



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 54 OF 2017

ABDALLA MOHAMED ABDISHEIKH.....PLAINTIFF/APPLICANT

VERSUS

KISHAN CONSTRUCTION LIMITED.....DEFENDANT/RESPONDENT

RULING

1. On 14th March 2017, a temporary injunction order was issued by this Court restraining the Defendant herein from trespassing upon the Plaintiff's parcel of land known as Ngomeni Squatter Settlement Scheme/1859. Those orders were extended until 19th September 2017 when they were confirmed pending hearing and determination of the suit.

2. In the meantime by an application dated and filed herein on 14th July 2017, the Plaintiff is seeking an order that:

2) Ranji Kalyan Patel the director of the Defendant Company and any other director of the Defendant Company together with the Site Manager or Supervisor at the construction that is causing trespass on the subject parcel of land herein called Naran Varsani be cited for contempt of Court proceedings, they be imprisoned to civil jail for a term of six (6) months, or, in the alternative, their property if any be attached and sold in accordance with the law.

3) The Defendant be condemned in costs occasioned hereby.

3. The said application is supported by the annexed affidavit of the Plaintiff and is premised on the grounds that:-

i. The Plaintiff owns the subject parcel of land and the Defendant has no claim over the same;

ii. The Defendant has admitted curving out a road through the Plaintiff's plot;

iii. The Defendant has continued to trespass on the subject land and has curved out another road thereon even after this Court initially issued the orders of injunction;

iv. The Defendant has continued to place and store building materials on the Plaintiff's parcel of land thus continuing the acts of trespass; and

v. The said acts are in breach of the existing Court order and the Defendant is clearly in contempt thereof and should be punished.

4. In response to the said application, Ranji Kalyan Patel, a director of the Defendant Company has sworn a Replying Affidavit filed herein on 5th October 2017 in which he repeatedly denies violating the Court orders. It is the Defendant's case that they stopped all activities in the suit property after the injunctive orders were issued by the Court and have not used the same as a road or to store building materials.

5. In particular the Defendants deny curving out any new road through the Plaintiff's plot and aver that the photos annexed to the Plaintiff's supporting affidavit were taken prior to the filing of this suit and do not therefore reflect the current and correct position.

6. I have considered the application and the response thereto. I have equally considered the submissions filed by the Learned Advocates for the Parties herein.

7. Vide Act No. 46 of 2016, Parliament enacted the Contempt of Court Act, 2016 which was assented to on 23rd December 2016 and commenced on 13th January 2017. According to the said Act, contempt includes civil contempt which means wilful disobedience of any Judgment, decree, direction, order or other process of a Court or wilful breach of an undertaking given to a Court.

8. Section 29(1) of the Contempt of Court Act provides that:-

“29(1) Where a company is guilty of contempt of Court in respect of any undertaking given to a Court by the company every person who, at the time the contempt was committed, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the contempt and such person may with the leave of the Court be committed to civil jail.

Provided that nothing in this subsection shall render any such person liable to punishment if the person proves to the satisfaction of the Court that the contempt was committed without his or her knowledge or that he or she exercised all due diligence to prevent its commission.”

9. In the matter before me, the Plaintiff has attached photos of what is alleged to be a road curved by the Defendant on the Plaintiff's parcel of land. The Defendant vehemently denies this and swears to have stopped any activity on the parcel of land the moment the Court issued the orders of injunction.

10. From the material placed before me, it is difficult to tell when the alleged road was created and who was responsible for the creation thereof. I did not find anything linking the Defendant Company or any of its representatives to the road. Indeed the photos annexed do not show any date or time and it is difficult to dismiss the Defendant's contention that the same were taken earlier or from a parcel of land other than the one in contention.

11. Arising from the foregoing, I do not find merit in the application dated 14th July 2017. The same is dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE