



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 105 OF 2015**

**SALIM ABDALLA BAKHSHUWEIN (Suing in his capacity as the administrators of the  
Estate of the late ABDALLA BAKHSHUWEIN.....PLAINTIFF**

**VERSUS**

**AHMED SALIM SAID (Sued as the Administrator of the late**

**SALIM SHEIKH SAID.....DEFENDANT**

**RULING**

1. By this Notice of Motion application dated 1<sup>st</sup> December 2015, Salim Abdalla Backshuwein suing in his capacity as the Administrator of the Estate of Abdalla Salim Bakhshuwein (the Plaintiff) prays for orders:-

- 1. That the Defendants and one Abdul Aziz Ali Mohamed alias M'manga be summoned to personally attend Court to show cause why they should not be punished for disobeying Court Orders;***
- 2. That a warrant of arrest be issued against the Defendants and one Abdul Aziz Ali Mohamed alias M'Manga to show cause why they should not be committed to civil jail for six months;***
- 3. That the Defendants be punished for contempt of Court by way of committal to civil jail for a period of six months for disobeying Court Orders;***
- 4. That the OCS Malindi to assist in executing and enforcing the above orders; and***
- 5. That the Respondents contemnors to pay costs of this application.***

2. The application is supported by the Plaintiff's affidavit in which he avers that this Court issued orders on 9<sup>th</sup> July 2015 restraining the Defendants from engaging in certain activities in respect of the suit property. Those orders were served upon the Defendants but they have elected to disobey the orders with impunity.

3. The Plaintiff asserts that by the said disobedience, the authority of this Court has been undermined by the Defendants and that to safeguard the dignity of the Court; the Defendants ought to be punished for their contempt.

4. The application is opposed. In a Replying Affidavit filed herein on 6<sup>th</sup> April 2016, Faiz Said (the 2<sup>nd</sup> Defendant/Respondent) avers that he was on 23<sup>rd</sup> July 2015 served with a number of documents including two applications one dated 1<sup>st</sup> July 2015 and the other 8<sup>th</sup> July 2015. He then sought legal representation for himself and his brother Ahmed Salim Said (the 1<sup>st</sup> Defendant).

5. The 2<sup>nd</sup> Defendant asserts that those two applications were to come up for hearing on 15<sup>th</sup> July 2015 and that their Advocates entered appearance and filed a Defence on 28<sup>th</sup> July 2015. The Advocates then advised the Defendants to wait for the date those two applications would be fixed for hearing. Their Advocates have informed them that those applications are yet to be fixed for hearing.

6. The 2<sup>nd</sup> Defendant further avers that on 2<sup>nd</sup> March 2016, their Advocates on record were served with the present application for contempt. He asserts that they were neither served with the orders said to have been disobeyed nor were they aware of their presence.

7. I have considered the application and the response thereto. The Plaintiff/Applicant is seeking summons and/or warrants to issue to the Defendants and one Abdulaziz Ali Mohamed alias M'manga to be brought to Court to show cause why they should not be committed to civil jail for disobeying the Court's orders.

8. While the date of the Orders said to have been disobeyed is not disclosed on the face of the application, Paragraph 2-3 of the Plaintiff's Affidavit reads as follows:-

***2. That this Honourable Court issued orders on 9<sup>th</sup> July 2015 which provided inter alia that the Defendants be restrained from constructing, digging, disposing, encroaching and digging pits in the suit premises.(Annexed hereto and marked 'A' is a copy of the Order).***

***3. That the said Order were served upon the Defendants by a licensed process Server. (Annexed and Marked 'B' is a copy of the Affidavit of Service.)***

9. A perusal of annexure 'A' of the Supporting Affidavit however reveals that no orders were issued by the Court on 9<sup>th</sup> July 2015 as purported. The orders annexed to the affidavit were instead granted on 15<sup>th</sup> July 2015.

10. Similarly while Paragraph 2 of the Supporting Affidavit as aforesaid purports that the Defendants were restrained from inter alia digging or digging pits on the suit property, the words digging or digging pits do not appear and are not apparent on the formal order extracted by the Plaintiffs as issued by the Deputy Registrar of this Court on 16<sup>th</sup> July 2015.

11. I have also looked at the Affidavit of Service of Morris Mwavuo Ngonyo, the Process Server alleged to have served those orders. It is not clear to me what was served upon the Respondents. At Paragraph 2 of the Process Server's Affidavit, he avers that he received a mention notice dated 16<sup>th</sup> July 2015 from the Plaintiff's Advocates for service upon the Defendants.

12. At Paragraph 3 of that Affidavit however, the Process Server purports to have served "the said Court Order" upon the Defendants personally on 23<sup>rd</sup> July 2015. The Process Server does not even indicate who accompanied him or how he came to identify the Defendants he purports to have served.

13. As this Court has restated time and again, contempt proceedings are quasi criminal in nature. That means that the liberty of a person is at stake and that as a consequence it must be satisfactorily proved.

14. In the matter before me, there is not only lack of clarity as to the date the orders were given but also their tenor and purport. Ultimately I did not even find evidence of service of the same upon and/or knowledge thereof by the alleged contemnors.

15. In the premise the application dated 1<sup>st</sup> December 2015 is dismissed with costs to the Respondents.

**Dated, signed and delivered at Malindi this 23<sup>rd</sup> day of January, 2020.**

**J.O. OLOLA**

**JUDGE**