



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO 103 OF 2013

MOHAMED SAID MUHALA.....PLAINTIFF

=VERSUS=

KANGOMBE KADENGE KATIFU.....DEFENDANT

R U L I N G

1. Before me is an application dated 19th October 2016 but filed in court on 9th November 2016. The application brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 of the Constitution of Kenya 2010 prays for Orders:

(i)

(ii) THAT the Respondent be cited for contempt of court and be punished accordingly for the same.

(iii) THAT at any rate, the Respondent be warned of (sic) interfering with the quiet and peaceful occupation by the Plaintiff on his portion of 1.25 acres of land excised from Plot No. 7920/III/ MN in accordance with the Court Order issued on 6th July 2015.

(iv) THAT the costs of this application be provided for.

2. The application is supported by an affidavit sworn on 19th October 2016 by Mohamed Said Muhala and on other grounds which may be summarized as follows: -

(a) That on 6th July (2016) this court granted certain orders which were then extracted and served upon the Respondent.

(b) That despite service of the said Orders of 6th July 2015 the Respondent has blatantly and contemptuously failed to comply with the same and has threatened to use violence against the Applicant and a Surveyor.

(c) That the Applicant was then forced to seek the intervention of the police who oversaw the survey exercise but on 17th October 2016, the Respondent used violence to prevent the Plaintiff from erecting a perimeter fence on his portion of the land.

(d) That the respondent's defiance and refusal to obey a Court Order is calculated to undermine the

authority of the court and to defeat the ends of justice.

3. When the application came up for hearing on 22nd February 2017, there was no appearance by the Defendant who, though served as per an affidavit of service on record, had also not filed any reply and/or opposition to the application.

4. The duty to obey the law by all individuals and institutions is indeed paramount to the maintenance of the rule of law, good order and the due administration of justice. This court therefore takes very seriously any case in which anyone individual or institution is said to be acting in flagrant violation of its orders.

5. It is now settled however that courts will only punish for breach of an injunction where it is established that the terms of an injunction are clear and unambiguous and where it has been shown that the defendant has had proper notice of the terms of the order said to be breached. In addition, it is necessary for the court to have clear evidence that the terms of the injunction have been breached.

6. From the record herein, it is evident that on or about 6th July 2015, this court issued an order for a survey to be carried out in respect of a plot of land known as Plot No. 7920/III/MN. It would appear the applicant was unable to enforce the order after people described as the defendant's relatives became hostile and threatened to use violence upon the Surveyor. This forced the Applicant to file an urgent application in court dated 22nd February 2016 seeking for the following orders: -

(i) That the application be certified urgent.

(ii) That this court be pleased to order the OCS(of) Kijipwa Police Station to provide security for the Surveyor to carry out the survey exercise in land known as Plot No. 7920/III/MN.

7. The said application was placed before the Honourable Justice Angote who granted the orders as sought ex -parte on 23rd February 2016.

8. At paragraph 3 and 4 of the Supporting Affidavit of Mohamed Said Muhala, the Applicant referring to the orders granted by the Learned Judge depones as follows: -

3. That an order was issued on 23rd February 2016 by this court restraining the Respondents from threatening to use violence against the Surveyor and myself while in the process of surveying the suit property. I annex a copy of the order and mark the same as annexure "MSM-2"

4. That the contents of the said orders are within the Respondents knowledge as they were served with the orders on 4th August 2015 and 1st March 2016 respectively.

9. I have looked at a copy of the order annexed and marked as annexure MSM2 in the application. It is in Pari Materia with the order sought as outlined at paragraph 6 hereinabove and not what the Plaintiff states in the Affidavit. In essence, it is directed at the OCS Kijipwa Police Station to provide security for the surveyor while carrying out the survey exercise. No evidence was annexed however to indicate that the Defendant was served by the orders as indicated. But, from a reading of paragraph 6 of the Supporting Affidavit aforesaid, it is apparent that the survey exercise was successfully carried out under the supervision of Kijipwa Police as per the orders of the court. What is clear however is that the Plaintiff later went back to the suitland on 17th October 2016 accompanied by a contractor for purposes of putting up a perimeter fence when the respondent is said to have resorted to violence.

10. While the respondent is certainly not at liberty to use violence of whichever nature for whatever reason to bar the Plaintiff from using his portion of the land, I am not able to find that any of the orders issued herein have been violated as alleged. It is clear from paragraph 7 of the Plaintiff's affidavit that after being stopped from constructing the perimeter fence on 17th October 2016, the Plaintiff reported the matter to Mtwapa Police Station who then asked him "to bring the said Court Orders." I think this application was an attempt to obtain such orders. I do not find any merit therein. The same is dismissed

with no order as to costs.

Dated, signed and delivered in Malindi this 21st day of April 2017.

J.O. OLOLA

JUDGE