



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 172 OF 2013

1. KAZUNGU FONDO SHUTU.....PLAINTIFFS/APPLICANT

2. HABEL KAHINDI CHARO.....PLAINTIFFS/APPLICANT

=VERSUS=

JAPHET NOTI CHARO.....DEFENDANT/RESPONDENT

R U L I N G

1. On 15th May 2015, this court dismissed an Application dated 11th September 2015 filed by the Defendant seeking to cite the Plaintiffs for contempt of an order of the court.
2. The Plaintiffs have now filed an Application dated 12th May, 2015 in which they are seeking to commit the Defendant to civil jail in the following terms:

(a) THAT an order of committal in prison do issue against the Defendant JAPHET NOTI CHARO, his agents; the director of Winstar Security Guards or any person or guard working under them who is on the ground on Land Ref C 10840 Malindi and the Directors of Afri-sine Limited in punishment for contempt of court and disobedience of court orders given on 5th September 2014.

(b) THAT an order do issue attaching the Defendant's properties, the properties of the Directors of Winstar Security Guards and the Director of Afri-sine Limited in accordance with Order 40 Rule 3 of the Civil Procedure Rules 2010.

(c) THAT an order do issue for the status quo ante as at 5th September 2014 to wit: the defendant to give vacant possession of the land ref: C10840 to the Applicant and demolish the perimeter wall or any structure raised therein by the defendant or his agents, proxies, assigns or any person working under him or on his behalf contrary to the existing orders of the court.

(d) The OCPD and OCS Malindi police station to enforce order NO. 4.

(e) THAT the costs of this Application be provided for.

3. The Application is premised on the grounds that on 5th September 2014, the Defendant was restrained from alienating, transferring or charging the suit premises and that although it is the Defendant who actually extracted the order of 10th September 2014, he has disobeyed the said

- order by subdividing plot number C10840 Malindi and transferred it on 17th October 2015 to Afri-sine Ltd.
4. According to the Plaintiffs, the Defendant's actions are contemptuous and the Defendant ought to be punished.
 5. In his response, the Defendant deponed that although he was restrained from alienating, transferring or charging the suit property on 5th September, 2014, the order was in respect of 1 ½ acres; that portion number 10840 is owned by various people who are his family members and that since the date of the Ruling, he has not transferred the land as alleged.
 6. According to the Defendant, the transferors of the subdivisions are not parties to this suit and that he has not signed any transfer to Afri-sine Limited.
 7. According to the Defendant, Lilian Japhet Noti, Fondo Japhet, Safi Noti Charo, Stella Salama Kirimo, Erick Mwakombe and Eddie Fondo Charo became registered owners of their respective portions within plot number 10840 on 17th October 2011 long before the filing of this suit.
 8. I have considered the submissions which are on record.
 9. The Plaintiffs/Applicants commenced this suit by way of a Complaint. In the Complaint, the Plaintiffs are seeking for a permanent injunction restraining the Defendant by himself, his servant, agents, representatives or assigns from trespassing, dealing with and interfering with the Plaintiffs' quiet possession and enjoyment of their share of 1 ½ acres comprised in land known as Plot C Malindi 10840.
 10. Together with the Complaint, the Plaintiffs filed an Application dated 30th September 2013 seeking for a temporary injunction in respect to plot C10840, Malindi.
 11. The Application for injunction was heard by this court inter partes and a Ruling was delivered on 5th September, 2014. In the Ruling, this court ordered as follows:-

“(a) Pending the hearing and determination of the suit, the Defendant, his servants, agents, employees, nominees or any other persons or authority be and is hereby restrained from alienating, transferring or charging the suit premises.”

12. The suit premises in this case was plot number C 10840, Malindi.
13. The Plaintiffs seem not to have conducted an official search when they filed the Application of 30th September 2013 to ascertain the position of plot number C 10840.
14. Indeed, in his reply, the Defendant went further to make the Plaintiffs and the court to believe that he was the registered owner of portion No. 10840 by annexing the grant that was registered in his favour on 28th June, 2002.
15. Unbeknown to the court and the Plaintiffs, the Defendant had already subdivided the suit property way back in the year 2009 and had some of the subdivisions transferred to his siblings.
16. The Plaintiffs have annexed on the current Application copies of Certificates of Titles for plot numbers 12276, 12271, 12274, 12272, 12273, 12271, 12277, 12275, 12281, 12282, 12283, 12279 and 12278 which are all subdivisions of plot number 10840.
17. The Certificates of Titles for the said subdivisions were all registered on 21st April 2009 before the Defendant transferred them to his siblings on 17th October 2011.
18. It is therefore obvious that by the time this suit was filed and the order of 5th September, 2014 was issued, plot number 10840 Malindi was not in existence having been subdivided in the year 2009.
19. Indeed, the Defendant and his siblings took advantage of the Plaintiffs' ignorance of the status of plot number 10840 at the time of filing the suit and had all the subdivisions transferred to Afri-sine Limited on 2nd December 2014, notwithstanding the court order of 5th September 2014.
20. In the circumstances, and considering that the Defendant's siblings are not parties to this suit, the Application for contempt as against the Defendant cannot succeed.
21. I say so because as at the time this court restrained the Defendant from transferring plot number 10840 Malindi, the said plot was neither in existence nor was the Defendant the registered owner. Had the Plaintiffs conducted an official search, they would have cited the correct portion numbers in the Complaint and the Application and sued all the registered proprietors.
22. For those reasons, I dismiss the Plaintiffs' Application dated 12th May 2015 with costs.

Dated and delivered in Malindi this 1st day of April ,2016.

O. A. Angote

Judge