



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 155 OF 2015

1. JAPHET KALAMA WASHE
2. PATRICK MONO MBURA.....PLAINTIFFS

=VERSUS=

1. CHRISPUS DECHE KADUKA
2. JUMAPILI MWOLOLO
3. SANGA DAVID KASSIM
4. KARIBU DAVID KASSIM
5. KALEWA MSIKITI
6. STEPHEN KADUKA
7. MWAMUYE KUTO
8. ZIRO MSIKITI
9. MAJIMBO MWANGOLO
10. NGOLINDO MSIKITI
11. MALAU KASSIMU
12. KABIBU KASSIMU
13. NGALA JILANI
14. KATANA KADUKA.....DEFENDANTS

RULING

1. In their Application dated 17th October, 2015, the Defendants are seeking for the following orders:-

(a) **THAT the orders issued by this court on 28th September, 2015 be reviewed varied and or set aside, and the defendants be allowed to file a replying affidavit to the Plaintiff's Notice of Motion dated 14th September, 2015 and defend the same.**

(b) **Costs.**

2. In the Affidavit supporting the Application, the 1st Defendant deponed that the Defendants were served with Summons to Enter Appearance on 20th September, 2015 without the Notice of Motion and the Plaintiff.
3. The 1st Defendant deponed that upon being served with the Summons, they took them to their current advocate; that on 28th September, 2015, their advocate dispatched his representative to Malindi court to seek for an adjournment and that the said representative was delayed on the way by the Kenya Defence Forces who had mounted a road block at the Vipingo area.
4. It is the deposition of the 1st Defendant that their representative arrived in court late and found the Notice of Motion had been heard; that their representative was served with the Notice of Motion on the same day in court and that the failure by their advocate or representative to attend court was beyond his reach and control.
5. It is the Defendants' case that they are in actual occupation and use of the property; that the Plaintiffs failed to disclose to the court that the issues herein were the subject matter in Chonyi Division, Kilifi District Land Civil Case No. 5 of 2000 which is now Mombasa ELC Case No. 21 of 2013 and that the Plaintiffs have their own land which is adjacent to the suit property.
6. In response, the 1st Plaintiff deponed that the Defendants were served with all the pleadings, including the Notice of Motion; that in any event, the Defendants' advocate should have entered appearance and then sought for an adjournment and that the Defendants have continued to disobey the orders that were issued on 28th September, 2015.
7. The advocate for the Plaintiffs and the Defendants filed their respective submissions and authorities. I have considered the said submissions and authorities.
8. This matter came up for the first time for the hearing of the Plaintiffs' Application dated 14th September, 2015 on 28th September, 2015. The said Application was argued by the Plaintiffs' advocate in the absence of the Defendants' advocate whereupon the court granted the injunctive orders.
9. Although the Defendants claim that they were not served with the Notice of Motion that was coming up for hearing on 28th September, 2015, the Affidavit of Service that was filed in this court on 28th September, 2015 shows otherwise.
10. If indeed the Defendants, were not served with the Notice of Motion that came up for hearing on 28th September, 2015, on which basis, as deponed by the 1st Defendant did the Defendants' advocate dispatch a representative to attend court on 28th September, 2015?
11. The 1st Defendant's admission that they were to be represented in court on 28th September, 2015 save for the delay that was occasioned to their representative on the way by the Kenya Defence Forces clearly shows that the Notice of Motion dated 14th September, 2015 was served on the Defendants.
12. Be that as it may, I am satisfied that the Defendants representative travelled from Mombasa to Malindi but arrived in court after the matter had been argued and the orders issued by the court.
13. I say so because the Plaintiffs' advocate has not denied that indeed he met the Defendants' representative in court on the same day and served him with pleadings.
14. The Defendants have satisfactorily explained to this court the delay that was occasioned to their representative on his way to this court.
15. In the circumstances, I am inclined to allow the Defendants' Application with a view of giving them an opportunity to be heard on the Plaintiffs' Application dated 28th September, 2015.
16. For those reasons, I allow the Application dated 17th October, 2015 with no order as to costs.

Dated, signed and delivered in Malindi this **1st** day of **July**, 2016.

O. A. Angote

Judge