



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 104 OF 2013

ABDULRAZAK MUHSIN SHERIFF.....PLAINTIFF/APPLICANT

VERSUS

KADZO MASHA KAZUNGU

MORRIS MULEWA

JOHSON HINZANO (a.ka.) JAFARI....DEFENDANTS/RESPONDENTS

RULING

1. Before me for determination is a Notice of Motion application dated and filed herein on 27th October 2017. By the said application, the Plaintiff/Applicant one Abdulrazak Muhsin Shariff prays for orders that:-

(2) This Court grants leave to the applicant to institute contempt of Court proceedings against the 1st Defendant/Respondent and one Noti Charo Alias Janja who have acted in violation of the Honourable Court's Orders.

(3) A warrant of arrest be issued to arrest the 1st Defendant/Respondent and one Noti Charo alias Janja so that they be brought to Court to show cause why they should not be committed to civil jail for a term not exceeding two (2) years or to a fine not exceeding Twenty (20) Million Shillings or both for disobeying the Court orders of 24/6/2013, 2/10/2015 and 13/07/2017 despite the Penal Notice on the said Court Orders.

(4) The 1st Defendant/Respondent and one Noti Charo alias Janja be subsequently committed to jail for a term not exceeding two (2) years for disobeying the said Court Orders of 24/06/2013, 2/10/2015 and 13/07/2017 or be fined a fine not exceeding Twenty (20) Million Shillings or both as the Honourable Court shall find fit.

(5) An order of mandatory injunction be issued directing the 1st Defendant either by herself, servants and/or agents and any person or persons acting under her to remove all the building materials wrongfully deposited on the suit property in disobedience of the Honourable Court's Orders within (7) days of service of the Honourable Court's Orders and failure by the 1st Defendant/Respondent to comply with the said Order, the Plaintiff be at liberty to remove the said material and dump them at the Malindi Sub-County dump(sic) and the costs incurred thereby be payable in summary manner by the 1st Defendant/Respondent.

(6) That the costs be in the cause.

2. The said application is supported by an Affidavit sworn by the Plaintiff and is based upon the grounds inter alia that:-

1. At all material times, the Plaintiff is the registered proprietor of the suit property known as Portion No. 9313 Malindi.

2. That on 24/6/2013 this Court issued an order inter alia restraining the Defendants from planting, or cultivating, trespassing, entering, remaining, selling, alienating or dealing with the suit property in any manner whatsoever.

3. That on 19/3/2014 the Court found the 1st Defendant guilty of disobedience of the Court's Orders and committed her to three months in jail.

4. On 3/07/2017 the Honourable Court rendered a Judgment in the Applicant's favour and the extracted decree was served upon

the applicant's advocate on 11th August 2017.

5. The 1st Respondent subsequently returned the materials which had been removed from the suit property pursuant to the earlier Orders of the Court and she and her relative-the said Noti Charo alias Janja have contrived to trespass on the suit premises at will.

3. In response to the said application, the 1st Defendant Kadzo Masha Kazungu depones in a Replying Affidavit filed herein on 2nd February 2018 that the Plaintiff's application is full of falsehoods and that the same ought not to be believed. It is her case that she has never been served with any decree from this Court nor is she aware of any affidavit of service on record.

4. The 1st Defendant further denies that she has been involved in or witnessed any of the acts complained of. It is her position that she only came to learn of an execution process when her advocates moved the Court with an application dated 5th September 2017 pursuant to which an order of stay was issued. She denies having ever been in the suit property since the time she was committed to jail for contempt and urges the Court to dismiss the application.

5. Similarly Japhet Noti Charo cited herein for contempt alongside the 1st Defendant denies being aware of the issues raised herein. In a Replying Affidavit filed on 10th November 2017, he avers that he only came to be aware of this matter when this application was served upon him. He however asserts that he owns Plots Nos M4 and M5 from which he states, the suit plot was sub-divided.

6. I have considered the application and the responses. I have equally considered the submissions and authorities placed before me by Mr. Ole Kina, Learned Counsel for the Plaintiff/Applicant as well as Mr. Otara, Learned Counsel for the Respondents.

7. The power to punish for contempt is an important and necessary power of protecting the cause of justice and the rule of law, and for protecting the authority of the Court and the supremacy of the law. In **Board of Governors Moi High School Kabarak –vs- Malcom Bell & Another (Supreme Court Petition No. 6 and 7 of 2013)**, the Supreme Court described the power to punish for contempt as a power of the Court to safeguard itself against contemptuous or disruptive intrusion from elsewhere and identified that power as one of the indisputable attributes of the Court's inherent powers. Without that power, the Supreme Court observed, protection of citizen's rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth Orders in vain.

8. As it were, contempt of Court proceedings are quasi-criminal in nature as the court is expected to impose criminal sanctions if a conviction ensues. The fact that the liberty of the Respondent could be affected in such an application means that the standard of proof in such cases is higher than in ordinary civil cases. It thus behoves the applicant to prove that the Respondent's conduct was deliberate in the sense that he or she willfully acted in a manner that breached the Order.

9. In the matter before me, it is not in dispute that Judgment was rendered herein on 13th July 2017 in favour of the Plaintiff. According to the Plaintiff, a decree executed from the Judgment was served upon Mr. Otara, Counsel for the 1st Defendant on 11th August 2017.

10. It is the Plaintiff's case that the 1st Defendant having been removed from the suit premises pursuant to an Order issued on 19th March 2014, returned to the premises upon completing her committal in jail and in violation of the Court order delivered materials back to the suit premises. While the Defendant denies being served with any decree from the Court, I did not think that personal service of the decree against her was necessary. As was stated in **James Gitau Mwara –vs- Attorney General & Another (2015) eKLR:-**

“It is now trite law, therefore, that service of the Judgment or Order alleged to have been breached and the penal notice served upon the advocate representing the person being charged with the contempt of Court is sufficient service unless it can be proved that the advocate did not notify his client. As the Court of Appeal stated in Shimmers Plaza Ltd Case:-

“There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in Court on instructions of a party, then it behoves him/her to report back to the client all that transpired in Court that has a bearing on the client's case. This is the position in other jurisdiction within and outside the Commonwealth.”

11. The Court in the James Gitau Mwara case went on to cite with approval the Supreme Court of Canada decision in the case of **Bhatnager –vs- Canada (Minister of Employment and Immigration) (1990) 2 S.C.R 217** at page 226 where the Canadian Court stated as follows:-

“.....a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. On other cases that the common law has always required personal service, there can be no doubt of a Court Order as a precondition to liability in contempt...Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases, inference of knowledge will always be available where facts capable of supporting the inference are proved.”

12. In the matter before me, the 1st Defendant cannot therefore claim to have been unaware of the decree of this Court more so when her Advocates on record were served and indeed acknowledged receipt of the decree by signing and stamping at the back thereof. That same Advocate remains her Advocate as well as the Advocate of the party cited herein for contempt and I am satisfied that indeed the 1st Defendant had sufficient knowledge of the decree.

13. I am however uncertain as to whether she indeed delivered material on the disputed site in violation of the Order as stated by the Plaintiff. The accusation that she delivered the material on the disputed plot is contained at paragraph 16 of the Plaintiff's affidavit where he avers as follows:-

“16. That further to the above, the applicant was removed from the suit premises as appears from the ruling referred to previously in my affidavit herein. She went to jail and I caused to be removed the development that she had made on the suit premises and the debris that resulted from the demolition was also removed, but when she regained her freedom, she quickly violated the Court order once more and delivered the materials back to the suit premises.”

14. From the above statement, this Court was unable to discern when, if at all the Order was violated and in what manner. The Rulings referred to previously had been issued on 24th June 2013 and 19th March 2014. A significant time has lapsed since and it was not clear to me if at all the violation had happened shortly after the Plaintiff regained her freedom as stated herein, why she had not been punished then.

15. From the record, the 1st Defendant was jailed for three (3) months for contempt of Court on 19th March 2014 and she would have served her sentence before the end of that year. As it were, this matter came before me for hearing in February 2017 and no such complaint was raised against the 1st Defendant. I am in the circumstances unable to find that she violated the Court Orders by depositing the alleged material on the suit premises.

16. The second complaint raised by the Plaintiff was that on 5th September 2017 at about 11.00 a.m., the applicant and the said Noti Charo (the party cited for contempt) went to the subject property where the Plaintiff had taken a Surveyor to identify beacons on the land. According to the Plaintiff, when the 1st Defendant and the said Noti Charo arrived, they insisted that the land belongs to them even if the Plaintiff held title thereto. They then forced the person the Plaintiff had retained to clear the land as well as the Surveyor out of the land and stopped the Plaintiff from fencing the same.

17. Again both the 1st Defendant and the man described by the Plaintiff as her relative-Japheth Noti Charo alias Janja deny the Plaintiff's accusations. According to the 1st Defendant she was neither involved nor had she witnessed the acts complained of. Japheth Noti Charo equally avers that he has never been served with any order or decree herein but insists at paragraph 6 and 7 of his Replying Affidavit as follows:-

“6. That I claim ownership of the entire Plots M4 and M5 wherein the suit Plot is a sub-division thereto.

7. That the revocation of all titles within Plot No. M4 and M5 is underway, soon the Government shall issue titles in my names and for the entire Plot M4 and M5. Annexed herewith is the said recommendation marked as Exhibit JNCJ.

18. I note from the response of both the 1st Defendant and the said Japheth Charo Noti that they have neither denied nor made any reference to the incident of 5th September 2017, some fortnight or so after their Advocate on record was served with the Court decree issued herein on 27th July 2017. That decree read in part as follows:-

IT IS HEREBY ORDERED AND DECREED

a) That a permanent injunction be and is hereby issued restraining the Defendants themselves, servants, agents, employees or any other person claiming interest through them from interfering in any way with the Plaintiff's use and enjoyment of Plot No. 9313 situated in Malindi Constituency within Kilifi County.

19. While the parties cited for contempt are silent on the same, it is apparent from the material placed before me that an incident did indeed occur on 5th September 2017 that was of significance in the circumstances of the case. At paragraphs 18 and 19 of the Supporting Affidavit, the Plaintiff depones and I quote in extenso as follows:-

18. That further to the above on the 5/09/2017 at about 11.00 a.m., the applicant (sic) and the said Noti Charo came to the subject Plot where I had taken a Surveyor to identify the beacons on the land. When they arrived, they insisted that the land belongs to them in spite of my holding the title, they insisted that the Judgment and orders of this Honourable Court were fake and they forced the person I had retained to clear the land as well as the Surveyor out of the land. They also stopped me from fencing the land. I reported the incident to the Police as appears from an abstract of the Occurrence Book I annex hereto as Exhibit REX 9.

19. That when I reported the matter to the OCS Malindi Police Station, the OCS phoned Mr. Noti Charo who handed the phone to his advocate Mr. Otara. I followed the discussion and it became clear to me that Mr. Otara had indicated to the OCS Malindi that the Judgment and Order in my possession were fake and that he had made an application to that effect and that his client was not going to vacate the suit premises.”

20. While it was possible to ignore the conclusion the Plaintiff made from overhearing the conversation between the OCS and Mr. Noti, it is telling that the Respondents do not deny that such a conversation occurred. Indeed, other than the general denials, they do not deny that they visited the suit property on the said 5th September 2017. As it were an extract of the Occurrence Book (OB) from Malindi Police Station (marked REX 9) corroborates the fact that the Plaintiff made a report at the said Station at 1135 hours. It is further apparent from the extract that the Police to their credit quickly visited the scene of the alleged “Threatening of Breach of Peace and at 1234 hours, the OCS records under OB No. 33 as follows:-

“RETURN/FOLLOW UP-OCS CI Mwachia, IP Getende, PC Ali, PC Omondi all book back from the scene of threatening breach of peace where it has been established that one Janja Noti and his son, namely Tumaini went to the parcel of land LR No. 9303 and started fencing and the person was clearing the Parcel of land from doing their work (sic). It is known they were not found at the fence but they refilled two holes which had been made by the Surveyors. Efforts are underway to trace Janja and his son to record their statements to shed light on their allegations that the land belong to them case PUI.”

21. Arising from the foregoing, I think there is sufficient circumstantial and direct evidence to corroborate the fact that the Respondents not only visited the suit premises but that they did so pursuant to their claim that the parcel of land belongs to them. Indeed from the circumstances herein, it can reasonably be inferred that the Plaintiff is indeed telling the truth when he asserts that the Respondents were shown the title and Court decree and that they insisted that the same were “fake” and that they would not obey the same. That must be the reason they have not denied the averments contained in paragraphs 18 and 19 of the Plaintiff’s Supporting Affidavits.

22. As it were, I am in agreement with the submissions of the Learned Counsel for the Plaintiff that the most important aspect of obedience of an order of the Court is knowledge of its existence. If a person becomes aware of an order of the Court which binds him he has no option but to obey it. Such a person need not be a party to the suit. As was stated in ***Refrigeration and Kitchen Utensils Ltd –vs- Gulabchand Popatlal Shah & Another Civil Application No. Nair 39 of 1990:-***

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the Suitors or their solicitors, could themselves judge whether an order was null or valid, whether it was regular or irregular.....they should come to Court and not take upon themselves to determine such a question....he should apply to the Court that it might be discharged. As long as it exists, it must not be disobeyed.”

23. Arising from the foregoing, I am satisfied that the 1st Defendant and the said Japhet Noti Charo alias Janja are in contempt of the Orders of this Court. For defying this Courts authority, they shall be punished as appropriate.

24. Accordingly a warrant of arrest shall henceforth issue to the OCS Malindi Police Station to apprehend the 1st Respondent and Japheth Noti Charo a.k.a Janja and to henceforth bring them to this Court jointly and/or severally in order for each and everyone of them to show cause why they should not be committed to civil jail as prayed under Prayer No. 3 of the Motion dated 27th October 2017.

25. Orders accordingly.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE