



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 66 OF 2012

NAFTALLY MURIITHI NJUKI.....PLAINTIFF

VERSUS

1. ABDIRAHMAN ABDILAHI

2. BEATRICE MULI

3. ROBERT MONG'ARE

4. ABDALLAH SAASI

5. MUTUA NZIOKA

6. THE DISTRICT LAND REGISTRAR, LAMU

7. HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion application dated 6th November 2018. By the said application, Abdirahman Abdilahi (the 1st Defendant) prays for orders as follows:-

b) That pending the hearing and determination of this application the Honourable Court be pleased to stay its orders dated 31/10/2018.

c) That pending the hearing and determination of this application the Honourable Court be pleased to stay its orders dated 31/10/2018.

d) Costs be in the cause.

2. The application is stated to be grounded on the annexed affidavit of the 1st Defendant. In that affidavit, the Applicant avers that he was previously represented by Messrs Wasuna Kiamba & Company Advocates. Sometimes in July 2018, he was informed that an application for contempt had been filed against him. The Applicant further avers that Mr. Wasuna Advocates was then unwell and he was later on called by Mr. Obaga Muriki Advocate who informed him that he had admitted to some serious issues in an Affidavit in Court.

3. Subsequently on 31st October 2018 the Applicant was informed that warrants of arrest had been issued against him. Upon perusal of the Court file he discovered that the averments he had made in an affidavit filed on his behalf were admissions. The Applicant avers that due to the illness of his former Advocate, an incompetent person in that office may have drafted the Affidavit and he prays for a fresh opportunity to put the record straight.

4. The application is opposed by the Plaintiff. In a Replying Affidavit filed herein on 20th March 2019 and sworn by his Advocate Randolph M. Tindika, the Plaintiff avers that this Court made a Ruling on 31st October 2018 after hearing both parties and that the said decision took into account the evidence presented by the parties on the construction of a house and the erection of a fence on the suit land by the 1st Defendant.

5. The Plaintiff asserts that the situation remained the same until after the Ruling when the 1st Defendant went and demolished the house. The Plaintiff however avers that the 1st Defendant has still left the fence in place and that the application herein does not raise anything new to warrant the setting aside of the orders.

6. But in a Further Affidavit filed herein on 19th March 2019, the 1st Defendant avers that upon consultation with the Plaintiff's Counsel and his own, he mobilized some workers between 18th and 20th March 2019 and brought down the offending fence.

7. I have considered the application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

8. By a Ruling delivered herein on 31st day of October 2018, this Court had found the 1st Defendant guilty of disobedience of Court orders issued by Meoli J on 23rd October 2012. Those orders had barred the 1st Defendant from entering, remaining in or interfering with the suit property.

9. As it turned out, the Plaintiff did admit by an Affidavit filed herein that sometime in December 2015, he was patrolling the property when he noticed some encroachment thereon. He then decided to put up a temporary house for a caretaker to use to keep away squatters and further built up a wall in April 2017 around the property to protect it from squatters.

10. It is that affidavit that the 1st Defendant now purports was made in error and he urges the Court to set aside the orders resulting from the admissions made therein.

11. From a perusal of the Affidavit filed in support of the application before me, it is evident that the previous affidavit was not filed in error. The averments contained thereon were factual as the 1st Defendant still implicitly admits that he had built a temporary house on the suitland and built a perimeter fence around it.

12. It is however also clear to me from a perusal of the Plaintiff's Replying Affidavit and the Further Affidavit of the 1st Defendant that he has since demolished the house as well as the wall that he had built on the suit property.

13. As it were, contempt proceedings is a tool [1] employed by the Courts to ensure obedience to its orders and directions. The Court has no interest in punishing a litigant, unless the litigant leaves the Court with no option but to resort to the quasi-criminal contempt proceedings to punish him. When the contemnor comes down and purges the contempt, either out of his own free will or at the prompting of the Court, the Court will accept the same unless circumstances exist to suggest that the action taken is not genuine or is actuated by bad faith.

14. In the matter before me, the Contemnor blames incompetent legal advice received as his Principal Advocate was allegedly ailing and unable to attend adequately to the requirements of his office. Upon learning of the Court's verdict, the Applicant proceeded to demolish all the offending structures that he had built on the suit property and is evidently remorseful from the substance of his affidavits herein and the submissions of his new Advocate on record.

15. In the premises, I shall give the 1st Defendant another chance. The orders made herein on 31st October 2018 are hereby discharged and set aside.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE

[1]