



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.90 OF 2014

DANIEL MWACHINGA MWACHDZUNGU.....PLAINTIFF/APPLICANT

=VERSUS=

1. TOM MWACHIDZUNGU

2. PHILIP KATANA MWACHIDZUNGU

3. WILLIAM TSUMA MWACHIDZUNGU

4. PETER MWAGONA KARISA.....DEFENDANTS/RESPONDENTS

R U L I N G

1. The current Application is dated 10th February 2015. In the Application, the Plaintiff is seeking for the following orders:
 - (a) **THAT the Defendants/Respondents herein, be committed to civil jail for a period of six (6) months for being in contempt of the Order of this Honourable Court made on 16th May 2014.**
 - (b) **THAT the Defendants/Respondents be summoned to appear before Court to show cause why they cannot purge the contempt.**
2. The Application is premised on the grounds that on 16th May 2014, this court made an injunctive order restraining the Defendants from entering or erecting any structures on the suit premises; that the order was served upon the Defendants on 20th May, 2014 and that the Defendants have disobeyed the said order.
3. In his Replying Affidavit sworn on 15th April 2015, the 1st Defendant deponed that the orders were served on 20th May 2014 after they had lapsed.
4. The Plaintiff's Advocate submitted that even after personal service of the order of this court, the Respondents went ahead to disobey the orders of the court.
5. The Defendants' advocate, on the other hand, submitted that the orders of this court were served seven (7) days after they were issued and not within three days as provided for by the law.
6. Counsel submitted that as at 20th May, 2014 when the orders of this court was served on his clients, there was no order in place capable of being served upon the Respondents because the orders had already lapsed.
7. Counsel submitted that the Applicant's Affidavit is not clear as to who cut down trees and who

- amongst the Respondents has erected new structures.
8. It is not in dispute that on 14th May 2014, this court issued an ex parte order restraining the Defendants from entering or erecting any structures on the suit property. The order was to last for 14 days.
 9. The Affidavit of service of the process server shows that the 1st and 3rd Defendants were served with the order of the court on 20th May 2014. The two also received the orders of the court on behalf of the other two Defendants who are their brothers.
 10. Although the Defendants' counsel has submitted that by the time the order was served on the Defendants on 20th May 2015 had lapsed by virtue of the Provisions of Order 40 Rule 3(3) of the Civil Procedure Rules, I disagree.
 11. The order, on the face it, states that it shall remain in force for fourteen (14) days.
 12. Consequently, having been served with the order within the said 14 days, the Defendants were under an obligation to obey.
 13. Where the court specifically states the duration within which its order shall remain in force, it does not matter that the law states that an ex parte order lapses after three days from want of service.
 14. Having been served with the said order, it was incumbent on the Defendants to move the court to have the order set aside on the grounds that they were not served within the 3 days required by law. However, before the order is set aside, then the Defendants were under an obligation to obey it.
 15. The Defendants' reprieve in this matter is that the photographs annexed on the Supporting Affidavit do not say much as to which Defendant committed which acts.
 16. Considering that the Application for contempt is quasi criminal in nature, the Applicant should have particularised, with certainty the allegation of contemptuous acts of each Defendant, giving details of when each act was committed.
 17. The photographs before me show some structures and fallen trees. The photographs do not however show the person who cut down those trees or who put up the structure and when that was done.
 18. In the circumstances, I decline to issue the orders being sought. For those reasons I dismiss the Application dated 10th February 2015 with no orders as to costs.

Dated and delivered in Malindi this 2nd day of **October** 2015.

O. A. Angote

Judge