



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC MISC. CASE NO. 37 OF 2017

HELLEN NEKESA NEILSEN.....1ST APPLICANT

PAUL FRIEDRICK NIELSEN.....2ND APPLICANT

-VERSUS-

DOROTHY NELIMA WAFULA.....1ST RESPONDENT

THE ESTATE OF JOHANNES FRIEDRICK

WILHELM LOWE.....2ND RESPONDENT

RULING

1. For determination is the notice of motion dated 30th August 2017 asking the Court to grant the following orders:

(a) That this application be certified urgent and service thereof be dispensed with in the first instance and be heard on a priority basis.

(b) That this Honourable Court be pleased to commit the Respondent herein to civil jail for a period not exceeding six (6) months or any such period as may be directed by the Honourable Court for disobeying the order of Her Ladyship Justice Omollo dated 8th May, 2017, attached to the Supporting Affidavit as annexure “HNN-1”.

(c) That the Officer Commanding Ukunda Police Station or any other officer as may be designated by the Honourable Court be ordered to execute the committal warrants within twenty four (24) hours of receiving the committal warrants or such other period as may be directed by this Honourable Court.

2. The prayers are supported by the grounds on the face of the motion and the facts narrated in the affidavit of Hellen Nekesa Neilsen. The Applicant in paragraph 8 of her affidavit stated thus;

“However immediately upon completion of the process and soon after the OCS Ukunda had dispersed his officers from the site, the Respondent accompanied by 5 goons attacked me and my workers, robbed us our money and the tools we were using to put beacons and thoroughly assaulted me as evidenced in the medical report produced herewith. I annex a copy of the P3 forms duly filled and treatment notes and mark them annexure “HNN – 3” for the kind perusal of the Honourable Court.”

3. The Applicant went further to accuse the 1st Respondent of subverting the cause of justice by using her links which the Applicant deposes that if left unchecked, shall embolden the parties to defy the Court’s Orders. The Applicant avers that the 1st Respondent disobeyed the Court Order by removing beacons placed by the District Surveyor as directed by the Court and also denied her access to the suit property.

4. The application is opposed by the Respondents vide the replying affidavit of Dorothy Nelima Wafula who is the 1st Respondent. The 1st Respondent accuses the applicants of filing endless applications such as Miscellaneous Civil Application No 22 of 2017. She denied being in contempt of the Court Order and denied being aware of the said Court Order. She deposed that she did not in any way interfere with the process of demarcation and placing of beacons as stated in the alleged order of 8th May 2017. Instead the 1st Respondent aver that the 1st Applicant and her brother assaulted her and was only rescued by her neighbours after she raised alarm. The 1st Respondent stated that the beacons are still in place. She urged the Court to dismiss the application.

5. The parties filed written submissions to argue this application. I have read & considered them. There are two issues which I consider as arising for my determination:

(1) Whether the Respondents were served or had knowledge of the impugned order.

(2) Whether the Respondents have disobeyed the said order.

(3) Who bears the costs of this application.

6. The 1st Respondent avers that she was not aware of the order of 8.5.2017 as the same was neither served upon her nor her advocate. The Applicants on their part annexed as '*HNN – 2*' an affidavit of service sworn by Michael Thoya Mb'wana. Mr Mb'wana gave a description on how he served the 1st Respondent with the order on the 21st June 2017. The 1st Respondent did not deny the narration given by the process server in the annexed affidavit. She is the one who declined to receive the order and the same having been left at her gate in my view was sufficient service. Further the Respondents had opposed the application that generated the impugned order and knew the Court would make a determination over the same. The 1st Respondent cannot therefore plead ignorance going by the history of this matter as the judgement has always been in place since June 2015 and which judgement specifically provided for the survey of the suit property.

7. The second issue is whether the Respondents have disobeyed the Court order. The Applicants had sought the Court's assistance in the implementation of the judgement which prayer the Court granted on 8.5.2017. Armed with the order, the Applicants stated that they visited the suit property on 30.6.2017 to carry out that exercise. From the Applicants' own averment, the exercise was indeed conducted as pleaded in grounds **(c) & (d)**, and paragraph 8 of her affidavit already quoted supra. The 1st Respondent has denied that she removed the beacons placed by the Surveyor. There was no evidence presented to the Court showing the removal of the beacons although with the hostility demonstrated by both sides that may have been an uphill task for the Applicants to prove. But this Court cannot make a positive determination on the removal of the beacons in the absence of proof and instead presume they are in place until the contrary is shown. Secondly the physical markings having been done on the ground, there is no evidence from the District Survey Office that they are unable to complete the paper work based on the date they collected. For this reason I find limb **(b)** of the order was fully effected. I find no reason to blame the Respondents for disobedience of the same at this stage.

8. Part **(c)** of the order required the Defendants/Respondents not to obstruct or resist the partitioning of the survey exercise. The facts pleaded by the Applicant relates to the events after the exercise was done. The orders issued on 8th May 2017 were specific and the survey having been carried out, any acts of violence & or malicious damage to property that may have taken place are criminal and ought to be dealt with through the criminal justice process. This Court is not clothed with criminal jurisdiction to conduct trials of the offence of assault causing actual bodily harm or any criminal offence that is alleged by both sides. I will therefore not make any comments about the same.

9. In conclusion, it is my considered opinion going by the Applicants' own pleadings on record that the orders issued on 8th May 2017 were duly executed and therefore find the Respondents not guilty of any contemptuous acts. If the Applicants wish to have access to their share of the suit property and the Respondents offer any resistance, let them move the Court appropriately. In the end, this application is hereby dismissed with costs to the Respondents.

Dated, signed & delivered at Mombasa this 25th May 2018.

A. OMOLLO

JUDGE