



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. APPLICATION NO. 28 OF 2017

IN THE MATTER OF: ELC CASE NO. 161 OF 2016 DAMA KAHINDI KARISA & 2 OTHERS VERSUS KATANA DYEKA

AND

IN THE MATTER OF: KATANA DYEKA (NOW DECEASED)

BETWEEN

DAMA KAHINDI KARISA & 2 OTHERS.....APPLICANTS

VERSUS

1. CHARO KATAKA DYEKA

2. SAFARI KATANA DYEKA

3. KAINGU KATANA DYEKA

4. KADZO KATANA DYEKA

5. REHEMA KATANA DYEKA

6. ZAWADI KATANA DYEKA

7. FURAHA KATANA DYEKA.....RESPONDENTS

RULING

1. By the Notice of Motion application dated 26th July 2017, the Applicants named as Dama Kahindi and 2 others pray for orders:-

2. That the Respondents herein be cited for contempt of Court for disobeying Court Orders issued on 20th July 2017 by this Court and be committed to civil jail for a term of six (6) months;

3. That this Honourable Court be pleased to issue an order that the body of Katana Dyeka interred on 2nd July 2017 on Plot No. Kilifi/Ngerenyi/19 be exhumed;

5. That the costs of this application be provided for.

2. The application is supported by an Affidavit sworn by one Kadzo Kahindi Karisa and is premised on the grounds:-

i) That the Plaintiffs are the absolute registered owners of all that piece of land known as Kilifi/Ngerenyi/19;

ii) That on 20th July 2017, this Court issued an order temporarily restraining the Respondents from burying Katana Dyeka on the said land;

iii) That on the 20th day of July 2017 the orders were extracted and the Respondents were served on 21st July 2017 therewith;

iv) That despite the said service, the Respondents disobeyed the same and proceeded to bury the deceased on the land on 22nd July 2017;

v) That Court orders must be respected and the actions of the Respondents ought to be discouraged by punishment as sought herein.

3. In a Replying Affidavit filed herein on 26th April 2018, Charo Katana Dyeka (the 1st Respondent) denies that they were made aware of the existence of the said Court order and that it is only later that they came to be aware of its existence. The 1st Respondent further denies that he was served on behalf of the family and states that he had no authority to receive the documents on behalf of the six other Respondents herein.

4. In addition, the 1st Respondent avers that the burial of his late father Katana Dyeka was a family, clan and community affair and that the same ought to have been served upon everyone who was involved in the burial.

5. I have considered the application and the response thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. This matter was filed on 20th July 2017 as Miscellaneous Application No. 28 of 2017. When the application brought under Certificate of Urgency was brought before me on the same day, I certified the same as urgent and granted orders as follows:-

1. That the Application dated 20th July 2017 filed under Certificate of Urgency is hereby certified as urgent.

2. That pending the inter-partes hearing of this application, the members of the family of Katana Dyeka (now deceased) namely:-

a) Charo Katana Dyeka

b) Safari Katana Dyeka

c) Kaingu Katana Dyeka

d) Kadzo Katana Dyeka

e) Rehema Katana Dyeka

f) Zawadi Katana Dyeka

g) Furaha Katana Dyeka

are temporarily restrained from burying the said Katana Dyeka on Plot No. Kilifi/Ngerenya/19.

3. That the application be heard on 26th July 2017.

7. When the matter came up for hearing inter-partes on the stated 26th day of July 2017, Ms Ruttoh, Learned Counsel for the Applicants sought to have the application withdrawn on the basis that the same had been overtaken by events. The matter was however not withdrawn but was stood over generally.

8. Subsequently, the Applicants filed the application now before me. As the Court of Appeal stated in **Central Bank of Kenya Ltd & Another –vs- Ratilal Automobiles Ltd & Others (Civil Application No. Nai 247 of 2006)**, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and it is a fundamental tenet of the rule of law that Court orders must be obeyed. It is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of Law.

9. Contempt of Court is a serious charge. It takes the form of quasi-criminal proceedings. Any person who is found guilty of contempt stands to lose his/her liberty. For one to be found guilty of contempt of Court therefore, there must be willful and deliberate disobedience of the Court order. One must have been served or must have had actual or constructive knowledge of the Court order.

10. In the matter before me, it has been submitted that the Respondents were served with the orders issued herein on 20th July 2017. Counsel for the Applicants relies on the affidavit of service of one Samson Kimbeja, sworn on 24th July 2017.

11. In that affidavit, the process server deponed that he received copies of the order and the application on 20th July 2017 to serve upon the Respondents. On 21st July 2017, he visited the residence of the Respondent in the company of one Thomas Katana Mwadzidze who is a “Bajaj” driver. The Bajaj driver was introduced to him by a relative of the Applicants who did not want his name mentioned and upon

reaching the burial place, the driver identified the 1st Respondent who then called his brothers and notified them of the service.

12. As it were, the name of the Applicant and the relative who introduced the Process Server to the Bajaj driver are not disclosed. The Bajaj driver himself has not sworn any affidavit or made any indication as how he came to identify the 1st Respondent who is described in the Process Server's affidavit as "the 1st born of the members of the family". The names of the brothers and the deceased's wife whom the 1st Respondent is alleged to have called to the scenes have not been given and it is not disclosed how the Process Server identified them as such brothers and the deceased's wife.

13. Under Order 5 Rule 15(1) of the Civil Procedure Rules, it is a requirement for a Process Server in such an affidavit to indicate inter alia, the date of service, or place of service, the time of service and whether the person being served was known to him or her, or if not so, who identified the person being served.

14. As it were, in the exercise of its contempt jurisdiction, the Courts are primarily concerned with the issue as to whether the alleged contemnor is guilty of intentional and willful violation of the orders of the Court. *In Shimmers Plaza Ltd –vs- National Bank of Kenya Ltd(2015) eKLR*, the Court of Appeal quoted with approval the dictum of Lord Justice Thesinger in the case of *Ex-parte Lantey 1879, 13Sh D 110(CA)* where the Lord Justice held:-

“...the question in each case and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made. And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think those who assert that there was such notice ought to prove it beyond reasonable doubt.”

15. In the matter before me, I was not satisfied that the Respondent had been given proper notice of the orders cited prior to the burial of the deceased. The application dated 26th July 2017 is accordingly dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

J.O. OLOLA

JUDGE