



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO.82 OF 2011

MATUNDA SERVICES LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

FREDRICK KITHI & 16 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. By a Plaint dated and filed in Court on 30th June 2011, the Plaintiff/Applicant sued the 16 Defendants/Respondents herein for trespass. After hearing the parties, the Court delivered Judgment on 18th February 2014 in which it was found that the Plaintiff Company had proved its case and was therefore entitled to the Orders sought in the Plaint. A decree extracted from the said Judgment issued on 24th June 2014 reflects that it was ordered as follows:-

a) A permanent injunction is hereby issued restraining the defendants, their servants, agents, family members and any other person deriving interest from them from trespassing and entering into the Plaintiff's Plot No. 295 Malindi and from cutting down mango trees, burning charcoal, cultivating and planting crops, putting up structures and living on this land;

b) A permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants or employees from entering upon, remaining thereon, removing from, wasting, sub dividing, digging on, excavating, fencing, erecting or building any construction whatsoever or otherwise dealing with the suit property all that property Plot No. 295, Malindi;

c) A permanent mandatory injunction is hereby issued compelling the Defendants by themselves, their agents, servants or employees to vacate the suit property and demolish any structure put on by the Defendants which order, be enforced by the officer commanding Malindi Police Station;

d) That the Plaintiffs counterclaim has failed and is hereby dismissed accordingly;

e) That an order is hereby issued for the Plaintiff, its agents and/or servants or agents to demolish and remove any illegal structure unlawfully built by the Defendants, its agents, servants on the suit property Plot No. 295 Malindi; and

f) Parties to bear their own costs.

2. It would appear that the issuance of the said decree did not however bring the conflict between the Plaintiff on the one hand and the Defendants on the other, to an end. By a Notice of Motion application

dated and filed herein on 9th February 2017, the Plaintiff now prays for orders:-

i) That the Honourable Court be pleased to summon the Judgment Debtors/Respondents, Fredrick Kithi Kombe, Gona Fondo Kalama, Changawa Ngulu Kitsao and William Kenga Shihi to appear and answer why they have resisted and obstructed the Decree holder/Applicant from possessing the suit property;

ii) That the Honourable Court be pleased to order the Judgment debtors/Respondents Fredrick Kithi Kombe, Gona Fondo Kalama, Changawa Ngulu Kitsao and William Kenga Shihi, their servants and agents or any other person obstructing be detained for a period not exceeding 30 days for obstruction and resistance of execution of the decree issued by this Court on 18/2/2014;

iii) That the Judgment debtors/Respondents do pay the costs of this application; and

iv) That such other and/or further relief be granted as the Honourable Court may deem fit and just to grant.

3. The said application is premised on a number of grounds listed on the body thereof and which may be summarized as follows:-

a) That the Judgment debtors have flagrantly disobeyed the Orders granted by the Court on 18th February 2014;

b) That despite receiving and having knowledge of the said orders, the Judgment debtors have refused to vacate the suit property;

c) That the Applicant has been denied access to enter or live in the suit premises; and

d) That the Respondents have refused to demolish the structures on the suit property and/or to render vacant possession thereof.

4. In a Replying Affidavit sworn by the 1st Respondent Fredrick Kithi Kombe on behalf of the other Respondents on 5th April 2017, the Respondents state that there are about 79 families residing in the suit property. It is further their case that there exists a Constitutional Petition No. 4 of 2017 pending for determination in this Court in which petition serious fundamental constitutional issues with overwhelming chance of success have been raised. The Respondents therefore aver that it would be fair and just if their said petition is heard first before any execution herein proceeds. It is also the Respondents position that even if the four of them are evicted, the other 75 families will still remain in the suit property.

5. In a further Affidavit sworn and filed in Court on 2nd May 2017, the Plaintiffs contend that the 79 families do not reside on the suit property but rather on Plot No. 302. It is further the Plaintiffs case that they are not aware of Petition No. 4 of 2017 as they have not been served with any papers thereon. The Plaintiffs further aver that the Defendants have been introducing third parties to take up possession in their suit property.

6. I have considered the application and the response thereto. I have also taken into account the submissions of Ms Chepkwony, Learned Counsel for the Plaintiffs/Applicants and Mr. Otara, Learned Counsel for the Defendants/Respondents. I have also perused the authorities referred to by the learned Counsels in support of their positions.

7. It is not in dispute that this Court delivered Judgment herein on 18th February 2014 and that a decree to that effect was issued on 24th June 2014. That decree required a number of things to be done including a requirement that the Defendants by themselves, their agents, servants or employees do vacate the suit property and demolish any structure put thereon by the Defendants.

8. Section 51 of the Civil Procedure Act provides that:-

“ Where the Court is satisfied that the holder of a decree for the possession of immovable property, or that the purchaser of immovable property sold in execution of a decree, has been resisted or obstructed in obtaining possession of the property by the Judgment-debtor or some other persons on his behalf, and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the Judgment-debtor or such other person to be detained in prison for a term which may extend to thirty days, and may further direct that the decree-holder or purchaser be put in possession of the property.

9. When confronted with the allegations of resistance and/or obstruction to the execution of the decree, the 4 Respondents named in the decree-holder’s application aver that there exists another suit it being Constitutional Petition No. 4 of 2017 pending for determination in this Court which raises fundamental constitutional issues with overwhelming chance of success. Accordingly they state that it would be fair and just that the said Petition be heard first before any execution proceeds herein. Alternatively, the Respondents state that there are about 79 families residing in the suit property and that even if the 4 of them were to be evicted, still the other 75 families will remain in the suit property.

10. In essence, the 4 Respondents admit that they have not complied with this Court’s Orders issued on 18th February 2014 because they have 3 years down the line, in the year 2017, filed a constitutional petition which raises issues that should be heard first and secondly, that even if this Court evicts them, the Decree-holder’s headache will not have been resolved as there are another 75 families residing on the same property.

11. The Respondents arguments in my view amount to nothing, but open defiance of the Court’s Orders. As it turned out, the Constitutional Petition referred to has neither been served upon the Applicant nor does it seek to stop execution of the matter before me. Besides, the mere facts that there may be third parties in the suit property does not absolve the Respondents of their obligation to comply with this Court’s Orders.

12. It has been said time and again and probably bears repeating here that it is essential for the maintenance of the rule of law and good order that the authority and dignity of the Courts are upheld at all times. In a democratic state like Kenya, citizens rely on the Courts for the impartial resolution of disputes in regard to their legal rights and obligations. As a result, once a dispute has been submitted to a Court of law, citizens should be able to rely on the ability of the Court to decide it impartially, independently and in accordance with the law. Consequently, any act or omission which offends the dignity and authority of the Courts impacts negatively on the fair administration of justice and ought to be punished accordingly.

13. In ***Board of Governors Moi High School Kabarak –vs- Malcolm Bell (2013) eKLR (Petition No. 6&7 of 2013)*** the Supreme Court typified the power to punish for contempt as one of the inherent powers of a Court which enables it to regulate its internal conduct, safeguard itself against contemptuous and/or disruptive intrusions from elsewhere, and ensure that its mode of discharge of duty is conscientious, fair and just. Without these powers, the protection of citizen’s rights and freedoms would be virtually impossible as Courts of Law would be reduced to futile institutions spewing forth orders in vain.

14. As a result, obedience of Court Orders is not optional. Rather, it is mandatory and a person does not choose whether to obey a Court order or not. As ***Romer L.J. held in Hadknison –vs Hadkinson***

“.....there is a plain, unqualified and uncompromising obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey that Order unless and until it is discharged.”

15. The power of Courts to punish for contempt is meant to assure a party who walks through the justice door with a Court order in his hands that the Order will be obeyed by those to whom it is directed. That is the only way to preserve and safeguard the rule of law. A Court Order requiring compliance is not a mere suggestion or an opinion. It is a command that is issued after much thought with circumspection. It must

therefore be complied with and it is in the interest of every person that this remains the case.

16. That being so, I find and hold that the acts and/or omissions of the 4 respondents named herein were deliberate and in open defiance of the authority of this Court. The acts and/or omissions were cleverly executed to circumvent the cause of justice and deny the Plaintiff its just entitlement. In refusing to vacate the suit premises and to remove their structures thereon, the Respondents were and are accordingly found in contempt of the orders granted by this Court on 18th February 2014 and extracted as per the decree issued on 24th June 2014.

17. Arising from the foregoing, I hereby order and direct that a warrant of arrest does issue against the Respondents/Judgment-debtors Fredrick Kithi Kombe, Gona Fondo Kalama, Changawa Ngulu Kitsao and William Kenga Shihi and that they be arrested forthwith and compelled to appear in this Court and show cause why they should not be punished for failing to comply with the orders of this Court.

18. The Officer Commanding Malindi Police Station is hereby directed to effect the Orders of this Court.

19. The costs of this Application shall be borne by the 4 Respondents jointly or severally.

Dated, signed and delivered at Malindi this 22nd day of February, 2018.

J.O. OLOLA

JUDGE