



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 225 OF 1993

VIOLET WANJUGU

KARIUKI.....PLAINTIFF

Versus

MICHAEL WANG'OMBE

GITHINJI.....DEFENDANT

RULING

Pursuant to the provisions of Order 51 rule 1 and Order 40 rules 3(1),(2) and (3) of the Civil Procedure Rules, Violet Wanjugu Kariuki, the Plaintiff herein took out the motion dated 24th June 2011 in which she applied for the following orders:

- 1. That this application be certified as urgent.***
- 2. That this application be allowed to be dealt with ex parte in the first instance.***
- 3. That the Defendant/Respondent be cited for contempt of his honourable court by disobeying this honourable court by burying his son in the suit land on 28th May 2011 inspite of having been duly served with an order of temporary injunction on 27th May 2011 restraining him therefore.***
- 4. That the Defendant/Respondent may be committed to jail for a period not exceeding six (6) months.***
- 5. That the Defendant be ordered to exhume the remains of MR. GITHINJI WANG'OMBE and bury or dispose off the same elsewhere outside the suit land Title No. Thegenge/Karia/1182.***
- 6. That the Defendant/Respondent may be required to purge the said contempt in terms to be given by this Honourable Court.***
- 7. That the Defendant be condemned to pay general damages hereon to be assessed by this honourable court.***

8. That the costs of this application be awarded to the applicant.

The motion is supported by the affidavit of Samuel Kariuki Kamanjiri sworn on 24th June 2011. Michael Wang'ombe Githinji, the Defendant herein was served with the motion but he did not file any response neither did he attend court for the interpartes hearing of the motion, hence the Applicant was granted leave to proceed ex parte.

It is the submission of the Plaintiff applicant that the Defendant was served with a court order dated 27th May 2011 which restrained the Defendant from interring the remains of one Githinji Wang'ombe in L.R. no. Thegenge/Karia/1182. It is alleged that despite having been served with the order on 27th May 2011, the Defendant defied the order by proceeding to bury the body of Githinji Wang'ombe in the aforesaid land on 28th May 2011. The Plaintiff urged this court to inter alia cite and punish the Defendant for contempt of court.

I have considered the material placed before this court. The serious issue raised against the Defendant is to the effect that he breached this court's order issued on 27th May 2011. In order to establish the offence of contempt an applicant must prove the following ingredients:

- (i) That the contemnor was served with the order with a penal notice.
- (ii) That the contemnor intentionally defied the court order.

Let me now determine whether or not the Applicant has established the aforesaid ingredients in her motion. There is no doubt that this court issued an ex parte temporary order of injunction on 27th May 2011 whereof the Defendant together with his family members, servants, and or agents were restrained from burying the remains of one Githinji Wang'ombe in L.R. no. Thegenge/Karia/1182, the subject matter of this suit. The applicant filed the affidavit of service of Julius Kariuki Mundia sworn on 2nd June 2011. In the aforesaid affidavit, the process server admits that he served the extracted order personally upon the Defendant. The process server avers that the order he served did not contain a penal notice hence he was prompted to caution the Defendant not to disobey the order lest he would be liable to be punished by being committed to civil jail. I am satisfied the order was served upon the Defendant upon being identified by the Plaintiff's husband, Samuel Kariuki Kamanjiri on 27th May 2011. It is said that the Defendant proceeded to bury the remains of Githinji Wang'ombe, deceased on L.R. no. Thegenge/Karia/1182 despite being served. Unfortunately the Defendant has not seen it fit to give his side of the story. On the basis of the averments contained in the Plaintiff's affidavit and the grounds set out on the face of the motion, I am convinced that the Defendant was in contempt of court orders. In the case of **Mwangi Wang'onde vs= Nairobi cit Commission C.A. no. 95 of 1988 (unreported) at pages 5-6.** The court of appeal stated inter alia as follows:

“Briefly, the effect of these provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been personally served on the person required to do or abstain from doing the act in question. The copy of the order must be indorsed 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.”

It is admitted by the process server that the order he served did not contain a penal notice. He claimed that he verbally stated the penal notice to the Defendant upon serving him with the court order. I am convinced the requirement that a penal notice must be stated on the order was satisfied in the circumstances of this case.

Having come to the conclusion that the Defendant is in contempt of court, I must grapple with the

punishment to be meted out against the Defendant. I think I will give the Defendant a chance to remedy the damage he has caused without committing him to civil jail. I issue the following orders:

1. A warrant of arrest is issued against the Defendant to be executed by the O.C.P.D., Nyeri police Division, who should apprehend Michael Wang'ombe Githinji and bring him before this court on 29th September 2011 for further orders and directions.
2. The Defendant is directed to exhume the body of Githinji Wang'ombe from L.R. no. Thegenge/Karia/1182 and bury it elsewhere within a period of 30 days.
3. The Defendant is ordered to pay costs of the motion.

Dated and delivered this 23rd day of September 2011.

J.K. SERGON

JUDGE

In open court in the presence of Kinoti for the Defendant & Macharia for the Plaintiff.

J.K. SERGON

JUDGE