



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.96 OF 2010
MALINDI HOLDINGS AND ESTATE AGENTS LIMITED.....PLAINTIFF
=VERSUS=
1. EVERLYN LUVUNDWA MASAMBAGA
2. GIDEON MACHARIA
3.HARISSON CHARO SHUTU
4. KIRIMO FONDO SHUTU
5. FRANCIS LAWRENCE KATANA FONDO
6. CHARLES MICHAEL SHUTU
7. RODGERS KARISA NYALE
8. ERIC MWALIMU KATANA.....DEFENDANTS

R U L I N G

1. What is before me is the Application by the Plaintiff dated 26th May 2015. In the Application, the Plaintiff is seeking for the following orders:

(a) That the property of the 3rd Defendant HARRISON CHARO SHUTU and 4th Defendant KIRIMO FONDO SHUTU be attached and or other appropriate sanctions be made against the Defendants for disobedience of the Honourable Court Order dated 15th September 2010.

(b) That a warrant of arrest be issued to arrest the 3rd Defendant HARRISON CHARO SHUTU and the 4th Defendant KIRIMO FONDO SHUTU be committed to jail for a term not exceeding six (6) months for disobeying court orders or their property be attached or both as the honourable court shall find fit.

The Plaintiff's/Applicant's case:

2. According to the Affidavit of the Plaintiff's director of 24th March 2015, he went to plot number 9297 and saw the court presided over by the Chief Magistrate visiting the site; that on inquiring, he established

that there was an ongoing case concerning the ownership of the suit property and that when he perused the file in Malindi CMCC No. 321 of 2014, he discovered that the 3rd Defendant, together with the 4th Defendant had sold the suit property to one Mary Syevutha Peter.

3. It is the Plaintiff's director's deposition that he served on all the Defendants the order of 15th September 2010 in which the court restrained the Defendants from selling the suit property pending the hearing of the suit.

4. It is the Plaintiff's case that the 3rd and 4th Defendants have gone ahead to interfere with the suit property by selling a sub-plot within plot number 9297 in disobedience of the order of the court.

5. Although the Respondent's advocate was served with the Application, he never filed a Replying Affidavit or Grounds of Opposition. The Application proceeded for hearing on 15th June, 2015.

Analysis and findings:

6. The record shows that on the basis of the Application dated 11th August 2010, the court on 14th September 2010 made the following order:

“2, THAT status quo be and is hereby maintained in that no new developments or constructions of houses or sale of any portion should take place pending hearing of application.”

7. The process-server swore an affidavit on 29th September 2010 in which he stated that he served the order of the court on the Defendant's advocates on 20th September 2010.

8. The Process-server also deponed that he served on all the Defendants, including the 3rd and 4th Defendants personally with the order of 14th September 2010 on 28th September 2010.

9. On 2nd November 2010, a final order was made by the consent of parties in respect to the Chamber Summons Application dated 11th August 2010.

10. The consent order provided that the Application of 11th August 2010 had been compromised to the extent that the status quo be maintained until hearing and determination of the suit.

11. The order of 2nd November 2010 was extracted and served on the Defendant's advocate on 18th November 2010. In fact the extraction and service of the order of 2nd November 2010 was not necessary because the Defendants' advocate was in court when the order was made.

12. The copy of the Sale Agreement that was filed in CMCC No. 321 of 2014 shows that the 3rd Defendant, Harrison Charo Shutu, sold a portion of land measuring 55' X 41' X 55' X 10' X 42 feet out of portion number 9297 for Kshs.120,000.

13. One of the conditions in the agreement states that the vendor, who is the 3rd Defendant herein, is to identify the portion sold and cause a separate title to be issued to the purchaser.

14. The agreement of 25th August 2014 was witnessed by the 4th Defendant.

15. The Plaintiff's suit is in respect of parcel of land numbers 9297, 9298, 9299 and 9300 which it claims to own. The order of status quo in respect to the suit property was to be maintained pending the hearing of the suit, meaning that neither the Plaintiff nor the Defendants could sell the suit property or portions thereof pending the hearing and determination of the suit.

16. However, the 3rd Defendant, with the co-operation of the 4th Defendant sold a portion of 9297 to Mary Syevutha Peter. Indeed Mary Syevutha Peter deponed in a Replying Affidavit filed in CMCC no. 321 of 2014 on 27th November 2014 that after purchasing the suit property, she initiated the construction of a perimeter fence to secure her compound.

17. It is therefore obvious that the 3rd and 4th Defendants in selling a portion of the suit property to Mary Syevutha on 25th August 2014 are in breach of the order of 2nd November 2010.

18. The 3rd and 4th Defendants have not controverted the evidence before this court.

19. In the circumstances, I find that the 3rd and 4th Defendants are in contempt of the order of this court of 2nd November 2010 and should be punished accordingly.

290. For those reasons, I make the following orders:

(a) A warrant of arrest be and is hereby issued to arrest the 3rd Defendant, Harrison Charo Shutu and the 4th Defendant, Kirimo Fondo Shutu, to show cause, on the date they will be arrested, why they should not be punished.

(b) The OCPD, Malindi to enforce this order.

(c) This matter to be mentioned on 17th July 2015.

(d) The 3rd and 4th Defendants to pay the costs of this Application.

Dated and delivered in Malindi this 10th day of July 2015.

O. A. Angote

Judge