



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 78 OF 2012

DZAME MUMBA KONDE (AKA RUTH DZAME MUMBA)

STEVE MUMBA (*SUING AS THE ADMINISTRATORS AND LEGAL*)

REPRESENTATIVE OF THE ESTATE OF MAURICE

KAMBISHERA MUMBA (DECEASED)...PLAINTIFFS/ APPLICANTS

=VERSUS=

DENIS CHAMOTO SHERA (ALIAS JITI).....DEFENDANT/ RESPONDENT

RULING

Introduction:

1. What is before me is the Application dated 1st July 2013 filed by the Plaintiffs seeking for the following orders
 - (a) **THAT the Defendant/Respondent be punished for disobedience of the court order of the 3rd day of June 2013 by being committed to serve a six (6) months imprisonment.**
 - (b) **The costs of this Application be provided for.**

The Plaintiffs'/Applicants' case

2. The Application is premised on the grounds that although the Defendant was restrained from constructing, altering or developing on land known as sub-division 3143 (original number 284/174) of section III/MN, he has since started raising a foundation of a high rise building without due regard to the said orders.
3. It is the Applicants' case that as at the time of filing the suit, the Defendant had only started sinking a well and had pulled down part of the then existing structures.
4. However, after he was served with the court order, he laid a proper foundation on the suit property which action amounts to disobedience of the court order of 3rd June 2013.
5. In response, the Defendant admitted that he was served with the order of 3rd June 2013 on 18th June 2013. It was the Defendant's deposition that as at the time he was served with the court order, he had started putting up the foundation of his building on the disputed parcel of land and that none of the photographs have dates and especially the status of the suit property as at 18th

June 2013.

6. It was further deponed that in any event, having been served with the order 15 days from the date of issue, the said order had lapsed.
7. The Defendant finally deponed that he has complied with the order of the court that was served upon him on 18th June, 2013.

Submissions

8. The Plaintiffs'/Applicants' counsel submitted that photographs were taken at the time the interim injunction was granted showing the status quo as at that time. However, it was submitted, the status of the land changed even after the Respondent was served with the court order on 18th June, 2013.
9. Counsel submitted that the original structures that existed on the suit property as at the time the injunction was granted no longer exist. Consequently, it was submitted, the Defendant is in contempt of court.
10. The Defendant's counsel submitted that the order of the court was only served upon the Defendant on 18th June, 2013 by which time there were already materials on the suit property. Counsel submitted that the Application should be dismissed.

Analysis and findings

11. The Plaintiffs annexed on their Supporting Affidavit the extracted copy of the order of this court issued on 3rd July 2013. The order restrained the Defendant for 14 days from continuing with any further construction of any structure on the suit property.
12. The order was to remain valid until the midnight of 17th June 2013. However, the Defendant was not served with the order until 18th June, 2013 when the matter came up for inter partes hearing.
13. In view of the fact that the Defendant was not served with the order until 18th June, 2013, he cannot be faulted with what happened on the suit property between 3rd June, 2013 and 17th June 2013.
14. Two of the photographs annexed on the Supporting Affidavit show that they were taken on 24th June 2013. It is the Defendant's deposition that what is depicted in the photographs does not show that the construction was undertaken by the Defendant after he was served with the court order. It is the Defendant's position that what is depicted in the photographs taken on 24th June 2013 is what was existing as at the time he was served with the court order.
15. I agree with the Defendant's arguments that there is no evidence before the court to show that what is depicted in the photographs taken on 24th June 2013 was the construction that was undertaken after 18th June, 2014 when the Defendant was served with the court order. There is therefore no evidence that the Defendant disobeyed the order of this court.
16. For those reasons, I dismiss the Plaintiffs' Application dated 1st July 2013 with costs.

Dated and delivered in Malindi this **12th** day of **September**, 2014.

O. A. Angote

Judge