



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 194 OF 2017

KADII KAHINDI KATANA

FELIX MWANDEGE

(suing as the legal administrator

of the estate) of MWANDEGE

NGUWA MWANDEGE (DECEASED).....APPLICANTS

VERSUS

NZOVU MUPE.....1ST RESPONDENT

MWAGONA MUPE & 8 OTHERS.....2ND RESPONDENTS

RULING

1. By this Notice of Motion Application dated and filed herein on 19th March 2018, the Applicant prays for orders:-

2. That a warrant of arrest be issued to arrest the Respondents, their servants, agents and/or any persons working under the Respondents' authority be brought to Court to show cause why they should not be committed to jail for a term not exceeding six(6) months for disobeying the Court Orders issued on 6th day of December 2017;

3. That the Respondents, their Servants, Agents and/or any persons acting under the Defendants' authority be subsequently committed to jail for a term not exceeding six(6) months;

4. That the OCPD-Kilifi assist in executing the above Orders; and

5. That the costs of this application be provide for.

2. The application is supported by an Affidavit sworn by Felix Mwandege and is premised on the grounds:-

a) That on 6th December 2017, this Court issued orders restraining the Respondents from constructing, cultivating and carrying on any activities on the suit premises pending the hearing and determination of this suit;

b) That despite service of the said Orders upon the Respondents, they have totally ignored and/or refused to obey the Orders thereby necessitating this application;

c) That the Respondents are now constructing on and cultivating the suit land to the detriment of the Applicants herein;

3. In response to the said application the Respondents have filed Grounds of Opposition dated 6th April 2018 in which they state:

i) That the Applicants application is brought pursuant to the wrong provision of the law.

ii) That the said application contravenes the mandatory provisions of Order 1 Rule 13 of the Civil Procedure Rules 2010.

iii) That the Applicants misconceived (sic) the content, import and tenor of the consent order issued by this Honourable Court on 6th December 2017.

iv) That there was no personal service of the said order upon the ten (10) respondents as required by the law.

v) That there is no evidence of an affidavit of service annexed to the application confirming that either or all the respondents were served.

vi) That the said application is misconceived, bad in law, unmerited and without basis hence ought to be dismissed with costs to the Respondents.

4. I have considered the Application as well as the Grounds of Opposition filed in response thereto. I have equally perused and considered the written submissions placed before me by the parties.

5. There are essentially four elements that must be proved in an application of this nature. Those elements may be framed as follows:-

a) The terms of order(or injunction or undertaking) were clear and unambiguous and were binding on the Respondent;

b) The Respondent had knowledge of or proper notice of the terms of the order;

c) The Respondent has acted in breach of the terms of the order; and

d) The Respondent's conduct was deliberate.

6. In the matter before me the Plaintiff/Applicants filed this suit on 18th September 2017. On that very day they also filed a Notice of Motion application dated 11th September 2017 seeking temporary orders of injunction to restrain the 10 Defendants/Respondents from disposing, selling, building structures, leasing or interfering in any way with Plot No. Kilifi/Vyambani/222.

7. On 6th December 2017 when the said application came up for hearing, Mr. Obaga, Learned Counsel for the Plaintiffs/Applicants and Mr. Nyamwange, Learned Counsel for the Defendants/Respondents recorded a consent which was extracted by the Applicants thereafter as follows:-

“IT IS HEREBY ORDERED BY CONSENT”

1. That the County Surveyor Kilifi do survey the boundary in dispute and avail his/her report to Court within 45 days of today's date.

2. That the Surveyor's costs to be met equally by both parties.

3. That the matter be mentioned on 12th March 2018 for further directions.

4. That the Status Quo obtaining as of 1st November 2017 to be maintained.”

8. From the record, it was not clear to me why the parties chose the date of 1st November 2017 to anchor the orders of Status Quo when the consent was being recorded on 6th December 2017. I have perused the pleadings and the entire file but was unable to discern the joint interest of both parties on that particular date.

9. According to the Plaintiffs/Applicants, those orders restrained the Respondents from carrying out any construction on the land, cultivating it or carrying on any activities thereon. And by the application before me, they express their grievance at the fact that despite such restraining orders, the Defendants/Respondents have ignored the same and continued with their constructions and cultivation of the land.

10. As was stated by the Court of Appeal in **Jihan Freighters Ltd –vs- Hardware & General Stores Ltd and in A.B & Another –vs- R.B. (2016) eKLR**, to sustain committal for contempt of Court, the order of the Court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing.

11. From the material placed before me, it is evident that the parties have had this dispute for some time now. The very basis of this suit is the Plaintiffs/Applicants claim that the Respondents have dispossessed them of the suitland where they (the Respondents) have now constructed buildings and carry on cultivation. Indeed in the year 2014, some of the Respondents herein were charged with the offence of Forcible Detainer contrary to Section 91 of the Penal Code on the very basis of taking possession of the land and using the same.

12. That being the case, the Orders of status quo as agreed by the parties on 6th December 2017 could hardly have had the effect the Plaintiffs/Applicants purported them to have herein. Contempt proceedings are quasi-criminal in nature and the standard of proof is higher than proof on a balance of probabilities. I did not in the circumstances of this case find sufficient proof of the alleged contempt.

13. Accordingly, the application dated 19th March 2018 is dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE