



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 333 OF 2016

1. KOMBO NG'OMBE KOMBO
2. BENSON MWATANA NZAO
3. AMOS WALE NZAO.....PLAINTIFFS

VERSUS

1. ANOLD TSAMA MWANDONDO
2. DZUYA MWANDONDO
3. RONALD MBAKA
4. JUMWA KAGOLI
5. HERBERT NDUNE MTSUNGUA
6. ENOCK SHINDO NDUNE
7. FREDRICK NDUNEH MTSUNGA
8. KESI JABALI MWANDINYA
9. NDAGO MVUKO JABALI
10. MBAJI KAULU JABALI.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion Application dated 11th January 2017. The application brought under the provisions of Order 40 Rules 2, 3 and 8 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act is seeking for orders:-

1. THAT Summons do issue to Arnold Tsama Mwandondo the 1st Defendant, Dzuya Mwandondo, the 2nd Defendant, Ronald Mbaka, the 3rd Defendant, Jumwa Kagoli, the 4th Defendant, Kesi Jabali Mwandinya, the 8th Defendant, Ndago Mvuko Jabali, the 9th Defendant and Mbaji Kaulu Jabali, the 10th Defendant herein to appear in Court to show cause why they

should not be cited for contempt of Court for disobeying the Order of injunction issued herein against the said Defendants on 8th December 2016 and be committed to prison for contempt of Court and/or their property be attached.

2. THAT the said Arnold Tsama Mwandondo, Dzuya Mwandondo, Ronald Mbaka, Jumwa Kagoli, Kesi Jabali Mwandinya, Ndago Mvuko Jabali and Mbaji Kaulu Jabali may be detained in prison for a term not exceeding six months and/or their property be attached for disobeying orders of this Court.

3. THAT (the) Orders be enforced by the Officer Commanding Kaloleni Police Station.

4. THAT the costs of this application be provided for.

2. The Application is supported by an affidavit sworn by the 2nd Plaintiff, Benson Mwatana Nzao on 11th January 2017 as well as a Supplementary one sworn on 21st March 2017 and is based on a number of grounds listed on the body thereof as follows:-

1. That the named defendants are deliberately disobeying the Court order issued on 8th December 2016 and the defendants have commenced and are proceeding with construction on the premises in contravention of the Orders issued on 8th December 2016.

2. That the named Defendants have personally refused to obey the Court order in question and have stated publicly that the order is of no consequence to them even after the same was served personally upon each and everyone of them.

3. That the contemnors failure to comply with the said orders have caused and continue to cause serious difficulties and injustice and have greatly inconvenienced the Plaintiffs who have effectively been evicted from the suit premises in contravention of the Orders issued on 8th December 2016 and the said acts of the defendants erode the dignity and power of the Court and constitute a threat to peace and order.

3. The Defendants have by various Replying Affidavits opposed the grant of the Orders sought herein. In a Replying Affidavit sworn on 24th February 2017 by Arnold Tsama Mwandondo the 1st Defendant on behalf of himself as well as the 2nd, 3rd and 4th Defendants, they aver that they have never met in person the process server by the name Japhet Katana who purports to have served them with the Orders in dispute. The 1st Defendant further avers that he only learnt of the case when his brother Ronald Mbaka (the 3rd Defendant) told him on 18th January 2017 that they had been sued in Malindi and handed over to him the Court documents. It is further his case that when he saw the substantive application dated 6th December 2016 and the contempt application dated 11th January 2017, he instructed the 2nd, 3rd and 4th Defendants to stop doing anything on the plot and to obey the Court Orders.

4. On the other hand, the 9th Defendant- Ndago Mvuko Jabali has also sworn another Replying Affidavit on 2nd February 2017 on his own behalf and on behalf of the 8th and 10th Defendants in which he states that they have from time immemorial stayed and lived on their portion of land without any interference by reason of them having been born there and it is their case that they have not trespassed on the Plaintiffs land. They further aver that the Plaintiffs live on a different portion of the land and that the balance of convenience tilts in their favour as a result whereof the injunction sought should not be granted.

5. The 8th, 9th and 10th Defendants further aver that in view of the decision of the Land Adjudication Committee rendered on 17th June 2016, there is a prescribed machinery for resolving disputes under the Land Adjudication Act and this Court lacks jurisdiction to deal with the matter.

6. I have considered the application and the affidavit in support thereof. I have equally considered the

various responses given by the Defendants/Respondents in response thereto. The need to obey Court Orders is paramount to the proper administration of justice. It is apparent that on or about 8th December 2016, the Applicant herein appeared before the Honourable Justice Chitembwe of the High Court in Chambers. The Learned Judge having considered the applications dated 6th December 2016 ex parte proceeded to grant orders as follows:-

1. That the application be and is hereby certified as urgent.

2. That the defendants by themselves, their servants and/or agents or otherwise however be and are hereby restrained by temporary injunction on interim basis from entering, trespassing into or continuing to trespass into, alienating, disposing of building on or in any other way interfering with the Plaintiff's ownership of the piece of land situated at Kaloleni pending the hearing and determination of this application.

3. In view of the Court Vacation, the matter is listed for mention on 6th February 2017 before the ELC Court.

7. It is these Orders that the Respondents herein are accused of violating. Order 40 Rules 1 and 3 of the Civil Procedure Rules provide that:-

"2. The Court may order grant such (a temporary) injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court deems fit.

3(1) In cases of disobedience, or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.

(2)...

8. Arising from the foregoing and as was observed in ***Mutitika –vs- Baharini Farm Ltd (1985) KLR 229 and 234;***

" Contempt of Court is an offence of a criminal character. It may lead to one being sent to prison and it must therefore be satisfactorily proved beyond a balance of probabilities."

9. Given its criminal character, it is imperative that the person sought to be punished is shown to have been served with and/or made sufficiently aware of the Court's Orders which are being sought to be enforced. As the Court of Appeal emphasized in ***Shimmers Plaza –vs- National Bank of Kenya (2015) eKLR;***

"It is important however, that the Court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's property."

10. In the matter before me, the Respondents deny being aware of or having been served with the Court Orders granted on 8th December 2016. The said Orders are said to have been served upon the Defendants/Respondents by one Japhet Katana, a process server of this Court on 14th December 2016. In his Affidavit of Service sworn on 15th December 2016 and filed herein on 23rd December 2016, the said Process Server depones at the relevant paragraphs 2-7 as follows:-

2. That on 14th day of December 2016, I received a Notice of Motion and an order dated 6th December 2016 from Ms F.M. Mwawasi Advocates with instructions to be served upon the

Defendants herein who resides(sic) at Mleji Village, Ruruma Location-Rabai District.

3. That on the same day 14th December 2016, I proceeded to the Defendants place of residence as stated above where I visited the 8th, 9th and 10th Defendants home where I met the Grandson of the 10th Defendant one Mvuko Ndago whom I introduced myself to him and the purposes of my visit there to him (sic) who informed me that he has instructions to receive the Court documents on behalf of the 8th, 9th and 10th Defendants. I served him with the Notice of Motion and the Order where he accepted service but declined to sign. The time was 2.30 p.m.

4. That at around 2.35 p.m. I proceeded to the 5th, 6th and 7th Defendants homes where I met the wife of the 5th Defendant who declined to inform me her names but informed me that she has instructions to accept the Court documents on behalf of the 5th, 6th and 7th Defendants. I served her with the Notice of Motion and the Order where she accepted service but declined to sign. The time was 3.00 p.m.

5. That I proceeded to the 1st, 2nd and 3rd Defendants home where I met their wives who introduced themselves though they did not mention their names to me. I served them with the Notice of Motion and the Order where they accepted Service on behalf of their husbands (the 1st, 2nd and 3rd Defendants) but they declined to sign. The time was 3.20 p.m.

6. That again I proceeded to the 4th Defendant's home where I met the Defendant herself and informed her the purpose of my visit there to her and served her with the Notice of Motion and the Order where she accepted Service but declined to sign. The time was 3.40 p.m.

7. That I do hereby return to this Honourable Court a copy of the Notice of Motion and the Order confirming service upon the Defendants herein.”

11. The above Affidavit of Service in my view is not a serious document upon which one can rely to claim there was service upon the Defendants. It certainly does not meet the elaborate procedure set out at Order 5 of the Civil Procedure Rules. No explanation whatsoever is provided as to why the unnamed wife of the 5th Defendant was served if at all, on behalf of the 5th, 6th and 7th Defendants. The Process Server does not even state the age of the 10th Defendant's Grandson and more so why he was served on behalf of the 8th and 9th Defendants. Similarly, he does not explain how he knew that the 3 ladies he allegedly served were the wives of the 1st, 2nd and 3rd Defendants after they refused to disclose their names to him. Simply put, it is not a serious document that warrants this Court's consideration.

12. Be that as it may I think proper service of Court documents in litigation is a crucial matter in the process whereby the Court satisfies itself that the other party to litigation has notice of the same and therefore chose to take appropriate action or not. The ideal form of service is of course personal service. It is only when the defendant cannot be found, that service on his agents empowered to accept service is acceptable upon laying of a basis therefor.

13. The Defendants have stated that they only became aware of this case on 18th January 2017 when the 3rd Defendant got the documents from his wife. Those documents included the application for contempt which is before me. Given the casual nature of the Affidavit of service referred to hereinabove, I have no reason not to believe the Defendants. They have stated that the moment they learnt of the said orders they stopped any further construction.

14. In the circumstances I find no evidence that the orders issued on 8th December 2016 were served upon the Defendants and/or that they disobeyed the same.

15. The Application dated 11th January 2017 was thus premature and is accordingly dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 15th day of November, 2017.

J.O. OLOLA

JUDGE