



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 147 OF 2014

ELLIUD KINGWARA ADAWO PLAINTIFF

VERSUS

PHILIP ACHIENG JOHN1ST DEFENDANT

GORDON ACHIENG 2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 15th April 2014 seeking; a permanent injunction to restrain the defendants by themselves or through their agents and/or employees from burying the remains of one, Risper Okombo Achieng on all that parcel of land known as **LR No. Suna East/Wasweta/6035** (hereinafter referred to as the “**suit property**”). In his plaint dated 15th April, 2014, the plaintiff averred that he is the registered proprietor of the suit property which he purchased from the said Risper Okombo Achieng, deceased (hereinafter referred to as “**the deceased**”). The plaintiff averred that the deceased died on 5th April, 2014 and that her body was preserved at Ojele Memorial Hospital, Migori, pending burial. The plaintiff averred that the defendants had made arrangements to remove the body of the deceased from Ojele Memorial Hospital for burial on the suit property without obtaining his consent. The plaintiff averred that a demand had been made upon the defendants to stop their plan to bury the body of the deceased on the suit property but they had declined to do so thereby leaving the plaintiff with no alternative but to bring this suit.
2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 15th April 2014 under certificate of urgency seeking a temporary injunction to restrain the defendants from removing the body of the deceased from Ojele Memorial Hospital and burying the same on the suit property pending the hearing and determination of this suit. The plaintiff sought a further order that the OCS Migori Police Station do ensure compliance with the order of injunction if granted.
3. The plaintiff’s application was filed during the High Court vacation and the same was placed before Omollo J. at the Environment and Land Court at Bungoma on 16th April 2014 who certified the same as urgent and granted prayers 2 and 4 thereof on an interim basis pending the hearing and determination of the application inter partes by this court. The orders that were granted by Omollo J. were on these terms;

“1. THAT the plaintiff’s application dated 15th April 2014 be and is hereby certified urgent.

2. THAT a temporary injunction be and is hereby issued restraining the defendants by themselves or through their servants or agents and/or employees from removing

the remains of the late Risper Okombo Achieng (“the deceased”) from Ojele memorial Hospital and burying the same on land parcel No. Suna East/Wasweta/6035 (“the suit property”) pending the hearing and determination of this application inter partes

3. THAT the OCS Migori Police Station be served to supervise compliance with the order

4. THAT the application be served on the defendants for interpartes hearing on 30th April 2014 before the Environment and Land Court at Kisii.”

The said order was extracted on the same day and endorsed with a penal notice. The order was served upon the defendants on 17th April 2014. The plaintiff has now moved the court by way of Notice of Motion application dated 30th July 2014 seeking among others, an order for the committal of the defendants to jail for duration not exceeding six (6) months for disobeying the said order that was made on 16th April 2014. The plaintiff has in the alternative sought an order for the attachment and sale of the defendants’ properties to defray the damages occasioned by their disobedience of the said order.

4. The plaintiff has sought a further order that the defendants be directed to exhume the body of the deceased from the suit property. This is the application which is the subject of this ruling. The application was brought on the grounds that the order issued herein on 16th April 2014 restrained the defendants from burying the body of the deceased on the suit property. The order was extracted and served upon the defendants with a penal notice warning them of the consequences of disobeying the same. The order was served upon the defendants before the burial of the deceased on the suit property. In defiance of the terms of the said order, the defendants proceeded and buried the body of the deceased on the suit property. The plaintiff has contended that the said action by the defendants amounts to and/or constitutes a disobedience of a lawful court order and that it would serve the interest of justice if the defendants are punished so as to safeguard the integrity and dignity of the court. In his affidavit in support of the application, the plaintiff averred that the order of 16th April 2014 was handed over to a court process server who served the same upon the defendants on 17th April 2014 before the deceased was buried. He annexed to his affidavit a copy of affidavit of service sworn by one, Vitalis Onyango Akuku on 28th April 2014. In the said affidavit, Vitalis Onyango Akuku who described himself a licenced process server of this court, has deposed that he served the defendants with the court order in dispute on 17th April 2014 at around 9.45am. He deposed that at the material time, the deceased had not been buried and he had an occasion to view her body with the other mourners who had attended the funeral. The plaintiff also annexed to his affidavit, a copy of the order said to have been disobeyed by the defendants and a copy of the register for the suit property in proof of his ownership thereof.
5. The plaintiff’s application was opposed by the defendants who filed separate replying affidavits both sworn on 19th September 2014. The defendants admitted that they were served on 17th April 2014 with the court order that was issued by the court on 16th April 2014. They however differed with the plaintiff as to the time when service of the order was effected upon them. The defendants contended that they were both served with the said court order at 2.00pm after they had buried the deceased on the suit property. The defendants contended that in the circumstances, they were unable to comply with the terms of the said order that had been overtaken by events. The defendants contended that the existence of the deceased’s grave on the suit property cannot in any way hinder the plaintiff from pursuing his claim herein and as such there is no justification for the order for the exhumation of the body of the deceased sought by the plaintiff. The defendants denied that they disobeyed the said order and termed the application herein as an abuse of the process of the court.
6. When the plaintiff’s application came up for hearing on 14th October 2014, the defendant’s advocate applied for leave to cross-examine the process server, Vitalis Onyango Akuku on his affidavit of service sworn on 28th April 2014 which application was allowed by the court. The

- plaintiff's application was thereafter fixed for hearing on several occasions but was adjourned from time to time on account of the unavailability of the said process server who was supposed to be cross examined before the application was argued. On each of the said occasions, the process server was either not served with summons to attend court or was engaged elsewhere. When the matter came up on 22nd April 2015 the advocates for both parties informed the court that they were ready to proceed with the application the absence of the process server notwithstanding.
7. In his submission in support of the application, the plaintiff's advocate Mr. Oguttu, reiterated the grounds which are set out in the body of the application and the contents of the plaintiff's affidavit in support of the application. Mr. Oguttu submitted that the only issue in dispute is whether the defendants were served with the court order before or after the burial of the deceased. On the issue, he submitted that the process server had stated that he served the defendants at 9.45am before the burial of the deceased while the defendants have contended that they were served at 2.00pm after the burial ceremony was over. Counsel submitted that, in law, there is a presumption in favour of the process server that what he has stated is correct and that this presumption can only be rebutted through cross-examination of the process server on the contents of his affidavit. Counsel submitted that in this case, the veracity of the contents of the process server's affidavit was not challenged through cross-examination and as such the same must be taken to be correct. Mr. Oguttu submitted in conclusion that everyone served with a court order has an obligation to obey the same. For this proposition, he cited the case of **Hadkinson –vs- Hadkinson (1952) ALLER 567**. Counsel submitted that in this case the disobedience of the court order is apparent. He submitted that the plaintiff has proved the defendants' contempt to the standard that was set out in the case of **Mutitika –vs- Baharini Farm Ltd (1985) KLR 227**.
 8. In his submission in reply, the defendants' advocate Mr. Ochoki submitted that the defendants were served with the court order of 16th April 2014 after they had buried the deceased and as such it cannot be said that they disobeyed the said order that was served after the event. On cross-examination of the process server, counsel submitted that the defendants had done what was humanly possible to have the process server in court for cross-examination but failed to secure this attendance. Counsel urged the court to consider the fact that the defendants had lost their mother and that punishing them would not resolve the underlying dispute that concerns the ownership of the suit property.
 9. I have considered the plaintiff's application together with the affidavit filed by the defendants in opposition to the same. I have also considered the submissions by the advocates for the parties and the authorities that were cited by them in support thereof. In the case of **Hadkison –vs- Hadkinson(supra)**, it was held that;-

“It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”.

In the case of **Mwangi H.C Wangonde –vs- Nairobi City Commission, Civil Appeal No. 95 of 1998 (unreported)**, it was held that;-

“...as a general rule an order of court requiring a person to do or abstain from doing any act may not 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. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

In the case of **Mutitika –vs- Baharini Farm Ltd (supra)** it was held among others that;

- i. **“The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.**
- ii. **The principle must be borne in mind that the jurisdiction to commit for contempt should be**

carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.”

10. It is on the foregoing principles that the plaintiff’s application falls for consideration. It is not disputed that on 16th April 2014 this court issued an order restraining the defendants from burying the body of the deceased on the suit property. It is also not in dispute that the order was extracted, endorsed with a penal notice and served upon the defendants personally on 17th April 2014. It is also not in dispute that the defendants buried the body of the deceased on the suit property on 17th April 2014 contrary to the terms of the said order. It is also not in dispute that if the burial of the deceased was carried out by the defendants after they had been served with the said court order, the same was conducted in breach of the order and the defendants would be guilty of contempt of court.
11. What is in dispute is whether the defendants were served with the court order before or after they had buried the deceased on the suit property. The plaintiff has contended that the defendants were served with the court order at around 9.45am on 17th April 2014 when the body of the deceased had not been buried. The defendants have on the other hand contended that they were served with the said court order on 17th April 2014 at 2.00pm after the deceased had been buried. It is not in dispute that the defendants were served with the said court order through a process server of this court. In the case of **Miruka –vs- Abok & Another [1990] KLR 541** it was held among others that:-

“Where service is disputed, there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service to show that the return is incorrect.”

12. In the Court of Appeal case of **Dickson Daniel Karaba –vs- John Ngata Kariuki & 2 Others, Nairobi Civil Appeal No. 125 of 2008 (unreported)**, the court stated that:-

“There is a presumption that the court process was properly served unless such presumption is rebutted and that the burden lies on the party questioning the affidavit of service to show that the same is incorrect.” In the same case the court stated further that:-

“Where service is denied it is normally desirable that the process server be put in the witness box and the opportunity given to those who deny service to cross-examine him.”

As stated earlier in this ruling, the defendants were served with the order of 16th April 2014 by a process server by the name, Vitalis Onyango Akuku. In his affidavit that was sworn on 28th April 2014, he stated that he served the defendants with the said court order on 17th April 2014 at around 9.45am before the body of the deceased was buried. As stated in **Miruka –vs- Abok & Another (Supra)** and **Dickson Karaba –vs- John Ngata Kariuki & 2 Others (Supra)** this court must presume that what the process server has stated in his affidavit is correct. It was up to the defendants to rebut that presumption. A part from claiming that they were served at 2.00p.m after the burial of the deceased, the defendants placed no other evidence before the court to show that they were indeed served at 2.00p.m and that the statement by the process server is not correct. The defendants had the opportunity to cross-examine the process server on his affidavit of service. They sought leave of court to do so which leave was duly granted. The defendants however failed to use the court machinery to compel the said process server to appear in court for cross-examination. I am not in agreement with the submission by the defendants’ advocates that the defendants did what was within their power to bring the process server to court for cross examination.

13. In the absence of any evidence that the statement contained in the affidavit of the process server is incorrect, I have no reason to disbelieve the same. It is therefore my finding that the defendants were served with the court order that was made on 16th April 2014, on 17th April 2014 at around

- 9.45a.m before the burial of the deceased. This means that the defendants buried the deceased after being served with the said court order.
14. Since the defendants have not contested the terms of the said court order and the fact that the order had a penal notice, it is my further finding that the defendants knowingly buried the deceased on the suit property in breach of the terms of the said court order with the full knowledge of the consequences of the said breach. Such action amounts to contempt of court. I therefore find the defendants guilty of contempt of court. Consequent to this finding, I now need to consider the appropriate punishment that should be imposed upon the defendants. The plaintiff has sought the committal of the defendants to civil jail for a duration not exceeding six (6) months and in the alternative, attachment and sale the defendants' properties to defray the damages occasioned by their breach of the said court order. The plaintiff did not tender any evidence of the damages if any that he has suffered as a result of the defendants' disobedience of the order that was made herein on 16th April 2014. No basis has therefore been laid for the attachment and sale of the defendants' properties. This leaves committal to civil jail as the appropriate punishment to be imposed upon the defendants. Contempt of court proceedings being quasi criminal in nature, it is normally desirable that the contemnor(s) be given a chance to address the court in mitigation before they are sentenced. I have no reason to deny the defendants this chance.
15. Apart from seeking the punishment of the defendants for disobeying the court order aforesaid, the plaintiff also sought an order to compel the defendants to exhume the body of the deceased, Risper Okombo Achieng from the suit property. In the cases of **Kenya Tea Growers Association –vs- Francis Atwoli & 5 Others [2012] eKLR** and **Clarke and Others –vs- Chadburn & Others [1985] 11 ALL ER (P.C) 211**, it was held that an act that is done in defiance of a court order is illegal and no advantage or benefit should be derived from it. A court has an inherent power to compel a party who has committed an illegal act to undo it. This court has power therefore to direct the defendants to exhume the body of the deceased from the suit property. This power is however discretionary. In the book **“The discretion of the Judge” Royal Bank of Scotland Lecture [1990] Denning Law Journal 27**, judicial discretion was defined as follows:

“ An issue falls within the judge’s discretion if, being governed by no rule of law, its resolution depends on the individual judge’s assessment of what is fair and just to do in a particular case. He has no discretion in making findings of fact. He has no discretion in his ruling on law, he has to choose between different courses of action, orders, penalties or remedies, he then exercises discretion. It is only when he reaches stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of discretion.”

16. What I have before me is an interlocutory application. The dispute between the parties concerns the ownership of the suit property. The main suit in which the rights of the parties over the suit property would be conclusively determined is yet to be heard. From the material before me, the dispute between the parties over the suit property has been going on for several years. Exhumation of a body of a human being is a sad affair and very involving. As was correctly submitted by the defendants' advocates, there is no property in a dead body. The remains of deceased persons should rest where they have been laid and should be disturbed only for very compelling reasons and as a last resort. To capture the role of the court faced with a situation such as the present one, I would wish to borrow the statement that was made in the case of **Re Matheson (deceased) [1958] 1 All ER 202**, that was cited in the case of **Hellen Cherono Kimurgor –vs- Esther Chelagat Kosgei [2008] eKLR** where the court stated that, **“As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases, the court will have regard to the supposed wishes of the deceased”**.
17. Due to the foregoing, I am not inclined to make an order for the exhumation of the body of the deceased at this stage. Although, I have found that the burial of the deceased on the suit property was carried out illegally, I would for the reasons that I have given above defer the order for exhumation until the hearing and determination of this suit when final orders would be made with respect to the rights of the parties over the suit property. The remainder of the body of the

deceased on the suit property would in no way prejudice the plaintiff's claim or rights herein. On the other hand, if the body was to be exhumed and it turns out after the trial that the plaintiff has no right over the suit property, the body of the deceased would have been disturbed unnecessarily and may have to undergo a second burial ceremony on the suit property. I am not satisfied that there are very compelling reasons that would justify the exhumation of the body of the deceased from the suit property at this stage. I have said enough to show that an order for the exhumation of the body of the deceased from the suit property is not for granting in the present application.

18. In conclusion, it is my finding that the defendants are guilty of contempt of court and are liable to be punished on that account. In the circumstances of this case however, I am not satisfied that the defendant's contempt would justify the exhumation of the body of the deceased from the suit property at this stage. I would therefore order that the defendants do appear before this court (if they are not present) on a date to be fixed to address the court in mitigation if they so wish before they are sentenced as aforesaid. The plaintiff shall have the cost of the application.

Delivered, Dated and Signed at Kisii this 29th day of May 2015.

S. OKONG'O

JUDGE

In the presence of:

Mr. Ogari h/b for Oguttu for the plaintiff

N/A for the 1st and 2nd defendants

Bosire Court Clerk

S. OKONG'O

JUDGE