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| Case Number: | Environment and Land Case 10 of 2021 |
| Date Delivered: | 28 Apr 2022 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Malindi |
| Case Action: | Ruling |
| Judge: | James Otieno Olola |
| Citation: | John Mwatela & 21 others v Dhahabu Promotion Limited & another [2022] eKLR |
| Advocates: | Mr. Odhiambo for the Plaintiffs Mr. Khan for the 1st defendant Mr. Ole Kina for 2nd Defendant |
| Case Summary: | - |
| Court Division: | Environment and Land |
| History Magistrates: | - |
| County: | Kilifi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed |
| History County: | - |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 10 OF 2021

JOHN MWATELA 1ST PLAINTIFF/APPLICANT

BENATI LUCIANO 2ND PLAINTIFF/APPLICANT

BOSCHI PINO 3RD PLAINTIFF/APPLICANT

CISLAGHI GIANFRANCO4TH PLAINTIFF/APPLICANT

COLOMBO GINAFRANCO5TH PLAINTIFF/APPLICANT

DESTRO DELFINO.....6TH PLAINTIFF/APPLICANT

DONOLO PAOLO7TH PLAINTIFF/APPLICANT

FERRI ABRAMO8TH PLAINTIFF/APPLICANT

LOTRECCHIANO ANNARITA..... 9TH PLAINTIFF/APPLICANT

STRAZZULLO GIOVANNA10TH PLAINTIFF/APPLICANT

PAOLUCHI MARIA 11TH PLAINTIFF/APPLICANT

SCHIAVONI NICOL 12TH PLAINTIFF/APPLICANT

SPANO MICHELE13TH PLAINTIFF/APPLICANT

VISENTIN TERESA 14TH PLAINTIFF/APPLICANT

PAOLA FERRARI15TH PLAINTIFF/APPLICANT

GIUSEPPE MATTA 16TH PLAINTIFF/APPLICANT

ELISA MOSTALLINO17TH PLAINTIFF/APPLICANT

UGETTI ARNERI GIOVANNA.....18TH PLAINTIFF/APPLICANT

BOVO GLAUCO19TH PLAINTIFF/APPLICANT

PAOLA FOUCHI20TH PLAINTIFF/APPLICANT

GIACOMO QUARTUCCI21ST PLAINTIFF/APPLICANT

ZUCCA RICARDO.....22ND PLAINTIFF/APPLICANT

-VERSUS-

DHAHABU PROMOTION LIMITED1ST DEFENDANT/RESPONDENT

MAMBRUI PROMOTIONS LIMITED2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling is in relation to two applications, one filed by the 22 Plaintiffs dated 9th March, 2021 and the other filed by the 1st Defendant dated 11th March, 2021.

2. By their Motion dated 9th March 2021, the Plaintiffs pray for orders:

2. That the directors of the 1st Defendant/Respondent (Dhahabu Promotion Limited), Sarah Centofanti and Joseph Njoroge Kungu be summoned to appear before this Court to show cause why they should not be committed to civil jail for a period not exceeding 6 months or in the alternative, the Court imposes a fine against Sarah Centofanti and Joseph Njoroge Kungu for disobeying the orders issued on 1st March, 2021; and

3. That the costs of the application be provided for.

3. The application which is supported by an affidavit sworn by the 1st Plaintiff – John Mwatela is premised on the grounds:

(a) That on 1st March 2021, the Court issued orders of temporary injunction against the Defendants/Respondents;

(b) That both the 1st and 2nd Defendants were served with a copy of the application and the orders on 2nd March 2021;

(c) That despite being served with the orders, the 1st Defendant has failed to comply with the Order and is instead digging trenches to build walls, blocking common footpaths and placing guards to stop movement of the Plaintiffs, blocking the entrances to the beach (and) going on with construction to alter the plan of the village;

(d) That as at March, 2021, the 1st Defendant had closed entrances accessing the beach, digging trenches for erecting a perimeter wall and generator lines breaking up some of the walls contrary to the Court Orders; and

(e) That Court Orders must be obeyed to protect the dignity of the Court and uphold the rule of the law.

4. By a similar application dated 11th March 2021, Dhahabu Promotion Limited (*the 1st Defendant*) pray for orders:

2. That Paola Ferrari, the 15th Plaintiff/Applicant and Luciano Mostalino be summoned to appear before this Honourable Court to show cause why they should not be committed to civil jail for a period not exceeding 6 months or in the alternative, the Court imposes a fine against the said Paola Ferrari and Luciano Mostalino for disobeying the Orders dated 1st March 2021; and

3. That the costs of the application be provided for.

5. The 1st Defendant's application which is supported by an affidavit sworn by its director Sarah Centofanti is premised on the grounds:

(i) That on 1st March, 2021 the Court made orders of temporary injunction and the same were served upon the 1st Defendant on 2nd March, 2021;

(ii) That a Court Order binds all parties;

(iii) That Paola Ferrari and Luciano Mostalino in contravention of the said Court Order drew an electric cable from a neighbouring Plot to the suit property by digging a trench along the common area and pathway the pass to electric cable to her home;

(iv) That this has greatly altered the original design/plan of the common area, has necessitated charging of the original pathway and (is) further causing a risk to all house owners employees of electrocution in stark contravention of the Court Order;

(v) That the Court Orders must be obeyed by all parties to this suit to protect the dignity of the Court and uphold the rule of law;

(vi) That Court Orders cannot be used as a shield and sword otherwise it can lead to perception of bias towards a litigant.

6. I have carefully perused and considered the two applications for contempt of Court together with the objections and responses as filed by both the Plaintiffs and the 1st Respondent. I have equally perused and considered the rival submissions and authorities placed before me by the Learned Advocates acting for the parties.

7. By an application filed by the Plaintiffs herein under certificate of urgency dated 26th February 2021, the Plaintiffs sought various orders of injunction against the two Defendants. Having considered the said application *ex-parte* on 1st March 2021, this Court granted orders for a temporary period of 14 days as follows:

1. That the application be and is hereby certified urgent;

2. That pending the hearing of the application *inter-partes*, there is granted a temporary order of injunction stopping the Defendants, their agents and/or servants from altering the original design plan of the common areas in any way, blocking the original entrances accessing the beach, blocking or changing the original common pathways, car park, erecting any perimeter walls, and putting up new entrances(s) to the beach on parcels of land namely land portion numbers 624/5, 624/7, 624/8, 624/9, 624/19, 624/11, 624/51, 624/52, 624/53, 624/54 and 624/55 on which the Applicants' houses stand;

3. That pending the hearing of the application *inter partes*, there is granted a temporary order of injunction stopping the Defendants, their agents and/or servants from claiming/charging the applicants the new increased service charges for use of common areas on parcels of land namely land portion numbers 624/5, 624/6, 624/7, 624/8, 624/9, 624/10, 624/11, 624/51, 624/52, 624/53, 624/54 and 624/55, on which the Applicants houses stand and instead the applicants be allowed to continue paying the old service charges to the 2nd Respondent/Defendant;

4. That the application be served for *inter-partes* consideration on 16th March, 2021.

8. Before the date fixed for *inter-partes* hearing could arrive and by their present application dated 9th March 2021, the Plaintiffs accuse the directors of the 1st Defendant Company – Sarah Centofanti and Joseph Njoroge Kungu of disobeying the said orders and urge the Court to summon them to appear before it and to show cause why they should not be committed to jail for such disobedience.

9. In return and by their application dated 11th March 2021, the 1st Defendant Company accuses the 15th Plaintiff – Paola Ferrari together with her husband Luciano Mostalino of disobeying the same orders and similarly urge the Court to summon the couple to appear before it and to show cause why they should not be committed to jail for their said disobedience.

10. As it were contempt of Court is conduct that defies or disrespects the authority of the Court. Such conduct is frowned upon by the Courts as the same tends to impair the fair and efficient administration of justice.

11. Given its ramifications on the administration of justice, **Order 40 Rule 3 of the Civil Procedure Rules** empowers the Court in the event of disobedience or breach of any terms of a temporary injunction to order the property of the person guilty of such disobedience or breach to be attached. In addition, the Court may order such person to be detained in prison for a term not exceeding six months. The Court also has power to impose a monetary fine where it deems appropriate.

12. As was stated in **Econet Wireless Kenya Limited -vs- Minister for Information and Communication of Kenya & Another (2005) KLR:**

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

13. Speaking on the same issue in **T. N. Gadavarman Thiru Mulpad -vs- Ashok Khot & Another (2006) 5 SCC**, the Supreme Court of India underscored the significance of obeying Court orders in the following manner:

“Disobedience of this Court’s orders strikes at the very root of the rule of law on which the judicial system rests. The rule of the law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic state. If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court’s orders are to be followed and complied with.”

14. That said, contempt of Court is in the nature of criminal proceedings as the liberty of the subject is usually at stake. That being the case, the standard of proof in such cases is higher than that of a balance of probabilities in civil cases and the applicant is therefore required to prove willful and deliberate disobedience of the Court Order, if an application such as the one’s before me were to succeed. This much was aptly captured in **Gatharia K. Mutitika -vs- Baharini Farm Limited 1985 KLR 227**, where the Court stated thus:

“A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily ... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt ...”

15. Due to the gravity of the consequences that ordinarily flow from contempt proceedings, it is proper where the person cited was not present during the issuance of the order, that he be served and that he should have personal knowledge of that order.

16. In the first application before me, the Plaintiffs aver that the impugned orders were served upon the 1st Defendant company on 2nd March, 2021 and that despite such service the 1st Defendant blocked the entrances to the beach on 5th and 6th March, 2021 and went ahead to dig trenches to prepare for the construction of a wall. The Plaintiffs also accuse the 1st Defendant of going ahead to bring down walls and do alterations to the buildings. They also accused the 1st Defendant of blocking them from using the footpaths by placing guards in strategic locations to threaten and stop the Plaintiffs.

17. In a Replying Affidavit sworn by the said Sarah Centofanti who is a director of the 1st Defendant, she confirms knowledge of the orders issued on 1st March, 2021 but denies disobeying the same. In particular she avers that the gate said to have been blocked is an emergency exit and is always closed and is only used during an emergency. She further avers that that fact is known to all residents and that the main gate and access to the beach is adjacent to the emergency gate.

18. The 1st Defendant denies digging any trenches to construct a wall or at all. It further asserts that the only wall it has dealt with during the period is a private wall belonging to House Nos. 183, 184 and 185 in Dhahabu Village and that all it did was simple repair and maintenance of the same.

19. I have looked at Annexure A-5 of the Supporting Affidavit sworn by John Karisa Mwatela on behalf of the Plaintiffs. The photo exhibited is clearly marked “Emergency Exit Only”. From a perusal of Annexure 2 of the Replying Affidavit of Sarah Centofanti, it is apparent as stated by the 1st Defendant that the premises have two exits, a main entrance and the Emergency Exit. The Plaintiffs have not explained why they sought to use the Emergency Exit when they could access the premises and the beach through the main entrance.

20. From the material presented before me, there was no evidence that the 1st Defendant had altered the original design/plan of the common areas as prohibited by the Court in the orders issued on 1st March, 2021. There was also no evidence that the 1st Defendant had blocked the original entrance accessing the beach, that they had blocked or changed the original common pathways or the car park and or that they had erected any perimeter wall or put up a new entrance to the beach. These were the actions that were prohibited by the Court’s order.

21. In the absence of any such evidence, it follows that the plaintiffs’ application to have Sarah Centofanti and Joseph Njoroge Kungu cited for contempt was misconceived and without any basis.

22. In regard to the second application, the 1st Defendant accused the 15th Plaintiff Paola Ferrari together with Luciano Mostalino of contravening the said orders by drawing an electric cable from a neighbouring plot to the suit property by digging a trench along the common area and pathway to pass the cable to her house. The 1st Defendant asserts that the said action has greatly altered the original design/plan of the common area and the same has necessitated changing of the original pathway as well as pausing a risk of electrocution of other house owners.

23. Those allegations are of course denied in the Replying Affidavit of Paola Ferrari sworn and filed herein on 11th May, 2021. Looking at the accusations *vis-à-vis* the orders issued herein, it was clear to me that 1st Defendant’s application was nothing but a classical abuse of the Court process. The application being filed some two days after the Plaintiffs filed the first application was clearly meant to scuttle the first application, create an atmosphere of confusion and to cause a delay in the proceedings herein.

24. As it were, this Court did not issue any orders against the Plaintiffs. While it is true that both sides were required to maintain fidelity to the law, there was no order made herein against repair of electric cables and/or drawing the same from a neighbouring compound.

25. While the 1st Defendant was quick to supply pictures showing the state of the suit premises in response to the Plaintiffs’ application, they did not exhibit anything to demonstrate that the 15th Plaintiff and her husband had dug any trenches on the suit premises. Neither was there any evidence purporting to show that the digging of such trenches if true, had altered the original design or plan of the common area as to necessitate changing the original pathways.

26. It follows that I did not find any basis for the two applications respectively dated 9th March, 2021 and 11th March, 2021. Both are dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28TH DAY OF APRIL, 2022

In the presence of:

Mr. Odhiambo for the Plaintiffs

Mr. Khan for the 1st defendant

Mr. Ole Kina for 2nd Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE



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