



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 104 OF 2013

ABDULRAZAK MUHSIN SHARRIF.....PLAINTIFF/APPLICANT

=VERSUS=

1. KADZO MASHA KAZUNGU

2. MORRIS MLEWA.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. The Application before me is the one dated 22nd August 2013 seeking for the following reliefs:

(b) That a warrant of arrest be issued to arrest the 1st Defendant/Respondent KADZO MASHA KAZUNU and be brought to court to show cause why she should not be committed to jail for a term not exceeding six (6) months for disobeying the court orders of 24th June, 2013, despite the penal notice on the said court order.

(c) That the 1st Defendant/Respondent KADZO MASHA KAZUNGU be subsequently committed to jail for a term not exceeding six (6) months for disobeying the said court orders of 24th 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 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 1st Defendant/Respondent KADZO MASHA KAZUNGU 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 said 1st Defendant to the Plaintiff.

(e) An order of Mandatory Injunction be issued directed to the 1st Defendant/Respondent KADZO MASHA KAZUNGU to restore the suit property to as near as it may possibly to the state it was before her violation of the Honourable Court's Order and in any case, within seven (7) days of service of the Honourable

Court's Orders AND failure by the 1st Defendant/Respondent KADZO MASHA KAZUNGU 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 1st Defendant, to the Plaintiff.

The Applicant's case

2. The Application is supported by the affidavit of the Plaintiff in which he has deponed that on 24th June 2013, this court made an order restraining the Defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from dealing with the suit property and to cease any or any further construction on plot number 9313 (the suit property) situated in Malindi pending the hearing and determination of the suit.
3. It is the Plaintiff's deposition that his advocate served upon the 1st Defendant the said court order and that after the service of the order, the 1st Defendant went ahead to interfere with the suit property.
4. According to the Plaintiff, on 14th August 2013, he passed by the suit property and noticed people who were on the suit property measuring and digging; that he was able to recognise the 1st Defendant as one of the people on the suit property and that he reported to the Malindi police station the continued trespass.
5. The Plaintiff finally deponed that an order of Mandatory Injunction should be directed to the Defendants to demolish and remove all the developments on the suit property in disobedience of the court order and to commit the Defendants to jail for a period not exceeding six months for disobeying a court order.

1st Defendant's Response

6. The 1st Defendant filed a Replying Affidavit on 17th September 2013 and deponed that she has not trespassed on the suit property; that the structure in the photographs annexed on the Applicant's affidavit does not belong to her and that there are many people living on the suit property and the Applicant should have exercised due diligence to find out the real owner of the structure.
7. It is the 1st Defendant's deposition that the evidence the Applicant is relying on is not conclusive; that the structures do not belong to her and that the Plaintiff and the police officers obtained evidence from her by duress.

Submissions

8. The Plaintiff's and Defendants' counsels appeared before me on 3rd October 2013 and made oral submissions which I have considered. I have also considered the authorities relied upon by the Applicant.

Analysis and findings

9. It is not in dispute that on 24th June 2013, this court issued an order of injunction in respect to the portion of land known as plot number 9313 restraining the Defendants from dealing with the suit property in any manner whatsoever pending the hearing of the suit.
10. According to the Further Affidavit of Service annexed on the Plaintiff's Application, the Defendants were served with the said order on 26th June 2013. The 1st Defendant, the alleged contemnor, has not disputed this fact in her Replying Affidavit.
11. It is the Plaintiff's deposition that on 14th August 2013, while driving to Saba Saba in Malindi, he noticed there were people on the suit property who were measuring it and digging. He was able to recognize the 1st Defendant as one of the people who was on the suit property on the said date.
12. The 1st Defendant has denied the allegations and stated that she was accosted by the police officers while she was walking on the road and took her to the suit property where they started

interrogating her.

Analysis and findings

13. 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.

14. 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.”

15. It is therefore paramount that to protect the supremacy and the rule of law, the courts are under an obligation to punish 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.

16. Contempt is said to be an act or offence of a quasi-criminal nature, and considering that the contemnor may be sent to jail, the breach of which the alleged contemnor is cited must be precisely defined and proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt (see **Wildlife Lodges Ltd Vs County Council of Nairobi & Another (2005) 2 EA 344**).

17. In the case of **Alken Connections Ltd Vs Safricom Limited & 2 Others (2013) e KLR**, the court held as follows:

“It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes contempt of court with sufficient particularity to enable him meet the charge. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being allowed especially on affidavit evidence.”

18. Has the current Motion stated concisely what the 1st Defendant has done which constitutes contempt of court with sufficient particularity?

19. The Plaintiff has deposed in his affidavit that on 14th August 2013, he noticed people on the suit property who were measuring and digging the suit property. He also recognised the 1st Defendant as one of the people on the suit property.

20. The alleged contemptuous actions on the part of the 1st Defendant and her servants therefore was the measuring and digging of the suit property.

21. The Plaintiff has annexed on his affidavit photographs showing two male individuals with what appears to be a tape measure.

22. From the position of the two men on the photographs marked as “2(b)”, it would appear that they were taking measurements of a building which is almost complete.

23. The Plaintiff has not alleged that the 1st Defendant and her servants were putting up a building on the suit property after this court issued its order. All the Plaintiff has stated is that he saw people “digging and taking measurements.”

24. It is therefore difficult to ascertain that the measurements of the building by the two individuals in the photograph marked as “2b” were in relation to a house standing on the suit property. It is also not clear when the photographs marked as “2b” were taken.

25. There are other photographs marked as 2c, 2d, 2e and 2f showing one of the men who was taking measurements in the photograph marked 2b taking measurements on an empty parcel of land.

26. 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 1st Defendant or on the suit property as claimed by the Plaintiff. The date that the photographs were taken is also not indicated.
27. The Plaintiff annexed on the affidavit the video recording that was taken by the Plaintiff or his agent at the scene. I have watched the said recording.
28. 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 1st 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 1st Defendant. That position can only be confirmed if the recording is played in court.
29. In the circumstances, I shall, which I hereby do, disregard the evidence which is in the said recording.
30. Even if I was to consider the evidence of the said recording, which I have had the opportunity to watch in my chambers, the same does not show the contemptuous acts that the 1st Defendant is alleged to have committed. The 1st Defendant, in the said recording, was only protesting that the suit property belongs to her notwithstanding the court order.
31. For the reasons I have stated above, it is not safe for the court to hold that the Plaintiff has proved the act of "digging and measuring" of the suit property by the 1st Defendant or her agents contrary to the order of the court. Indeed, no evidence of "digging" was produced in court. It is not clear whether the measurement that is shown in the photographs was being undertaken on the suit property after the issuance of the court order.
32. The Plaintiff did not state in his affidavit that it was the Defendants who put up the structure shown in the photographs after the order of this court. There was no allegation at all in the affidavit of a construction that was going on on the suit property. In the circumstances, the prayer for a mandatory injunction directing the 1st Defendant to demolish and remove all the developments made on the suit property in disobedience of the court order does not arise.
33. In the circumstances, I find that the Plaintiff has not proved the acts of contempt of the court order of 24th June 2013 to the required standard. I therefore dismiss the Plaintiff's Application dated 22nd August 2013 with costs to the 1st Defendant.
34. This order does not however bar the Plaintiff to bring a fresh application for contempt in the event that the alleged contemptuous acts are going on with better and further particulars. This court has stated time and again that it will not hesitate to punish an individual who disobeys its orders.

Dated and Delivered in Malindi this 27th day of **November, 2013**

O. A. Angote

Judge