



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

**AT MALINDI**

**ELC Civil Case No. 183 Of 2013**

**DANIEL KATUMO NYAMAI (suing as the administrator of the Estate of Onesmus Nyamai Kyengo (Deceased)).....PLAI**

**NTIFF**

**=VERSUS=**

**1. GILBERT KANUNGU MWAGANDA**

**KATANA**

**MRYANI**

**KIERIA**

**MWANZA**

**MUNYOKI**

**2. JOANNES CHARO**

**3. JUMWA KARISA**

**4. ZAWADI KIBEYU**

**5. PAUL KATANA**

**6. JOSEPH NGALA**

**7. JONATHAN KENGA KATANA alias  
GONA.....DEFENDANTS**

**R U L I N G**

**Introduction:**

1. What is before me is the Plaintiff's Application dated 18<sup>th</sup> March, 2014 seeking for the following reliefs:
  - a. **THAT the Defendants should attend court to show cause why they should not be committed to civil jail for a term not exceeding 6 months.**
  - b. **THAT the Honourable court be pleased to order that the Defendants be committed to civil jail for a term not exceeding six (6) months.**
  - c. **THAT this Honourable court be pleased to issue an order to compel the Defendants to demolish and remove all the developments made on the suit property in disobedience of the**

**order within seven (7) days of service of the orders of the Honourable Court.**

**(c) THAT the costs of the application be paid by the Defendants.**

**The Applicant's case:**

2. According to the affidavit of the Plaintiff in support of his Application for injunction, the deceased is the registered owner of the suit property measuring 48.05 ha; that they have lived on the suit property since the deceased purchased it and that the Defendants have used force, violence and unlawful threats to invade the suit property with the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants erecting structures on the land.
3. According to the Plaintiff, the Defendants have developed a subdivision scheme dated 20<sup>th</sup> May 2013 in which they have proposed to subdivide the suit property into twelve portions of varying sizes; that the 6<sup>th</sup> Defendant was charged and convicted for the offence of forcible detainer in the year 2006 and that the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants were charged in criminal case no. 886 of 206 for creating disturbance.
4. The Plaintiff further deponed that the 7<sup>th</sup> Defendant viciously attacked his sister-in-law and cut her deeply in the head thereby causing her permanent injuries and was charged with the offence of causing grievous bodily harm in criminal case number 546 of 2008. The Plaintiff has stipulated the other criminal cases facing the Defendants.
5. It is the Applicant's case that the Defendants do not have permanent structures on the suit property and that they own properties in surrounding settlement schemes; that their motive of invading the suit property is for speculative purpose and that the Defendants have been selling some parts of the land to unsuspecting members of the public.
6. After hearing the Application for an injunction ex parte, this court granted to applicant orders of injunction on 17<sup>th</sup> October 2013.
7. The Applicant has deponed that the order restraining the Defendants from developing or erecting structures on the suit property was duly served upon the Defendants but the Defendants have now ignored the court order and are continuing to subdivide, cultivate and to erect structures on the suit property.

**The Respondent's case:**

8. The 7<sup>th</sup> Respondent filed his Replying Affidavit on 19<sup>th</sup> May 2014 and deponed that him, together with the other six Defendants are not in breach of the court's order; that the Defendants are residents of the disputed parcel of land and have homestead on the said land.
9. The Defendant denied that they are subdividing the land as alleged by the Plaintiff and that they have complied with the court orders.

**Submissions:**

10. The Plaintiff's advocate submitted that the Defendants have continued to subdivide, cultivate and to erect structures on the suit property despite the court order. Consequently, it was submitted, the Defendants should be committed to civil jail. Counsel relied on several authorities which I have considered.
11. On the other hand, the Defendants' counsel submitted that the photographic evidence produced by the Plaintiff is unclear; that some of the photos are pitch black and it is impossible to state what was happening in the said photos.
12. Consequently, it was submitted, the Plaintiff has not proved that the Defendants are in contempt of the orders of this court.

**Analysis and findings:**

13. On 17<sup>th</sup> October 2013, the court restrained the Defendants by themselves, their servants, agents or whomsoever claiming under them from subdividing, selling, transferring, developing, erecting

- structures, or making roads on the suit property. The said order is still in force.
- 14.The Plaintiff has alleged that the Defendants have disobeyed the said order.
  - 15.The Defendants have not denied that they were served with the said orders.
  - 16.I have looked at the photographs annexed on the Plaintiff's Supporting Affidavit. Four photographs were taken on 1<sup>st</sup> February 2014 while five photographs were taken on 3<sup>rd</sup> February 2014.
  - 17.None of the photographs that were taken on 1<sup>st</sup> and 3<sup>rd</sup> February 2014 shows the Defendants erecting or subdividing the land. It is not even clear whether any of the Defendants was captured in any of those photographs.
  - 18.There are other undated photographs which are not of any evidential value because it is unknown as to when they were taken. This court cannot determine whether those photographs were taken before or after the order of 17<sup>th</sup> October 2013.
  - 19.It is also not clear to this court the person who took the photographs in question and under what circumstances he took the photographs. The person taking the photographs should have filed an affidavit deponing on what was happening in the captured photos.
  - 20.In the circumstances, the Plaintiff has not proved to the required standard that the Defendants are in contempt of the order of the court dated 17<sup>th</sup> October 2013.
  - 21.For those reasons I dismiss the Plaintiff's Application dated 18<sup>th</sup> March 2014 with costs.

Dated and delivered in Malindi this **31<sup>st</sup>** day of **October**, 2014.

**O. A. Angote**

**Judge**