



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC CIVIL CASE NO.56 OF 2013

RODGERS KABILA MTSONGA.....1ST PLAINTIFF/APPLICANT

SHADRACK NYINGE MTSONGA.....2ND PLAINTIFF/APPLICANT

=VERSUS=

JAPHET MWANGEMI.....1ST DEFENDANT/RESPONDENT

PATRICK MWAROME MWANGEMI.....2ND DEFENDANT/RESPONDENT

RULING

Introduction:

1. What is before me is the Plaintiffs' Application dated 21st July 2014 in which the Plaintiffs are asking to have a warrant of arrest issued against the Defendants and the said Defendant to be punished for disobedience of the court's orders given on 12th February 2014.
2. The Application is premised on the grounds that the court delivered a Ruling on 22nd August 2013 and issued a temporary injunction against the Defendants; that the order was served upon the Defendants on 22nd February 2014; that the Defendants have failed to obey the court order and that they have resolved to continue disobeying the court's order.
3. According to the 1st Plaintiffs' Affidavit, he went to plough the suit property on 6th April 2014 when the Mwangemi's turned hostile and chased him away together with the tractor's driver; that the Respondents and their family members are trespassing on the land and that the Respondent's have disobeyed the order of the court.
4. In his reply, the 1st Defendant deponed that neither the 2nd Defendant nor himself have ever been served with the court's order on 12th February 2014; that from 20th to 27th February 2014, the 2nd Defendant was in Kikambala, Mtwapa and that on 22nd February 2014, he was sickly and unable to make any movements.
5. The Plaintiff's advocate submitted that the Defendants were well aware that the court had issued an order but chose not to obey it; that when the process server went to serve them, they turned violent and abusive and that the Defendants refused to give the Plaintiff access to plough the land.

6. In his submission, the Defendants' advocate submitted that the Defendants were never served with the court order and that the affidavit of service cannot be relied on without cross-examining the process-server.

7. It is not in dispute that on 22nd August 2013, this court issued a temporary injunction restraining the Defendants through their agents or servants from interfering with the Plaintiffs' land measuring 6 acres pending the hearing of the suit.

8. The said order was extracted together with the penal notice on 12th February 2014.

9. The Plaintiff has annexed on the Application an Affidavit of service by the process-server showing that on 22nd February 2014, he visited the Defendant's village accompanied by the area village elder, one Stephen Munga Akida, who pointed out to him the Defendants.

10. The process-server deponed that when he introduced himself, the Defendants, together with the whole family turned violent and threatened to assault him. The process-server had to drop the order in the Defendants' compound, which according to him, was service.

11. The Defendants did not make an application to call the process-server, or the village elder, one Stephen Munga Akida for cross-examination.

12. In the circumstances, this court believes the deposition by the process-server, that he indeed went to the Defendants' residence accompanied by the village elder and the Defendants turned violent.

13. No evidence was called by the Defendants to deny that their village elder is called Stephen Munga Akida or that the said village elder ever accompanied the process-server when he alleges that he visited their residence on 22nd February 2014.

14. The Defendants were duly served with the court order on 22nd February 2014 when they turned violent and the process-server left the order in their compound. What else did the Defendants expect the process-server to do after turning violent?

15. When a person refuses to receive a duly extracted order of the court which is brought to his attention, and instead turns violent, that person will be deemed to have been validly served with such an order if the process server drops it in his house or compound. He cannot be heard to say that the order was not personally served on him just because it was dropped after he became violent.

16. The Defendants have not denied that the Plaintiffs were turned away, by themselves and siblings when they went to plough the suit property on 6th April 2014 in contravention of the order of the court. All the 1st Defendant has stated is that they were not served with the order, which is not true. In the circumstances, I am satisfied that the Defendant disobeyed the court order of 22nd August 2013 and are in contempt.

17. For those reasons, I make the following orders;

(a) The Defendants/Respondents to pay a fine of Kshs.50,000 each and in default to serve a jail term of 30 days.

(b) The Defendants to pay the costs of this Application.

(c) The OCPD, Malindi police station to enforce this order

Dated and delivered in Malindi this 6th day of February, 2015.

O. A. Angote

Judge