

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC 135 OF 2014

SAMWEL MUKABANAE SHIOSO.....PLAINTIFF

VERSUS

1. HARE LWAMBI

2. HAMISI NDEGWA.....DEFENDANTS

RULING

1. This motion for determination is dated 4th November 2014 brought under section 1A, 1B, 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules, section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England. In the motion, the applicant seeks orders to commit both the respondents and any other persons found on the land to civil jail for a period of six (6) months or such period as the court deems fit. The reason for asking for the committal orders is that the respondents have disobeyed the court's order issued on 11th June 2014.
2. The motion is premised on the grounds on the face of it and on the affidavit deposited by Samwel Mukabane Shioso, the applicant. In that affidavit, the applicant deposes that the respondents were duly served with the court order on 14th June 2014 and which order was endorsed with a penal notice. The applicant deposes further that the said interim orders were extended on various dates in the presence of counsel for the respondents and therefore they are aware the order is still in force. The applicant annexed photographs of what he desposes as acts of disobedience committed by the respondents and says the respondents ***"appear to be fully determined to continue disobeying the aforesaid court order."***
3. The respondents opposed the motion by their replying affidavit filed and in which they have denied disobeying the orders of the honourable court. The 1st respondent deposes that they own land parcel No. 845 and not 843. The 1st respondent deposed further that the OCPD Mariakani Police Station advised the plaintiff/applicant to contact the owner of parcel No. 843 who is known as Munga Nzaka Mkaha. It is the respondents' case that the applicant is misleading this court by filing the contempt proceedings against them. Further that the applicant has failed to demonstrate how the order has been disobeyed or how these parties are connected to parcel 843. They asked the court to dismiss the motion. The respondents also filed their written submissions in which they stated that their family owns parcel No. 845. The respondents submit the applicant failed to show the nexus between the defendants and parcel No. 843 hence the present motion is misconceived and ought to be dismissed with costs.
4. The order the applicant complains has been disobeyed was issued to restrain the respondents from demolishing, evicting, leasing, selling, alienating, transferring, dealing of interfering with the

applicant's occupation of land known as plot no. Mgumopatsa/Mazeras/843 in Kilifi County - pending the hearing of the application. The respondents have not denied the order was served upon them. The question is whether the applicant has proved that indeed the respondents are in contempt of this court's order. The applicant has annexed several photographs taken on 18th November 2014 some of which show a wall under construction while others show an old house with clothes hanged on the lines. In my view, the photos in themselves do not amount to disobedience if no explanation is given on who put up this wall and on which parcel of land it is being put up.

5. The applicant has not deposed anywhere in his supporting affidavit that he found any of the respondents or their agents carrying out the construction. The affidavit did not disclose whether the photos were taken on the suit land. Further the respondents submitted they have no interest in parcel No. 843 as their family land is parcel No. 845. The respondents deposed further that the applicant was told who the owner of the suit land is but he has chosen to still pursue the respondents. The applicant has not denied the existence of parcel No. 845. It is therefore not proved that it is the respondents carrying out the construction works. Further there is no evidence to clarify whether the activities of the respondents if at all, are on parcel No. 843 and not 845 as alleged. There remains a doubt as to whether indeed the respondents are dealing on the applicant's land. Contempt proceedings border on criminality and proof is required to be above the standard allowed in civil cases. I do find that the applicant has not met this standard of proof to justify being granted the orders sought in his application.

6. Lastly Rule 52 of the rules of the Supreme Court of England which our section 5 of the Judicature Act is premised and usually referred to in filing contempt proceedings has been amended. The procedure for commencing contempt proceedings is no longer by way of Notice of Motion as presented in this case. The motion before this court is therefore defective for not complying with the amendments. I dismiss this motion for lacking in merit with costs to the respondents.

Dated and delivered at Mombasa in open Court this 10th day March, 2015

A. OMOLLO

JUDGE

10.3.2015