



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 187 OF 2017**

**SEIF MOHAMED SAID NASSOR AL-BUSAIDY**

**HILAL MOHAMED SAID NASSOR AL-BUSAIDY**

**SOD MOHAMED SAID NASSOR AL-BUSAIDY**

**KHALIFA MOHAMED SAID NASSOR AL-BUSAIDY.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**FRANCIS STEMBO MATAYO.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is a Notice of Motion application dated 31<sup>st</sup> October 2017. By the said application, the four Plaintiffs/Applicants urge that a warrant of arrest be issued to arrest the Defendant/Respondent and that he be brought to Court to show cause why he should not be committed to jail for a term not exceeding two years or be fined a sum not exceeding Kshs 20 Million or both for disobeying orders issued by this Court on 11<sup>th</sup> September 2017. The Plaintiffs also urge that the Defendant be so jailed and/or fined as the Court may find fit.

2. At the same time the Plaintiffs pray that an order of mandatory injunction be issued directing the Defendant to demolish and remove all the developments made on the suit property in disobedience of the said Court orders and in the event of failure, the Plaintiffs to demolish and remove the same at the Defendant's cost.

3. The application is supported by an affidavit sworn on the same date of the application by Seif Mohamed Said Nassor Al-Busaidy

(the 1<sup>st</sup> Plaintiff) and is premised on the grounds:-

*(i) That on 11<sup>th</sup> September 2017, this Court issued orders restraining the Defendant from further building on Plot No. 4286(Original No. 1755/31) Malindi and from trespassing, entering, remaining upon and/or dealing therewith pending the hearing and determination of an application that was pending in this Court;*

*(ii) That the orders were duly extracted and served upon the Defendant;*

*(iii) On 20<sup>th</sup> September 2017, the Defendant appearing in person sought a variation thereof but as directed to obey the same and file a formal application for variation;*

*(iv) That contrary to the said orders and directions, the Defendant has since been using his workmen to trespass upon and carryout construction on the suit property; and*

*(v) It is fair and in the interest of justice that the Orders sought herein be granted as the Defendant has vowed to continue with the constructions on the suit property.*

4. In a Replying Affidavit filed herein on 23<sup>rd</sup> November 2017, Francis Stembo Matayo (the Defendant) avers that he is the first born son of one Mathayo Kondo, who is now deceased. It is his case that he and other heirs of the Estate of the deceased have an interest in the suit premises as his deceased father was granted a Licence by the owners of the suit premises to erect or build a house thereon.

5. The Defendant states that his father used to pay ground rent for the land and upon his death, he offered to pay the same but the Plaintiffs refused to respond to their request. At one stage when their father's structure on the premises needed repairs, the Plaintiffs pulled it down and removed the debris out of the site in order to defeat the Defendant's beneficial interest.

6. In 2007 when the Defendant's family got funds, they desired to develop the property but the Plaintiffs refused to respond to their request. It is therefore the Defendant's case that they are ready and willing to pay the arrears of ground rent to-date and to continue being on the suit premises as Licensees or in the alternative to negotiate for the purchase of the suit premises.

7. I have considered the application and the response thereto. I have equally considered the submissions filed herein and authorities to which I was referred by the Learned Advocates for the parties. As was stated in the old English case of ***Hadkinson –vs- Hadkinson(1952)2 ALL ER 567:***

*“It is the plain obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”*

8. It is now commonly understood that there are essentially four elements that need to be proved in a case for civil contempt. The applicant in such cases must prove to the required standard that:-

**(i) The terms of the order( or injunction or undertaking were clear and unambiguous and were binding on the defendant;**

**(ii) The defendant had knowledge of or proper notice of the terms of the orders;**

**(iii) The defendant has acted in breach of the terms of the order; and**

**(iv) The defendant's conduct was deliberate.**

9. Pursuant to an application dated and filed herein on 5<sup>th</sup> September 2017, the Plaintiffs sought orders of injunction restraining the Defendant from further building on or from dealing with the suit property in any manner whatsoever. When the said application was placed before the Honourable Justice Anne Omolo in Mombasa on 11<sup>th</sup> September 2017; the Learned Judge granted orders as follows:-

**1. That this application be and is hereby certified as urgent.**

**2. That pending the hearing and determination of this application, a temporary injunction be and is hereby issued restraining the Defendant/Respondent by himself, servants and/or agents and any person or persons acting under him from further building on Plot Number 4286(Original Number 1755/31) Malindi and from trespassing, entering, remaining and/or dealing with the said property in any manner whatsoever.**

**3. Applicant to serve the Defendant with the application.”**

10. When the matter subsequently came before this Court on 20<sup>th</sup> September 2017, the Parties appeared in Court whereupon the Defendant indicated that he had only been served on 19<sup>th</sup> September 2017 and he therefore required time to instruct an advocate and to file a response. The Defendant further addressed the Court and stated as follows:-

***“I have issues with an order against trespassing. We can however stop the construction. My name is Stembo and not Tembo (as indicated in the suit papers).”***

11. Thereafter, the Defendant was granted 21 days to instruct Counsel and the Interim Orders were extended and have continued to be extended upto the time the Plaintiffs filed the present application. The Defendant was therefore aware of the existence of the said Orders and indeed he does not deny their existence and/or knowledge thereof.

12. However from the submissions made by Mr. Okuto, Learned Counsel for the Defendant, it is the Defendant's case that the said orders were served after they became stale and were therefore ineffective in law and incapable of being disobeyed and/or violated. Counsel's argument was premised on what he submitted was Order 40 Rule (3) but which I think should be Order 40 Rule 4(3) of the Civil Procedure Rules. The said provision reads as follows:-

***4(3) In any case where the Court grants an ex-parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under the rule, the injunction shall automatically lapse.”***

13. With respect, I think the requirement of service within three days of an order granted ex-parte is a provision that was imported into the Civil Procedure Rules 2010 to safeguard the party against whom the order has been made from inconvenience or possible injustice occasioned from a restraining order, and was meant to facilitate the parties to the dispute to return to Court within the shortest time possible to argue the same.

14. I decline the invitation that Order 40 Rule 4(3) of the Rules was meant to defeat the ends of justice in service of Court orders. It could not have been the intention of the drafters to have Court orders disobeyed and defied at will merely because the order was not served within

three days. All Court Orders once made are binding and must be obeyed unless and until they are varied or set aside.

15. At any rate, the Defendant herein subsequently attended Court on 20<sup>th</sup> September 2017, some nine days after the orders were issued and was aware of their extension thereon on the said date and other subsequent dates prior to the filing of the application for contempt presently before me. As the Court of Appeal observed in **Refrigerator and Kitchen Utensils –vs- Gulabchand Popatlal Shah & Another (Civil Application No. 39 of 1990)**:-

*“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question... he should apply to the Court that it might be discharged. As long as it exists, it must not be disobeyed.”*

16. In this regard, I note in the matter before me that the Defendant does not deny anywhere in his Replying Affidavit that he continued with construction after the said orders were granted. Indeed as the Plaintiffs have demonstrated his workers were on the site on 9<sup>th</sup> October 2017 carrying on with construction when the Plaintiffs visited the site in the presence of Police Officers from Malindi Police Station. The Police Officers captured the same in their OB No. 9/10/17 at 12.17 hours.

17. The Defendant was certainly continuing with the construction on his belief or upon the advise of his Counsel that the Court's Orders had become stale and incapable of obedience. He was grossly mistaken in that belief. This Court will not condone deliberate disobedience of its orders and will certainly not shy away from its responsibility to deal firmly with proven contemnors.

18. Accordingly and in order to facilitate his punishment I do find merit in the application. Warrants of arrest are hereby issued as sought at Prayer No. 2 of the application to the Officer Commanding Station, Malindi Police Station to forthwith apprehend the Defendant and to bring him to Court to show cause why he should not be committed to civil jail

19. Orders accordingly.

**Dated, signed and delivered at Malindi this 31<sup>st</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**