONDENTS**

**R U L I N G**

**Introduction**

1. What is before me is the Plaintiff's/Applicant's Application dated 19<sup>th</sup> December, 2013 in which the Applicant is seeking for the following orders;-

**(a) That leave be granted to the applicant to commence contempt of court proceedings against JOHNSON HINZARO aka (JAFARI) and he be named in this application for that purpose only.**

**(b) THAT a warrant of arrest be issued to arrest the 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent JOHNSON HINZANO (aka JAFARI) they be brought to court to show cause why they should not be committed to jail for a term not exceeding six (6) months for disobeying the court orders of 24<sup>th</sup> June, 2013 despite the Penal Notice on the said Court Order.**

**(c) THAT the 1st Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent JOHNSON HINZANO (AKA JAFARI) be subsequently committed to jail for a term not exceeding six (6) months for disobeying the said court order of 24<sup>th</sup> June 2013 or her property to be attached or both as the Honourable Court shall find fit.**

**(d) THAT an order of mandatory injunction be issued directing the Defendants either by themselves, servants, agents, employees, legal representatives or any of them to demolish and remove all the developments made on the suit property in disobedience of the Honourable Court's Orders within seven (7) days of service of the Additional Honourable Court's Orders AND failure by the 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent JOHNSON HINZARO (AKA JAFARI) to comply with the said order, the Plaintiff be at liberty to demolish the said structures and remove the offending developments and the costs incurred thereby**

**be payable in summary manner by the 1st Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent JOHNSON KAZUNGU HINZARO (AKA JAFARI) to the Plaintiff.**

**(e) THAT an order of mandatory injunction be issued directing the 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent JOHNSON HINZARO (AKA JAFARI) to restore the suit property to as near as it may possibly be to the state it was before their violation of the Honourable Court's Orders and in any case, within seven (7) days of service of the Honourable Court's Order's AND failure by the 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU'S and the 3<sup>rd</sup> Respondent JOHNSON HINZARO (AKA JAFARI)'s compliance of the afore prayed order, this Honourable Court does issue an Order of Mandatory Injunction mandating the Plaintiff with the Liberty to restore the suit property as afore mentioned and the costs incurred thereby be payable in summary manner by the said 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent KADZO MASHA KAZUNGU and the 3<sup>rd</sup> Defendant/Respondent JOHNSON HINZARO (aka JAFARI), to the Plaintiff**

**(f) THAT the Honourable court grants leave for all the video recording to be produced and played in open court.**

**(g) THAT this Honourable Court be pleased to visit the suit property to substantiate the Plaintiff's merits of this case.**

**(h) THAT costs be in the cause.**

2. The Application for contempt is in relation to the interim orders of injunction that this Court granted on 24<sup>th</sup> June, 2013 restraining the defendants either by themselves or servants or agents from trespassing, entering, remaining, selling or dealing with the suit property in any manner whatsoever and to cease any further construction or undertaking any development upon the Plaintiff's portion of land known as PLOT NO.9313 Malindi pending the hearing and determination of the suit.

#### **The Applicant's Case:**

3. The Applicant has deponed in his supporting affidavit that this court issued injunctive orders in this matter on 24<sup>th</sup> June 2013. The said order was extracted and served upon the 1<sup>st</sup> Defendant who has gone ahead to interfere with the suit property. According to the Applicant, he first noted activities on the suit property on the 14<sup>th</sup> day of August 2013. The people who were on the suit property were measuring and digging trenches thereon.

4. When the Applicant sought from the 1<sup>st</sup> Respondent who was on the suit property to know why she was undertaking developments despite the court order, the 1<sup>st</sup> Respondent informed him that she had won the case. It is the Applicant's deposition that the 3<sup>rd</sup> Respondent continued with his work and informed the Applicant that he was working for and under the instructions of the 1<sup>st</sup> Respondent.

5. It is the Applicant's deposition that he reported the incident to the police in OB Number 46/14/08/2013 and went back to the suit property accompanied by the police. They found the 3<sup>rd</sup> Respondent still working on the suit property and he showed him the court order in the presence of the police.

6. The Applicant took photographs of the activities that were going on on the suit property together with the people who were involved in the activities. Later on, the 1<sup>st</sup> Respondent showed up on the suit property and the Applicant recorded part of the conversation between the 1<sup>st</sup> Respondent and the police officers. The 1<sup>st</sup> Respondent informed the Applicant and the police officers that the suit property belonged to her.

7. It was deponed that while the first Application dated 22<sup>nd</sup> August 2013 for contempt that was filed in this court was pending, which Application I eventually dismissed, the 1<sup>st</sup> Respondent and his agents continued with the developments; that the suit property was only one meter high from the foundation as at the time of instituting the suit but the house has now been roofed and a subsequent building in front of it erected by the Respondents.

8. On 18<sup>th</sup> November 2013, the Applicant again reported the continued disobedience of the court order to the police in OB number 61/14/6/2013. He went to the suit property with PC Gabriel Kosgei who took photographs of the ongoing activities and also video recorded what was going on.

9. PC Eric Liela, police constable number 93872 attached to Malindi Police Station swore an affidavit on 19<sup>th</sup> December, 2013 in support of the current Application and deponed that on 14<sup>th</sup> August, 2013 together with his colleague Peter Karanja, they received a report from the Applicant about the continued disobedience of a court order by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. They recorded the complaint and further confirmed that the Applicant had made another complaint on the 14<sup>th</sup> June 2013 in respect to the activities of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents on the suit property.

10. On the same day, the deponent left together with the Applicant for the suit property where they found people going in with the construction. He interviewed the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and the conversation was recorded on video. The Respondents activities were recorded in OB Number 66/14/08/2013.

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's advocate was served with the Application on 14<sup>th</sup> January, 2014 but did not file any Replying Affidavit. However, he was in attendance when the Application came up for hearing on 11<sup>th</sup> February, 2014 and when the court visited the suit property on the same day at 2.30Pm. The 1<sup>st</sup> Respondent was also at the suit property during the said site visit. The 3<sup>rd</sup> Respondent did not file any response to the Application although he was personally served on 14<sup>th</sup> January 2014.

### **Analysis and findings:**

12. This suit was filed on 24<sup>th</sup> June, 2013. Contemporaneously with the Plaint, the Plaintiff filed on Application for injunctive orders. On the Application, the Plaintiff annexed the photographs showing the construction that had just commenced on the suit property. The walls were about three feet high from the ground on 24<sup>th</sup> June, 2013. I certified the Application as urgent and granted the Applicant the orders of injunction in the following terms.

**“That pending the hearing and determination of this suit an injunction do issue against the Defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from Planting or cultivating, trespassing, entering, remaining, selling, alienating, or dealing with the suit property in any manner whatsoever and to cease any or any further construction or undertaking any development or otherwise upon the Plaintiff’s portion of land known as PLOT No. 9313, situated in Malindi constituency within Kilifi County. ”**

13. The Application together with the order of the court was served on the Respondents on 26<sup>th</sup> June, 2014. When the Application came up for inter-partes hearing, it was adjourned on several days for one reason or the other. On all those occasions, the interim orders of injunction were extended by the consent of the parties. The Application was then slated for mention on 12<sup>th</sup> September, 2013 to confirm if parties would have filed and exchanged their written submissions. The interim orders were again extended by the consent of the parties until then. All along, the firm of Richard O & Co. Advocates was acting for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

14. On 22<sup>nd</sup> August 2013, the Applicant's advocates filed an Application under a certificate of urgency for contempt. The Applicant complaint was that despite the existing order of injunction, the

1<sup>st</sup> Respondent had continued with the construction of a house on the suit property. The Applicant annexed the photographs that had been taken on site after the order of injunction was granted. The court was asked to compare those photographs, with the photographs that were taken when the suit was filed. The Appellant also annexed on the supporting affidavit a copy of the CD being the video recording that had been taken when the 1<sup>st</sup> Respondent was interviewed by the police at the site on the 14<sup>th</sup> August, 2013.

15. The photographs annexed on the Application for contempt of 22<sup>nd</sup> August, 2013 which I dismissed on 27<sup>th</sup> November, 2013 shows the house whose walls were approximately three feet off the ground when I granted the interim injunctive orders had been completed and roofed. The other photographs showed the further measurements that were being undertaken on the suit property for further construction.

16. In response to the contempt application of 22<sup>nd</sup> August 2013, the 1<sup>st</sup> Respondent deponed that the structure in the photographs that were annexed on the Application of 22<sup>nd</sup> August 2013 did not belong to her; that there were many people who lived on the suit property and that the Applicant should have exercised due diligence to find out the real owner of the structure.

17. The 1<sup>st</sup> Respondent confirmed in his Replying Affidavit that indeed the Applicant had reported about the disobedience of the court order and that the police had interrogated her over the same.

18. I dismissed the Application dated 23<sup>rd</sup> August 2013 because I was not sure if indeed the developments which were shown in the photographs were on the suit property or not. At paragraph 26 of my Ruling, I stated as follows:-

**“Again, this court cannot ascertain if indeed the man in the photographs was taking the measurements on a different parcel of land as claimed by the 1<sup>st</sup> Defendant or on the suit property as claimed by the Plaintiff. The date that the photographs were taken is also not indicated.”**

19. On the issue of the video evidence that had been annexed on the Application, I stated as follows:-

**“I am of the view that the Plaintiff's counsel should have sought the leave of the court to play the said video in court, in the presence of the 1<sup>st</sup> Defendant's counsel. I am afraid that the court cannot make a determination on the weight of the evidence to be placed on the recording before it can be confirmed that a copy of the same video was served on the 1<sup>st</sup> Defendant. That position can only be confirmed if the recording is played in court.”**

**“In the circumstances, I shall, which I hereby do, disregard the evidence which is in the said recording.”**

20. While dismissing the Application for contempt dated 22<sup>nd</sup> August, 2013, I stated that my orders did not bar the Plaintiff from bringing a fresh application for contempt in the event that the alleged contemptuous acts are ongoing with better and further particulars.

21. It would appear, as I shall show later, that the dismissal of the Application for contempt of 22<sup>nd</sup> August, 2013 gave the 1<sup>st</sup> Respondent the impetus to begin the second phase of the construction having completed the first phase despite the orders of this court.

22. After the first phase was completed, photographs have been annexed on the current Application showing the measurements that were being undertaken on 14<sup>th</sup> August 2013 for the construction of the second phase. The second phase of construction was on the suit property and it was towards a permanent structure with two blue doors.

23. The Applicant sought the leave of the court, which leave was granted to play the video recording which showed the construction of the second phase of the building after I dismissed the first Application

for contempt. The video recording also showed the interrogation of the 1<sup>st</sup> Respondent while at site. The 1<sup>st</sup> Respondent, in the video which was annexed on the affidavit as EVD 3 and EVD 5 contemptuously informed the police officers that all she knew was that the suit property belonged to her. The video was played in the open court in the presence of Mr. Otara, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

24. PC Eric Lieta confirmed the reports that the Applicant made to the police about the continuous contemptuous actions of the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent. PC Eric Lieta deponed that he was gazetted by the Attorney General under the Evidence Act by an order of Kenya Gazette notice number 407 dated 18<sup>th</sup> January 2010 to take photographs and process prints. He deponed that he supervised the processing of the photographs which he annexed on his affidavit and marked as A1, A2, A3, A4, A5 and A6.

25. I have perused annexures A1 and it shows the first phase of the building that was put up by the 1<sup>st</sup> Respondent and her agents after the order of this court on 24<sup>th</sup> June, 2013. A2 and A3 are the photographs of the second phase of the construction that was being undertaken by the 1<sup>st</sup> Respondent after I dismissed the first Application for contempt on 27<sup>th</sup> November, 2013.

26. The court visited the site on 12<sup>th</sup> February, 2014 in the presence of Mr. Ole Kina, counsel for the Applicant and Mr. Otara, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The court found the 1<sup>st</sup> Respondent on site and she identified herself. The court observed the photographs annexed in the current Application and the photographs that were annexed in the Application dated 21<sup>st</sup> June 2013 for injunctive orders. The court was taken around the building by the 1<sup>st</sup> Respondent and counsels and after being guided by the neighbouring permanent structure with two blue doors abutting the suit property, it was clear that the 1<sup>st</sup> Respondent did indeed build the structure on the suit premises in two phases during the pendency of the court order.

27. The court found out that the 1<sup>st</sup> Respondent with her agents had actually removed the roof and iron sheets which had been fixed during the first phase so as to complete the second phase. The two adjoining buildings, which were now close to the permanent structure with two blue doors no longer had the roof and the iron sheets. There was no other construction going on on the suit property or any other structure other than the structure which had been put up by the 1<sup>st</sup> Respondent.

28. In view of the evidence presented to the court by way of photographs taken by PC Eric Lieta, the video which was played in the court with the leave of the court, the site visit by the court and the deposition by the Applicant, and in the absence of a Replying Affidavit, I find that the Applicant has proved his case to the standards required in contempt proceedings. That standard, as has been held by the Court of Appeal, is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt (see **Wild Life Lodger Vs County Council of Narok (2005) 2 EA 344**).

29. The 1<sup>st</sup> Respondent has made the Applicant to run around and make reports to the police station about her contemptuous actions, to take videos at great expense and to file two Applications for contempt. Even after the court gave her a second biting at the berry, the 1<sup>st</sup> Respondent persisted with her contemptuous actions and completed the structure on the suit property in two phases.

30. The law relating to contempt proceedings was clearly laid down by the **Court of Appeal in Mutitika Vs Baharini Farm (1982-88) 1 KAR 863**, where it was held that if anyone knowing of the existence of an injunction or an order of stay, willfully does something to break the injunction is liable to be committed for contempt.

31. In **Johnson Vs Grant, 1923 SC 789 at page 790, Lord President Clyde** stated as follows:-

**“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental**

**supremacy of the law which is challenged.”**

32. It is therefore paramount that this court protects the supremacy of the law and the rule of law by punishing individuals who are in contempt of its orders. The powers to punish individuals who disobey injunctive orders is provided for under Order 40 Rule 3 of the Civil Procedure Rules.

33. As was held in the case of **Hadkinson vs Hadkinson(1952) ALL ER 567**, it is a plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

34. In the circumstances of this case, and for the reasons I have given above, I find that the 1<sup>st</sup> Respondent was served with the order of this court of 24<sup>th</sup> June 2013 and she is in contempt of the said order. The court visited the site and was left in no doubt that the structure which was on the suit was not there when the suit commenced and when the injunctive order was granted.

35. For the reasons I have given above, I shall, which I hereby do, cite the 1<sup>st</sup> Respondent for contempt and order that she serves a jail sentence of three (3) months.

36. As for the 3<sup>rd</sup> Respondent, he was not a party to this case. The 3<sup>rd</sup> Respondent was an agent of a known principal, the 1<sup>st</sup> Respondent. In the circumstances, I dismiss the Application in respect to the 3<sup>rd</sup> Respondent with no order as to costs.

37. The construction of the first phase of the building on the suit property by the 1st Respondent was three feet off the ground when I granted the orders of injunction on 24<sup>th</sup> June 2013. I agree with the Applicant's counsel's submissions that the 1<sup>st</sup> Respondent, even after serving her jail term, must purge her contempt by restoring the suit property in the state that it was as at 24<sup>th</sup> June, 2014, which was only three feet off the ground.

38. In the case of **Mucuna Vs Ripples Ltd (1990-1994) EA 388**, the Court of Appeal held that maintenance of status quo does not include the circumstances existing after an intruder's illegal acts, but which existed before hand.

39. In **intimate Beauty Care Ltd Vs Kundan Singh Construction Ltd: Mombasa HCCC No. 227of 2001, Justice Onyancha** held as follows:

**“I wish to add that if the relief of the mandatory injunction should issue, its purpose will be to force the Respondent to restore the Applicant to the status quo ante; that is to say, to the position which the Applicant occupied before the Respondent misconducted himself against the Applicant. In this regard it has been held and I support the position held, that it will not matter whether or not the Respondents had taken further steps to make it difficult to revert to the status quo ante.....”**

40. I associate myself with the statements of the court in the **Mucuna** and the **Intimate and Beauty Care Ltd** cases (supra).

41. The status quo which existed before the 1<sup>st</sup> Respondent's illegal acts should be restored by the 1<sup>st</sup> Respondent before this suit can proceed further. I shall therefore allow the Applicant's prayer for a mandatory injunction.

42. For the reasons I have given above, I allow the Applicant's Application dated 19<sup>th</sup> December, 2013 in the following terms;-

a. **THAT the 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU be and is hereby**

committed to jail for three (3 ) months for disobeying the court order of 24<sup>th</sup> June 2013.

- b. **THAT an order of mandatory injunction be and is hereby issued directing the 1<sup>st</sup> Defendant either by herself, servants, agents, employees, legal representatives or any of them to demolish and remove all the developments made on the suit property in disobedience of the Honourable Court's Orders within fifteen (15) days of service of this order AND failure by the 1<sup>st</sup> Defendant/Respondent KADZO MASHA KAZUNGU to comply with this order, the Plaintiff be at liberty to demolish the said structures, and remove the offending developments and the costs incurred thereby be payable in summary manner by the 1st Defendant/Respondent KADZO MASHA KAZUNGU to the Plaintiff.**

- (c) **The costs of this Application to be paid by the 1<sup>st</sup> Respondent.**

Dated and delivered in Malindi this 19<sup>th</sup> day of **March 2014**

**O. A. Angote**

**Judge**