



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 137 OF 2016**

**ABDALLA MOHAMED ABDALLA.....PLAINTIFF/APPLICANT**

**VERSUS**

**DAVID MANGALE.....DEFENDANT/RESPONDENT**

**RULING**

1. By this Notice of Motion dated 2<sup>nd</sup> August 2018, Abdalla Mohamed Abdalla (the Plaintiff/Applicant) prays for Orders: -

- 2. That the Respondent be summoned to Court to show cause why he should not be jailed for contempt to civil jail for six (6) months;***
- 3. That the Respondent be condemned to (serve) six months in prison for contempt;***
- 4. That the OCS Kilifi (do) enforce the above orders; and***
- 5. That the costs of this application be provided for.***

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds: -

- a) That this Court issued orders on 21<sup>st</sup> September 2016 but in disregard thereto, the Respondent has sold a portion of the suit premises to a third party;***
- b) That the said Third Party has already started construction on the suit premises with purpose of settling thereon; and***
- c) That the said actions undermine the dignity of this Court and the Court ought to stamp its authority by citing the Respondent for contempt.***

3. The Plaintiff's application came before this Court for hearing on 9<sup>th</sup> October 2018 and in the absence of the Defendant/Respondent, this Court issued orders in terms of Prayer No. 2 thereof. Subsequently, the Defendant-David Mangale was brought to Court on 18<sup>th</sup> November 2019 under a warrant of arrest. Upon interrogation by the Court, the Defendant who was then unrepresented told the Court he was unaware of the application that led to his arrest. On confirming that this application had only been served upon his Advocates on record, this Court directed that he be served afresh therewith and that he be given a chance to file his response thereto.

4. Accordingly, and by his Replying Affidavit sworn and filed herein on 3<sup>rd</sup> December 2019, the Defendant avers that it is not in dispute that the Court issued the orders of 21<sup>st</sup> September 2016. It is however his case that the Order complained of was not served upon him directly but upon his Advocates on record M/s Nyameta, Mogaka & Magiya Advocates.

5. The Defendant further avers that his said Advocates have advised him that the impugned order ought to have been served upon him in person. He denies that he has sold a portion of the suit property to a third party and puts the Plaintiff to a strict proof thereof. He further denies that there is any house under construction on the suit property and avers that the only house standing thereon is his own house built in the year 2002 and renovated in 2016 before this suit was instituted.

6. I have perused the said application and the response thereto. While both parties were granted a chance to file and serve submissions none of them filed any.

7. The Plaintiff urges this Court to summon the Respondent to come before the Court in order to show cause why he should not be jailed for a period of six months for contempt of the orders of this Court. The contempt cited is the accusation that in disregard of orders issued herein on 21<sup>st</sup> September 2016, the Defendant/Respondent has sold a portion of the suit premises to a third party who has already paid a deposit and has commenced construction thereon.

8. The Defendant on the other hand replies that the impugned orders were not served directly upon him but were instead served upon his Advocates on record. He further denies being in violation of the Court orders by selling the suit premises or a portion thereof and/or commencing or causing to be started any construction thereon.

9. While I did not think there was any requirement for the orders issued by this Court on 21<sup>st</sup> September 2016 to be served directly upon the Defendant as purported in his Replying Affidavit, I think it was incumbent upon the Plaintiff to prove that the Defendant had alienated a portion of the suit property subsequent to the issuance of the impugned orders and that some construction had commenced thereon.

10. However, other than asserting that the Defendant had sold the premises to an unnamed third party and that a deposit had been paid to the Defendant, there was neither evidence of the sale nor of any construction commenced after the orders were granted by this Court. The Defendant has clearly denied selling any portion of the premises and has exhibited a photo of his completed house thereon which he avers was built in 2002, some 14 years before this suit was instituted.

11. Indeed, while the Plaintiff was granted a chance to rebut those assertions by way of a Supplementary Affidavit, no such affidavit was filed.

12. This Court is conscious of the fact that Court Orders are never and ought not to be seen to be made in vain. Otherwise the Court would be exposed to ridicule and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people. (Per the dictum of Ojwang J (as he then was) in *B –vs- Attorney General (2004) 1 KLR 431*).

13. Be that as it may, this Court is equally conscious of the fact that where one is cited for contempt and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof of such cases is higher than the standard in civil cases.

14. On the facts placed before me, I am not persuaded that the Plaintiff's application gets anywhere near that high standard. In the premises I am left with no option but to dismiss the application with costs.

15. The recognizance and/or personal bond issued to the Defendant herein on 18<sup>th</sup> November 2019 is hereby accordingly discharged forthwith.

16. Orders accordingly.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**