



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 197 OF 2015

1. BISHOP MARK KUBAI KARIUKI

2. BISHOP J.B MASINDE

3. BISHOP WILLIAM K. TUIMISING

4. REVEREND SAMUEL GAKUO

5. REVERED GEORGE MULINGE MWAULA

6. REVEREND PAUL MUTUNGA (Suing on behalf of

the Deliverance Church of Kenya).....PLAINTIFFS

VERSUS

JAPHET NOTI CHARO

COUNTY GOVERNMENT OF KILIFI

THE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By this Notice of Motion dated and filed herein on 24th June 2019, Bishop Mark Kubai Kariuki, Bishop JB Masinde, Bishop William K. Tumusing, Rev. Samuel Gakuo, Rev. George Mulinge Mwaula and Rev. Paul Mutunga suing on behalf of the Deliverance Church of Kenya (hereafter "the Plaintiffs) pray for orders:

3. That the 1st Defendant Japhet Noti Charo be punished for contempt and jailed for a period not exceeding six months and;

a. Be compelled by a mandatory order to reconstruct all the structures which stood on Plot Portion No. 14034 contained in Land Survey Plan No. 401352/Unsurveyed Plot Numbers 4, 5, 7, 8, 10 and 11 Sabaki Squatters Upgrading Scheme/Portion No. 10840 and (which) were destroyed on 20th June 2019;

b. Be restrained permanently by himself, his servants, agents and or employees from accessing, remaining on, constructing on, selling, leasing, charging, transferring and/or in any other manner dealing with Plot Portion No. 14034 contained in Land Survey Plan No. 401352/unsurveyed Plot Numbers 4, 5, 7, 8, 10 and 11 Sabaki Squatters Upgrading Scheme/Portion No. 10840 pending the hearing and determination of this suit.

c. The Court Bailiff one Samuel Ntongai be punished for contempt for executing the Court Order at night.

2. The application which is supported by an affidavit sworn by Pastor Paul Katithi Mutunga is premised on the grounds that:

a. There exists a Court Order arrived at as a compromise and consent of the parties herein issued on 16th June 2015. That order has not been set aside or varied and the suit herein has not been heard and determined;

b. The 1st Defendant was represented in Court by his lawyer Mr. Otara on the 16th June 2015 and authorized the recording of the Court order that day;

c. Following an application by the Applicants dated 28th October 2015, Justice Angote directed in his Ruling of 20th May 2016 that on breach of the order of 16th June 2015, the avenue open to the Applicants is to enforce the order rather than seek further orders;

d. On 2nd April 2019, the 1st Respondent moved the lower Court in Malindi CMCC No. 5 of 2018 and obtained ex parte mandatory orders which destroyed the status quo guaranteed by the orders of 16th June 2015 and 20th May 2016;

e. On 20th June 2019 at around 3.30 a.m. escorted by armed Police Officers and a Court Bailiff, the 1st Respondent destroyed all the structures standing on Plot Portion No. 14034 in open contempt of the Court Orders aforesaid.

f. Court Orders are never issued in vain and the Court is empowered to protect full compliance with its orders.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 5th July 2019, Japhet Noti Charo (the 1st Defendant/Respondent) avers that he is the registered owner of all that parcel of land known as Portion No. 14034 Malindi. He avers that the Plaintiffs plots at the said Sabaki Squatter Upgrading Scheme are far away from the suit property which is situated at Malindi Town Centre.

4. The 1st Defendant further avers that this suit was commenced way back in 2015 but the Plaintiffs have never taken any steps to prosecute the same. He further avers that he had filed another suit being *Malindi ELC No. 2 of 2012* against the 6th Plaintiff but he has since withdrawn the same and filed *Malindi CMCC Land Case No. 5 of 2018* against the said 6th Plaintiff.

5. The 1st Defendant accuses the 6th Plaintiff of refusing, and/or ignoring to participate in the proceedings in the said *Land Case No. 5 of 2018* and that on 2nd April 2019 the Court issued an order which was duly executed by the Court Bailiff with the help of the OCS Malindi. Following that execution, the Plaintiffs filed *Constitutional Petition No. 20 of 2019* against the 1st Defendant which Petition remains pending for determination.

6. The 1st Defendant denies any knowledge of the consent order referred to by the Plaintiffs and avers that he has never been served with the same and that in any event the order was issued on 5th November 2015 and had lapsed on 4th November 2016 without being extended.

7. I have perused and considered the Plaintiffs' application and the response thereto by the 1st Defendant. I have similarly perused and considered the authorities and written submissions placed before me by the Learned Advocates for the parties.

8. The Plaintiffs have urged this Court to punish the 1st Defendant-Japhet Noti Charo- for contempt and to accordingly jail him for a period not exceeding six months. Those prayers arise from the Plaintiffs' contention that on 20th June 2019, the 1st Defendant demolished the Plaintiffs' structures on the suit property in spite of an existing Court Order issued on 16th June 2015. It is the Plaintiffs' case that the 1st Defendant's Advocates participated in the recording of the order which was by the consent of the parties and hence the 1st Defendant had full knowledge of the same.

9. The impugned orders were unfortunately neither attached to the Plaintiffs application nor to the 1st Respondent's Replying Affidavit. From the material placed before me however, it was clear that both parties agreed that on the said 16th June 2015, a consent order was recorded by the parties to the effect that the status quo pertaining then be maintained pending the hearing of the suit.

10. As it were, those orders were not issued in this suit but in *Malindi High Court Civil Suit No. 2 of 2012; Japhet Noti Charo –vs- Pastor Paul Mutunga and the Deliverance Church*. From an extract of an order issued by the Honourable Justice Chitembwe annexed to the Plaintiffs Supporting Affidavit as Annexure PM2, it is evident that on 5th January 2016 an order was made that the said matter filed in the High Court be mentioned before the Environment and Land Court at Malindi on 15th February 2016. That would appear to explain how the parties henceforth came to refer to the matter as *Malindi ELC No. 2 of 2012*.

11. From the material placed before me, that suit was by a Notice dated and filed on 24th April 2018 wholly withdrawn by the 1st Defendant and was accordingly marked as withdrawn. It is also apparent that around the time the 1st Defendant withdrew the said suit, he filed another one before the Malindi Chief Magistrates Court being *Land Case No. 5 of 2018*.

12. On 2nd April 2019, about a year after *Malindi ELC No. 2 of 2012* was withdrawn, an order was made by the Honourable Mrs Wewa Senior Principal Magistrate Malindi for the removal of the structures on the suit property. Those were the orders whose execution led to the application before me.

13. Given the failure by the Plaintiffs to annex the impugned order, this Court was unable to tell if the same made any reference to the suit presently before me. And given that the suit in which the order was given had been withdrawn a year before the action constituting the subject of the application before me, this Court had no basis upon which to assume that the said orders were in existence as at the time the 1st Respondent is said to have breached the same.

14. At any rate, it was clear to this Court that the act complained of was as a result of the execution of a Court order issued in *Malindi CM's Land Case No. 5 of 2018*. At Paragraphs 11 to 12 of the 1st Defendant's Replying Affidavit, he avers that the said new suit was served upon

the 6th Plaintiff who refused and/or ignored the same.

15. From the material placed before me I had no reason to doubt that the 6th Plaintiff was so served and that the Plaintiffs were as a result aware of the new case in which the 1st Defendant sought the removal of their structures from the land. Having failed to take any action to defend the suit, the Plaintiffs cannot be allowed to come to this Court accusing the 1st Defendant of contempt of Court for executing lawful orders that were obtained from another Court.

16. In the premises, I did not find any merit in the Motion dated 24th June 2019. I dismiss the same with costs to the 1st Defendant/Respondent.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE