



Case Number:	Civil Case 16 of 2010
Date Delivered:	17 Dec 2013
Case Class:	Civil
Court:	Environment and Land Court at Malindi
Case Action:	Ruling
Judge:	Oscar Angote
Citation:	Raphael Mulewa Mkare & 515 others v Agricultural Development Corporation [2013]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL CASE NO. 16 OF 2010**

**RAPHAEL MULEWA MKARE & 515 OTHERS.....PLAINTIFFS**

**=VERSUS=**

**AGRICULTURAL DEVELOPMENT CORPORATION..... DEFENDANT**

**R U L I N G**

**Introduction**

1. What is before me is the Defendant's Application dated 27<sup>th</sup> September 2013 seeking for the following orders:

(i) **THAT the Honourable court be pleased to issue warrant of arrest against the Plaintiffs herein:**

**(a) Mr. Joseph Kalume**

**(b) Mr. Patrick Katana**

**(c) Mr. Benson Gona**

**(d) Mr. Charo Kaingu Gory alias Yenyee**

**(e) Mr. Kesi Nyiro**

**(f) Mr. Kenga Karisa Mulisho**

**(g) All the officials of KISIWANI FARMERS ASSOCIATION (KFA) and in their capacity as chairman, secretary, treasurer and the representatives and agents of the 515 Plaintiffs listed in the Plaint.**

**(h) Hosea Chome, Ibrahim Athman and Kadzo Koi Kazungu in their capacity as the Plaintiffs' leaders/councilors/representatives, agents and activists for their arrest and production in court to show cause why they should not be punished for contempt of court to be enforced by the OCPD Malindi.**

(ii) **THAT the OCPD Malindi to be ordered to enforce the court orders issued on 8th June 2012**

**affecting the entire firm known as Kisiwani Malindi complex top farm situated in L.R No. 513, 467, 470, 480, 485, 482, 488, 489, 456, 5061 and 1949 pending the hearing of this Application and suit.**

**(iii) THAT the Deputy county commissioner be ordered to enforce the court order and with assistance of the general service unit or any other competent force ensure that the Plaintiffs/respondents withdraw/vacate the encroached areas in Kisiwani farm.**

**(iv) THAT Mr. Omagwa Angima advocate for the Plaintiff/respondents be held in contempt of disobeying the court order dated 8th June 2012 and that he be called upon to show cause why he should not be punished accordingly.**

**(v) Costs of the application be borne by the Plaintiffs/Respondents**

2. According to the deposition by the Defendant's/Applicant's farm manager, the Plaintiffs filed an application seeking for interim orders of injunction against the Defendant. It has been deponed that the court delivered its Ruing on 8<sup>th</sup> June 2012 in which it ordered the Plaintiffs/Respondents not to either encroach further into the land occupied by the Defendant/Applicant or build new structures on the disputed land pending the hearing and determination of the suit.

3. It is the Defendant's/Applicant's deposition that in disregard of the said order of the court, the Plaintiffs/Respondents have now embarked on demarcation of the land and encroaching into and acquiring more land belonging to the Defendant/Applicant such that the Defendant's/Applicant's animals are under threat for lack of space and land for grazing.

4. The Defendant/Applicant has further deponed that the Respondents have increased in number; that from the initial area of cultivation of 300 acres as alleged in their Plaint, they are now occupying approximately 1282.25 acres; that the Plaintiffs are building dwelling houses, and that the invasion is in large numbers and the Applicant is losing control of the farm and its officers' lives.

5. The Defendant's/Applicant's representative further deponed that the Plaintiffs/Respondents have formed an association known as Kisiwani Farmers Association which they are using to share, demarcate and sub-divide the land amongst themselves contrary to and in disregard of the court order and gazette notice number 37/2001 and 157/2003.

6. The Defendant's representative finally deponed that the Plaintiffs have been threatening its employees; that the Plaintiffs have been injuring its animals and that the Plaintiffs have disobeyed the order of this court.

### **Plaintiffs'/Respondent's case**

7. The Respondents' advocate, who is one of the alleged contemnors, swore a length Replied Affidavit which was filed on 17<sup>th</sup> October 2013.

8. The Respondents' advocate deponed that him, together with the Respondents, had been cited for contempt.

9. It was the advocate's deposition that they have never disobeyed the court order of 8<sup>th</sup> June 2012; that after the said orders were issued on 8<sup>th</sup> June 2012, the Respondents have never moved even one inch to the Applicants parcel of land and that it is the Applicant who has refused to recognise the presence of the Respondents on the land.

10. The Respondents' Advocate has gone into great details on how the Applicant interfered with the Respondents' land and the mayhem and death that followed thereafter necessitating the order of 8<sup>th</sup> June 2012 and that the current Application is intended to revive the blame game that existed before the Ruling of Omondi J on 8<sup>th</sup> June 2012.

11. According to the Respondents' counsel, there has been no violence since the status quo order was given and that to the contrary, it is the Applicant who has been deliberately grazing its livestock on the Respondents crops; that there is no evidence that any of the Respondents was involved in inflicting the injury on the animals and that the Respondents have never pleaded that they are claiming only 300 acres.

12. It is the Respondents' case that the Applicant has lost its land due to the greed on the part of the management of the Applicant who have hived, grabbed and sub-divided the land belonging to the Defendant; that real estates such as Serangeti Estate have been developed by private developers on the Applicant's land and that most of the Applicant's land has been leased out to third parties.

13. The Respondents' counsel finally deponed that the affidavit of the Applicant's farm manager contains inaccurate information because the said farm managers only joined the Applicant a few months ago and do not understand the nature of the dispute between the parties herein neither do they understand the interests of the people driving the vendetta.

14. Hosea Chome filed his Replying Affidavit on 15<sup>th</sup> October 2013 and deponed that although, he has been cited for contempt, he is not a party to the suit and that he does not have any interest in the subject matter.

15. The advocates appeared before me on 31<sup>st</sup> October, 2013 and made oral submissions which I have considered.

## **Analysis and findings**

16. Although the parties, especially the Respondents' counsel, have gone into the details of the dispute, the only issue before me is whether the alleged contemnors have disobeyed the order of the court of 8<sup>th</sup> June 2012.

17. The Order of 8<sup>th</sup> June 2012 has been annexed on the Applicant's supporting affidavit and it reads as follows:

**“THAT status quo is preserved and restraining orders sought as against the Respondent by itself, servant, agents, employees or otherwise do issue and remain in force until the suit is heard**

and determined.

**THAT the Applicants must not erect any other new structures on the land pending the hearing and determination of the suit.**

**THAT the Respondent shall bear the cost of this Application.”**

18. The said orders arose from the Plaintiffs'/Respondent's Application dated 1<sup>st</sup> March 2010 in which the Ruling by Omondi J was read by Meoli J on 8<sup>th</sup> June 2012 in the presence of Mr. Binyenya who was holding Ms Chesaro's brief.

19. The Respondents' counsel has argued that although the Ruling was in respect of his Application, he was not present when the Ruling was delivered. Consequently, it was upon the current Applicant's counsel to bring the said order to the attention of the Respondents which did not happen.

20. The law relating to contempt proceedings was clearly laid down by the Court of Appeal in **Mutitika Vs Baharini Farm (1982-88) 1 KAR 863**, where it was held that if anyone knowing of the existence of an injunction or an order of stay, willfully does something to break the injunction is liable to be committed for contempt.

21. In **Johnson Vs Grant, 1923 SC 789 at page 790, Lord President Clyde** stated as follows:-

**“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”**

22. It is therefore paramount that to protect the supremacy and the rule of law, the courts are under an obligation to punish individuals who are in contempt of its orders. The powers to punish individuals who disobey injunctive orders is provided for under Order 40 Rule 3 of the Civil Procedure Rules.

23. Contempt is said to be an act or offence of a quasi-criminal nature, and considering that the contemnor may be sent to jail, the breach of which the alleged contemnor is cited must be precisely defined and proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt (see **Wildlife Lodges Ltd Vs County Council of Nairobi & Another (2005) 2 EA 344**).

24. It is trite law that before one commences proceedings for contempt, which are quasi-criminal in nature and in which the alleged contemnor may be jailed, the Applicant must show that the alleged contemnor(s) were aware of the said court order.

25. The **Halsbury's Laws of England (4th Edition) Volume 9** at page 37 provides as follows:

**“As a general rule, no order of court requiring a person to do or abstain from doing an act may be enforced unless a copy of the order has been served personally on the person required to do**

**or abstain from doing the act in question.**

26. It is the Respondent's case that they were not served with the order of the court of 8<sup>th</sup> June 2012. They cannot therefore be accused of being in contempt of the orders which they were not aware of.

27. The general rule therefore is that a party must endeavor to serve an order of the court if he is to succeed with an application of contempt. However, in a situation where personal service is difficult because of the circumstance of the case, then the court will hold that the service of the order was effected if it is shown that the person to be served with the order was aware of the existence of the order despite the lack of personal service.

28. In the case of Basil Criticos Vs Attorney General & 8 others (2012) Eklr, the court held as follows:

**“The law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”**

29. The Application which gave rise to the order before me was made by the Plaintiff's/Respondents Advocate. The Ruling was delivered on 12<sup>th</sup> June, 2013 in absence of the Plaintiff's advocate.

30. It is not clear from the Applicant's Application when the people who have been cited for contempt came to learn about the said order. A simple letter by the Applicant's Advocate to the Respondents' advocate would have brought to the attention of the advocate, who is the agent of the more than 500 Plaintiff's, the existence of the said order.

31. In the absence of evidence to show that the Plaintiff's advocate was informed of the existence of the court order so as to assist the court to ascertain if in deed the Plaintiff's are in contempt, the court is unable to make a finding that the Respondents are in contempt of the said order. The knowledge of the court order is paramount and it is upon the Applicant to prove that.

32. Even if it is true that the order of 8<sup>th</sup> June 2012 directing that status quo existing then should be maintained was served, or that the Plaintiff's were aware of the same, it is imperative for the Applicant to state clearly what the Respondents are alleged to have done which constitutes contempt of court with sufficient particularity.

33. The Applicant has stated that the Respondents have encroached on its land contrary to the orders of the court. On the other hand, the Respondents have stated that they have not moved an inch. The photographs annexed on the Applicant's affidavit do not show the status quo that existed on 8<sup>th</sup> June 2012 and the subsequent encroachment on the Defendant's land by the Plaintiff's. It is not even shown when the said photographs were taken.

34. Indeed, it is difficult for the court to ascertain from the pleadings before it what the status quo was on 8<sup>th</sup> June 2012 to determine if the Plaintiff's are in breach or not. The photographs annexed on the Application do not assist the court at all. The only way of determining the rights of the Plaintiff's and the Defendant's is to have this matter heard.

35. Indeed, I am surprised that although the matter before me is affecting more than 500 people,

whose number must have increased due to procreation, the suit has not been prosecuted to date. I do not understand in whose interests the counsels for both parties are protecting if a suit which has caused grievance to so many people can stay pending since the year 2010. This state of affairs will not be allowed by this court to persist. In fact, this court, on its motion, will take a proactive measure of ensuring that all suits for the claim of adverse possession are heard expeditiously and on a priority basis in the new term.

36. In the circumstance, and for the reasons I, I find and hold that there is no evidence that the order of the court of 8<sup>th</sup> June, 2012 was brought to the attention of the Respondents. There is also no evidence that the Plaintiffs have encroached on the Defendants' land other than the land that they were occupying as at 8<sup>th</sup> June 2013. There is also no evidence before me to show that the Respondents have put new structures after the order of 8<sup>th</sup> June 2013 was served upon them. The alleged acts of injured animals in my view are of a criminal nature which should be pursued by the police.

37. For the reasons I have given above, I dismiss the Defendant's/Applicant's Application dated 27<sup>th</sup> September 2013 with costs.

38. In view of the acrimony that exists between the parties in this matter, I direct that this matter should be fixed for hearing in the next 90 days from today.

Dated and Delivered in Malindi this 17<sup>th</sup> Day of **December 2013**

**O. A. Angote**

**Judge**



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