

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC CASE NO. 234 OF 2015

BENSON MBOGO.....1ST PLAINTIFF

FRASER JACKSON UTANJE.....2ND PLAINTIFF

RAJAB MWADUNGULE KATUMBO.....3RD PLAINTIFF

VERSUS

MADONGA KENGA MASHA.....1ST DEFENDANT

KASSIM GUO.....2ND DEFENDANT

BAKARI alias BEKA BIDII JUMA.....3RD DEFENDANT

KARISA CHARLES MWAMUYE & 6 OTHERS.....4TH DEFENDANT

RULING

1.The plaintiffs filed this contempt application dated 16th August 2016 seeking for orders that the Court be pleased to cite the Respondent and imprison them for a period not exceeding six (6) months. They have also prayed for costs of the application.

2. The application is supported by the grounds on the face of it inter alia that the defendants have contrary to the orders issued by consent continued to sell the portions of the property and carry out constructions thereon. That it is important to maintain the dignity of the Court and in order to do so it is necessary the defendants herein be cited for contempt and be punished.

3. The application is further supported by the affidavit of Benson Mbogoh. Mr Mbogo deposed that the defendants recently on 11th August 2016 built structures next his house and unlawfully possessing and selling sections of other parts of the suit property. Further if the orders are not granted us the applicants are likely to suffer irreparable harm and gross injustice.

4. The defendants were given time to file a response to the application but none was filed at the time the application was argued. All the same I have to consider whether the application has merit. Contempt proceedings are quasi criminal in nature and the burden of proof lies on the person who avers that the orders of the Court have been disobeyed. The applicants accuse the defendants of disobedience of the Court Order by building structures next to his house and selling sections of the suit land to 3rd parties. The burden of proof lies upon them to show the acts of disobedience.

5. However the applicants have not demonstrated by way of photographs any structures that were built prior to the order being issued and the new/additional structures built while the order was in force. Secondly the applicants have deposed that the defendants have been selling portions of this land inspite of the injunctive order. This averment has also not been supported by any evidence i.e. a sale agreement and or an affidavit from any buyer.

6. I am therefore not satisfied there has been sufficient proof that the orders of the Court issued on 31.3.2016 were disobeyed. It is not specified if at all which of the defendants built the alleged structures or sold sections of the suit property. The grounds and the affidavit upon which this application is premised consists of generalities that makes it difficult for this Court to come to a conclusion that there has been disobedience of a Court order.

7. Consequently I make a finding that the applicant has failed to meet the bar on proving contempt. The result is the application is dismissed. Since the defendants did not file any response, I award no costs.

Dated and delivered in Mombasa this 24th day of February 2017.

A. OMOLLO

JUDGE