



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 27 OF 2014**

**REUBEN MULWA KIOKO.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JAPHET KAHINDI NOTI SHUTU**

**(alias) NJANJA.....DEFENDANT/RESPONDENT**

**R U L I N G**

**Introduction:**

1. On 24<sup>th</sup> February 2014, this court granted to the Plaintiff/Applicant an *ex parte* injunction restraining the Defendant for 14 days by himself, his servants, agents and or employees from trespassing, encroaching, entering and or in any other manner howsoever and whatever interfering with the Plaintiff's quiet ownership, occupation, use and proprietorship of plot number 10866 Malindi. The order was extended to 24<sup>th</sup> March 2014 when the matter came up for the inter partes hearing on 6<sup>th</sup> March 2014.
2. The Plaintiff has now filed an Application dated 3<sup>rd</sup> April 2014 in which he seeking for the following orders.

(a) **THAT the Honourable court be pleased to issue a warrant of arrest to bring into this Honourable court, one JAPHET NOTI CHARO alias NJANJA, EDWARD FONDO NOTI, ERIC TUMAINI NOTI and JUSTANCE KARISA alias RASTA to show cause why they should not be committed to civil jail for a term not exceeding six months for violating and breaching a court order issued on 24<sup>th</sup> of February 2014 and extended on the 6<sup>th</sup> March 2014.**

(b) **THAT this Honourable Court be pleased to order that the said JAPHET NOTI CHARO alias NJANJA, EDWARD FONDO NOTI, ERIC TUMAINI NOTI and JUSTANCE KARISA alias RASTA be detained in prison for a term not exceeding six months for violating and breaching the orders of this Honourable court issued on the 24<sup>th</sup> February 2014 and extended on 6<sup>th</sup> March 2014 and/or that this Honourable court be pleased to order that the said JAPHET NOTI CHARO alias NJANJA, EDWARD FONDO NOTI, ERIC TUMAINI NOTI and JUSTANCE KARISA alias RASTA to pay such a fine to the Plaintiff/Applicant as the court shall deem fit and expedient for violation of its orders granted on the 24<sup>th</sup> February 2014 and extended on 6<sup>th</sup> March**

**2014.**

**(e) THAT the OCPD and the OCS Malindi police station be ordered to ensure compliance with the court orders.**

**(f) THAT the costs of this Application be borne personally by the Defendant/Respondent.**

**The Plaintiff's/Applicants' case**

3. According to the Plaintiff's Affidavit, he has developed the suit property and he has been in exclusive quiet possession of the said land since he acquired the title; that on 24<sup>th</sup> February 2014, he obtained an order of injunction from this court which order was further extended on 6<sup>th</sup> March, 2014 and that both orders were served on the Defendant.
4. It is the Plaintiff's deposition that on 20<sup>th</sup> March 2014, at around 0415 hrs, he received a call from his watchman who informed him that there was a group of six men who had invaded the suit premises and were demolishing part of the building.
5. The Plaintiff deponed that after a while, he was informed that the said group of six men had stopped demolishing the building on the suit property but instead had thrown bottles containing petrol in the premises thus causing the place to catch fire. The Plaintiff's watchman managed to identify three of the six men who had petrol bombed the suit premises as Eddie Shutu and Brian Shutu, the Defendant's sons and Justance Karisa alias rasta, who is the Defendant's watchman.
6. On 21<sup>st</sup> March, 2014 at around 0300 hrs, it was deponed, the Plaintiff received another call from his watchman who informed him that his bar "Come Back Bar and Restaurant" which stands on the suit property had been set on fire. The Plaintiff rushed to the suit property and found that indeed the said bar had been razed down.
7. It was the deposition of the Plaintiff that the Defendant is a well-known notorious criminal who was causing a lot of insecurity within Malindi and its environs and that the value of the building and goods burnt down is approximately Kshs.4 million and that the Defendant, his sons and watchman were behind the burning down of the suit property against the order of this court.
8. The Plaintiff's Security guard, Chengo Kurera swore an affidavit and stated that on 20<sup>th</sup> March, 2014 at 0430 hrs, while guarding the suit premises, he saw six men, three of whom were well known to him, that is, Edward Fondo Noti and Erick Tumaini Noti, the sons of the Defendant and Justance Karisa alias Rasta, the Defendant's watchman.
9. It was the deposition of Chengo Kurera that the six men divided themselves into two groups; one group confronted him and they started throwing stones at him while the second group attacked his colleague, Samwel Mengoru.
10. According to Chengo Kurera, the attackers started demolishing the building on the suit property before they came back with containers containing petrol and set a tuk tuk that was next to the gate on fire.
11. On the following day at around 0300 hrs while at the suit property with four administrative police officers they saw fire on top of the makuti building within the suit premises which had been thrown from behind the restaurant.

**The Respondent's case:**

12. According to the Respondent's Replying Affidavit, he was in Nairobi between 17<sup>th</sup> March 2014 to 30<sup>th</sup> March 2014; that on the evening of 19<sup>th</sup> March, 2014, he was in the office of the Chief Justice where he had gone to present his complaint and that after presenting his complaint, he remained in Nairobi for other businesses at the lands office.
13. It is the Defendant's/Respondent's deposition that he stayed in Nyam Lodge, Nairobi and that the Application is baseless. According to the Defendant, the Plaintiff's workers have been busy with the construction on his plot with the protection of the court.

**Further Affidavit:**

14. The Plaintiff swore a further affidavit in which he deponed that the receipts which have been annexed on the Replying Affidavit showing that the Defendant was in Nairobi during the alleged period when the suit property was burnt down are forgeries and that if it is true that the Defendant was in Nairobi, then he organised and or planned the burning of the said Comeback Bar and Restaurant through his agents.
15. The parties filed their respective submissions which are a replication of the depositions in their respective affidavits.

**Analysis and findings:**

16. The Defendant has not denied that he was served with the orders of this court which were issued on 24<sup>th</sup> February, 2014. The alleged arson act by Edward Fondo Noti, Eric Tumaini Noti and Justance Karisa is said to have been perpetrated during the subsistence of the court order and under the Defendant's instructions.
17. The Defendant has denied that he has disobeyed the order of this court that was issued on 24<sup>th</sup> February 2014. According to the Defendant, he was in Nairobi on 20<sup>th</sup> and 21<sup>st</sup> March 2014 when the acts that the Plaintiff is complaining about occurred. The Defendant has attached on his affidavit receipts showing that he was in Nairobi between 18<sup>th</sup> March 2014 to 27<sup>th</sup> March, 2014.
18. It may be true, as argued by the Plaintiff, that the receipts attached on the Defendant's affidavit showing that he was in Nairobi when the suit premises were burnt down are a forgery or that indeed it is the Defendant who acted, in collusion with the other alleged contemnors, to burn down the suit property in disregard of the order of the court. However, this court will be speculating if it was to find with certainty that that is what happened on the basis of affidavits and commit the mentioned people to civil jail.
19. The most appropriate thing that should have happened in this Application was to call for cross-examination of the people who are alleged to have burnt down the suit property, including the Defendant, to ascertain where they were on the said dates.
20. This observation does not imply that the named individuals did not commit the acts complained of and does not in any way give an indication as to how the pending criminal case currently pending in the lower court should be decided. Indeed, if the lower court finds that there is sufficient evidence that the alleged contemnors committed the offences that they have been charged with, then they should be punished in accordance with the law.
21. However, for the purpose of the Application before me, and in the absence of the cross-examination of the deponents herein to ascertain who committed what and when, I shall disallow the Application dated 3<sup>rd</sup> April 2014 and give room to the lower court to determine the guilt or innocence of the Defendant, his sons and his watchman.
22. Each party shall bear his own costs.

Dated and delivered in Malindi this **26<sup>th</sup>** day of **September**, 2014.

**O. A. Angote**

**Judge**