



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MOMBASA

MISC. APP. NO. 66 OF 2020

TIMOTHY KAI BANDA.....PLAINTIFF/APPLICANT

VERSUS

TUMA MWASHETANI.....DEFENDANT/RESPONDENT

RULING

(Application to hold defendant in contempt of an order of injunction; application not opposed; application allowed)

1. This is an application dated 31 August 2020 and filed on even date. What the applicant wants in this application is for this court to find that the respondent has been in contempt of an order of injunction issued by this court on 26 August 2020. It is the contention of the applicant that the respondent has disobeyed this order and should thus be arrested and be committed to jail.

2. To put matters into context, on 20 August 2020, the applicant filed the suit Mombasa ELC No. 107 of 2020 against the respondent. In that case, he averred that he is the owner of the land parcel Mombasa/Ziwa La Ng'ombe Scheme/1128 and that the respondent has encroached into it and commenced developments on it. Together with the suit, the applicant sought an order of interim injunction pending the inter partes hearing of the application and eventually pending the hearing of the suit. The matter came before me on 21 August 2020. I certified the application as urgent but did not issue any interim orders and directed that the application be served for inter partes hearing on 26 August 2020. The respondent did not enter appearance and did not respond to the application for injunction and did not appear at the inter partes hearing of the application.

3. On that day, I thought the matter could be boundary dispute as the respondent was said to own the neighbouring land parcel Mombasa/Ziwa La Ng'ombe/1130. I therefore issued the following orders :-

(i) That the Regional Surveyor, Coast Region, do proceed to the disputed site and ascertain the boundaries, by establishing or re-establishing the boundary marks and/or beacons, of the plaintiff's land parcel Mombasa/Ziwa La Ngombe Scheme/1128 and the defendant's land parcel Mombasa/Ziwa La Ngombe Scheme/1130.

(ii) The Regional Surveyor, Coast Region, to do a sketch map of the disputed area and provide details of whether the defendant is undertaking any developments or is encroaching in any way with the boundaries of the plaintiff's land parcel Mombasa/Ziwa La Ngombe Scheme/1128, and if so, the extent and nature of the developments and/or encroachment.

(iii) The Regional Surveyor, Coast Region, to undertake the exercise and file his report within the next 14 days.

(iv) That pending the consideration of the survey report by the Court, there is hereby issued an order of injunction, stopping the defendant from undertaking and/or proceeding with construction on the disputed land, irrespective of whether the defendant believes the disputed land to be Mombasa/Ziwa La Ngombe Scheme/1130. For avoidance of doubt this order to remain in place until the next mention date which shall be 16 September 2020.

(v) The costs of the survey by the Regional Surveyor, for now, to be shouldered by the plaintiff and depending on the outcome of the report, this court reserves the discretion to order that the plaintiff be compensated by the defendant for such costs.

(vi) Mention 16 September 2020.

(vii) The plaintiff to extract and serve this order upon the Regional Surveyor, Coast Region, and follow up on the survey and to also serve a mention notice upon the defendant.

4. In this application, the applicant avers that despite the order of injunction issued in prayer (iv) above, the respondent has failed to comply with it and has refused to stop the works and/or developments in issue. There are annexed photographs to demonstrate this. He thus wishes to have the respondent found to be in contempt.

5. The respondent has not filed anything to respond to this motion.

6. I have no reason to doubt the averments of the applicant. If the respondent was keen to oppose this motion, she would have filed a reply to it but she has not. Court orders are not issued in vain and it is upon each party to obey the same. We would be in a state of anarchy if persons disobeyed orders of the court with impunity. I need not say more.

7. I find the respondent to be in contempt of the order of court issued on 26 August 2020. I issue a warrant of her arrest to be executed by the OCS of the police station that is nearest the disputed properties. Once arrested, the respondent to be presented before this court for this court to give her a chance to mitigate before meting out the appropriate sentence. The respondent will also pay costs of this application.

8. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

IN THE PRESENCE OF:

Mr. Gambo for the applicant

No appearance for the Respondent

Court Assistant; Wilson Rabongo.