



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 195 OF 2017

MADHAA CHARO KALU.....APPLICANT/PLAINTIFF

VERSUS

SALIM CHARO.....1ST RESPONDENT/DEFENDANT

FREDRICK OMAR.....2ND RESPONDENT/DEFENDANT

JULIUS NGOMBO.....3RD RESPONDENT/DEFENDANT

RULING

1. Before me for determination is a Notice of Motion application dated 9th April 2018, By the said Motion the Plaintiff Madhaa Charo Kalu pray for orders as follows:-

1) ...

2) That a warrant of arrest be issued to arrest the Defendant, his servants, agents and/or any persons acting under the Defendant's 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 18th day of December 2017;

3) That the OCS Bamba Police Station be ordered in executing this order(sic);

4) That the Defendant, his servants, agents and/or any persons acting under the Defendant's authority be subsequently committed to jail for a term not exceeding six(6) months; and

5) That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by the Plaintiff and is based on the grounds:-

i) That this Court issued orders on the 18th day of December 2017 restraining the Defendants, his servants, agents or anyone acting under his authority from disposing off, selling, building structures, leasing and/or interfering with the Applicant's property known as Plot No. 177/Kilifi/Mitsedzini Adjudication Settlement Scheme pending the hearing and determination of the application dated 28th August 2017;

ii) That despite the orders being duly extracted and served upon the Defendants, he totally ignored and or refused to obey the same; and

iii) That the Plaintiff is apprehensive that the Defendants and his agents will continue their illegal activities on the suitland unless dealt with as sought in the application.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on their behalf by the 2nd Defendant/Respondent Fredrick Omar, the Defendants aver that the parties in this suit are family members of the late Charo Kalu Mwangi who passed away on 28th May 1994. It is the Defendant's case that the suit property was purchased by their late father and that the Plaintiff being their step-brother has beneficial rights and interests over the same.

4. The Defendants however assert that they were not aware of the existence of this suit until the time when they were arrested and brought before this Court. They aver that they are law-abiding citizens and urge the Court to grant them a chance to defend the suit.

5. I have perused and considered the application as well as the response thereto. Contempt of Court may be defined as the willful disobedience or disregard of Court orders, Judgments, decrees or directions. Contempt thus manifests itself in the willful and intentional disregard of or disrespect for the authority of the Court, a behavior that is regarded wrongful because it tends to undermine the authority of the Courts and its processes and thereby to lower the dignity of the Courts and undermine the rule of law.

6. As it were contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than that required in ordinary civil cases. Examining the elements of Civil Contempt in *Katsuri Ltd –vs- Kapurchand Depar Shah (2016)eKLR*, Mativo J quoting from the Learned Authors of the book *Contempt in Modern New Zealand* observes as follows:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard that:-

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

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

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

d) The defendant’s conduct was deliberate.

7. In the matter before me the Plaintiff prays for a warrant to issue to have the Defendants arrested and be brought to Court to show cause why they should not be committed to jail for disobeying the orders issued by this Court on 18th December 2017.

8. On the said date, the Court allowed the Plaintiff’s application for injunction and thereby restrained the Defendants from disposing off, selling, leasing and/or interfering with the property known as Plot No. 177/Kilifi/Mitsedzini Adjudication Settlement Scheme. According to the Plaintiffs, those orders were served upon the Defendants who have ignored the same and continue to deal with the land.

9. At annexure MCK2 of the Supporting Affidavit, the Plaintiff annexes an Affidavit of Service sworn by one Michael Otieno in which the deponent states in the relevant part as follows:-

“2. That on the 18th December 2018, I received a copy of order dated 18th day of December 2018 from M/s Katuga & Company Advocates, Mombasa with instructions to serve the same upon the Defendants herein.

3. That on the same day upon arrival I met the defendants at their homestead at Bamba Matsedzini Village a place well known before, they accepted service and acknowledged receipt but declined to sign.

4. That service was successfully done upon the Defendants herein.

10. I have looked at that Affidavit of Service. Other than missing the year of service by one whole year, the deponent does not state how he came to know the Defendants and or their village which he claims to be a place well known before. To make matters worse, the Plaintiff in a Supplementary Affidavit filed herein on 22nd March 2019 in an effort to clarify the issue states that the Defendants were served at the Ganze Deputy County Commissioner’s office in his presence and that at another time they were served through the Area Assistant Chief in his office.

11. As I have pointed out above, in an application of this nature, the Court is dealing with the liberty of a person and such an order ought to be granted only in the clearest circumstances where the Court is persuaded that the orders said to have been disobeyed were properly brought to the attention of the alleged contemnor.

12. In the present matter, other than it not being clear when, how and where the Defendants were served, it was also not clear to me what the Defendants are said to have done in disobedience thereof. At paragraph 4 of the Supporting Affidavit, the Plaintiff simply states that the defendant (sic) has ignored or refused to obey and continue (sic) with dealings on the suit land.

13. In support of the alleged “dealings on the suitland” the Plaintiff purports to annex copies of photographs taken two days after service as annexure “MCK 3”. As it turned out, there are no photographs annexed to the application before me.

14. In the result, I did not find any merit in the application dated 9th April 2018. The same is dismissed with costs to the Defendants/Respondents.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE