



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 86 OF 2013

PATRICK KHADONDI.....PLAINTIFF/APPLICANT

=VERSUS=

JAPHET NOTI CHARO.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. What is before me is the Application by the Plaintiff dated 3rd June, 2013. The Plaintiff is seeking for the following orders:
 - (a) That the court be pleased to issue warrants of arrest against the Defendant herein JAPHET NOTI CHARO for his arrest and production in court to show cause why he should not be punished for contempt of court and the warrants to be enforced by the OCPD Malindi.
 - (b) THAT the OCPD Malindi be ordered to ensure vacant possession of the suit property known as unsurveyed plot Malindi development plan no. 150 (departmental reference no. 55/MLD/2001) situated at former Malindi show ground and alienated for allocation and development to individuals under SABAKI squatters upgrading is given to the Plaintiff in compliance of the Orders of the court given on 29th May 2013.
2. The Application is premised on the grounds that the Defendant disobeyed the orders of this court dated 29th May 2013 restraining him or his agents from remaining, entering or trespassing on plot number 9 delineated on development plan number 150.

The Plaintiff's/Applicant's case:

3. According to the affidavit of the Plaintiff, the Defendant was served with the orders of 29th May

- 2013 restraining him from dealing with the suit property on 30th May 2013. The Plaintiff deponed that after the Defendant was served with the orders of the court, he proceeded to put padlocks and raised a wall thus blocking the entry to the house standing on the suit property.
4. The Plaintiff is asking this court to punish the Defendant for his contemptuous actions.
 5. In response, the Defendant deponed that he was not served with the order of this court on 30th May 2013 because he was in Nairobi on that day and that he spoke to the process server on phone while in Nairobi.
 6. The Defendant further deponed that after his trip to Nairobi, he proceeded with Mr. Otara to Kisii to attend a funeral. Consequently, it was deponed, he could not have been in contempt of court when he was not aware of the existence of the court orders of 29th May, 2013.

Further Affidavits:

7. The Plaintiff filed a Further Affidavit and deponed that pursuant to the order of this court directed to Safaricom Limited, Safaricom Kenya Limited supplied to the process-server the call log which confirmed that a call was received by xxxxx, the Defendant's phone number, from xxxxx, the process-server's number.
8. It is the Plaintiff's deposition that the same call log shows that on 30th May 2013 at 17:56:02, both the process server and the Defendant were in Malindi when the process-server called the Defendant on his cell phone.
9. In response, the Defendant deponed that he cannot understand the document from Safaricom Kenya Limited and that the records from Safaricom are not in conformity with the order of the court.

Cross-examination of the process-server

10. Mr. Morris Mavuo Ngonyo, the process-server, informed the court that he swore an affidavit showing that he served the Defendant with the order of this court on 30th May 2013 at 4 pm.
11. It was the evidence of the process-server that he served the Defendant with the court order at his bar known as Mbuzi Wengi after calling him on his cell phone.

Analysis and findings:

12. The Application before me is for contempt. It is alleged that after the court restrained the Defendant from remaining, entering or trespassing into the Plaintiff's plot on 29th May 2013, the Defendant went ahead and put padlocks on the house situated on the suit property. It is also alleged that the Defendant barricaded the entry to the house by raising a wall after the court issued the orders.
13. The Defendant has denied that he was ever served with the said orders. According to the Defendant, he was in Nairobi on 30th May, 2013 when he was allegedly served in Malindi with the court order. To support his claim, the Defendant annexed invoices and ETR receipts showing that on 30th May, 2013, he had breakfast in a hotel known as Marteve Guest House.
14. The process-server was cross examined on the issue of service of the order on the Defendant. The process-server was categorical that he served the Defendant at his bar and restaurant which is also his residential home after calling him on his cell phone on 30th May 2013.
15. At the request of the Defendant's counsel, and after providing the Defendant's cellphone number, this court directed Safaricom to provide the call log showing the calls that were made by Mr. Morris Ngonyo Mavuo from his call phone number xxxxx at around 4 pm on 30th May 2013 to Mr. Japhet Noti Charo of xxxxx and more specifically the position of the said Mr. Japhet Noti Charo at around 4 pm.
16. Safaricom Kenya Limited complied with the said Order. The certified copy of the call log shows that on 30th May 2015, the process-server, whose number is xxxxx made a call to the Defendants number at 17:56:02 (outgoing). The call log shows that Defendant's number xxxxx received a call from the process server's number (incoming) at 17:56:02. The Defendant's location during that

- call is indicated as 639-02-00118-06914 while the process-server position was 639-02-02002-11022.
- 17.The information from Safaricom shows code 639-02-00118-06914, the Defendants position while receiving the call from process server, is for Malindi Hse-Hub while code 639-02-02002-11022, the process server's position while making the call, is for Maweni-Matatu Terminus.
 - 18.The information from Safaricom confirms the testimony of the process-server that indeed he called the Defendant on his cell phone on 30th May 2014 at 17:56:02. The information further confirms that the Defendant was in Malindi on 30th May 2013 at 17:56:02 and not in Nairobi.
 - 19.I am convinced that the Defendant lied on oath, which is an offence under the penal code, when he stated that he was in Nairobi on 30th May 2013 at around 4 pm and could not therefore have been served with the order of this court on the said date.
 - 20.Even if it is true that the Defendant was in Nairobi on 30th May 2013 as shown in the ETR receipts attached on his Replying Affidavit, he must have travelled to Malindi on the same day, and arrived before 17:56:02 when the process server called him on his cell phone and served him with the order of this court. In any event, anyone could have obtained an ETR receipt from Nairobi and sent it to the Defendant for the purpose of misleading the court, which the Defendant has attempted to do.
 - 21.The evidence before me clearly shows that the process-server personally served the Defendant with the court order of 29th May, 2013 on 30th May 2013.
 - 22.There is however no evidence before me to show that the Defendant committed the acts alleged by the Plaintiff. The Plaintiff did not annex photographs to show that the Defendant locked the house on the suit property and barricaded the door of the said house by raising a wall after this court issued its orders.
 - 23.For those reasons, I find and hold that the Plaintiff has not proved on the required standards that the Defendant is in contempt of the orders of the court after been served with the court order. The Application dated 3rd June, 2013 is therefore dismissed with costs.

Dated and delivered in Malindi this 21st day of November, 2014.

O. A. Angote

Judge