



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 58 of 2008

ONDIMA MONGERIPLAINTIFF

VERSUS

JEFF OMBATI ONDIMA AND ANOTHER.....DEFENDANT

RULING

The Plaintiff/Applicant had moved to this court, by way of plaint dated 4th March 2008 and filed on the same date. The salient features of the same are as follows:-

- The proceedings relate to one deceased person Grace Nyanchora Ondima who died on the 23rd February 2008. She was a mother to the 1st defendant and a sister to the 2nd defendant and daughter in law to the plaintiff. She was wife to one Nemuel Ondima (deceased) who was a son to the plaintiff.
- When the deceased died, the defendant made burial arrangements to the exclusion of the plaintiff and the clan elders and as at the time the plaintiff came to court, the defendants were planning to bury the deceased at Kitale, instead of the rural home at Boochi, the ancestral land of the deceased husband next to the grave of her late husband Nemuel Ondima in accordance with Kissi customary law.
- That despite several consultations, the defendants refused and or neglected to respect Kisii customary law hence the inevitability of the filing of the suit. In consequence thereof the plaintiff sought the following reliefs from the court namely:-

(a). *That this honourable court, does issue orders restraining the defendants by themselves, their servants, orders, agents from removing, or interfering in any way, the remain of late Grace Nyanchora Ondima at Chiromo Mortuary.*

(b). *That the honourable court, does issue orders that the plaintiff inter bury the remains of the late Grace Nyanchora Ondima at L.R. NO.Majoge/Boochi/846 next to her late husband in accordance with Kisii customary law.*

(c). *Any other suitable relief deemed fit and just to grant.*

(d). *Cost of the suit.*

The suit was simultaneously accompanied by an interlocutory chamber summons dated the same 4th day of March 2008 and filed the same date. It was brought under order XXXIX rules 1, 2, 8 and 9 of the CPR. In a summary form, it sought orders that “*the Defendant/Respondent their, servants and or Agents be*

restrained by an order of this honourable court, from interfering, burying , removing, disposing off the remains of the late Grace Nyanchora Ondima lying at Chiromo Mortuary or taking her remains at Kitale or anywhere else a part from the ancestral land pending hearing and final determination of the application in the first instance and pending the final determination of the suit in the second instance. There was also a prayer (iv) for an order that the honourable court, do issue orders that the remains of the late Grace Nyanchora Ondima be buried and or interred next to her late husband's grave at their ancestral land."

The application **was** grounded on the grounds in the body of the application, grounds in the supporting affidavit and annexures. The grounds were simply a reiteration of the content of the plaint to the effect that the deceased was indeed married to the late son of the plaintiff under Kisii customary law, that the duo had four issues between them enumerated in paragraph 5 of the supporting affidavit as Jeff Ombati Ondima, Faith Nyaslaboka Ondima, Ayub Matanda Ondima and Joy Bosibori Ondima, that according to customary law, the deceased should be buried on the ancestral land next to her late husband. That the annexed publication proves that the defendant intends to burry the deceased at Kitale contrary to the will of the plaintiff and the clan.

When the mater came before the duty judge on 4/3/2008, his lordship declined to grant interim orders in the first instance, and ordered that the matter be served. Indeed the application was served, the respondents counsel came on board on 6/3/2008 and informed the court, from the bar that by the time the respondents were served, the body had already left Chiromo Mortuary for Kitale and there was a possibility by the time the courts', intervention was being sought, the body had already been interred. The court, then made the following orders:-

- 1. Stood over to 11/3/2008 at 3.30 p.m to enable the respondent respond to the application by 10/3/2008.*
- 2. Parties to file written skeleton arguments along side authorities to be relied upon simultaneously.*
- 3. In the mean time counsels to encourage, their clients to explore a possibility of amicable settlement before then.*

ORDER: *"Status quo in terms of prayer II to remain in force till then"*

On 11/3/2008 both counsels appeared in court, and they made the following representations:

Mr. Mokuu: *"There is a replying affidavit. The latest is that the body was interred on 6/3/2008 at 9. 00 p.m. according to information. I will seek leave to institute contempt of court proceedings"*

Mr. Mariaria: *" The position still remains that as at the time we came to court, the body had already been buried. He is free to bring contempt of court proceedings"*

The court then proceeded to make the following order:-

Order *in view of new developments in the matter, matter is now marked stood over generally."*

Following the above set out developments, the Plaintiff/Applicant presented an application by way of notice of motion dated 30th day of June 2008 and filed on 1st July 2008. It is brought under sections 3,3A and 63 of the CPA (not CPR) order XXXIX Rules 2A (2) and (3) order L rule 1 of the CPR. Four prayers are sought namely:-

(i). *spent*

(ii). *That the Respondent/Defendant to exhume the body of one Grace Nyanchora Ondima now deceased.*

(iii). That the honourable court be pleased to order that the Respondent/Defendant herein be detained for six (6) months for disobeying the injunction order issued on the 6th March 2008 by this honourable court.

(iv). That the Defendants/Respondent be condemned to pay costs of this application.

The grounds are set out in the body of the application, supporting affidavit, annexures and highlights in the written skeleton arguments filed herein and the major ones are as follows:

- This court, made orders on 6th day of March 2008 restraining the defendants from interring the remains of the deceased subject of these proceedings.
- The said orders were made in the presence of counsels of both parties.
- That no objection was raised to the making of the same.
- That despite knowledge of the existence of the said orders, the Defendant/Respondent went a head and interred the body of the said deceased without the said orders having been varied and or set a side by the honourable court.
- That the said body was buried on the same 6th day of March 2008 at 9.00 p.m. in flagrant breach of the said orders and contrary to Kisii customary law.
- That the sole reason of the defendant burying the body at night was to evade obedience to this courts' orders, of 6/3/2008 issued in the presence of the defendants counsel.
- By reasons of matters afore said, the court is urged to grant the orders sought in order to teach the defendant a lesson that they can not use indirect means to disobey the orders of the honourable court.
- The court, is invited to hold that since the Defendant/Respondents acknowledge that they were served with the court, orders on 7th day of March 2008 in the morning and remarked that the body had been buried on 6/3/2008 at 10.00 a.m., the same was a lie calculated to shield from them the facts that the body was interred on the 6th day of March 9.00 p.m. in the night after the orders had been made in the morning of 6th day of March 2006. This is clear proof that they were trying to avoid the consequences of the court orders.
- The court, is urged to ensure that the rule of law, good order, and authority and dignity of the court, are upheld at all times.
- The court, is urged to find the application meritorious and allow the same more so when the balance of convenience tilts in their favour.

The respondent moved to oppose that application vide a replying affidavit sworn by one Jeff Ombati Ondima on 21st day of July 2008 and filed on 23rd July 2008. A summary of the sum total of the same are as follows.

- The deceased Grace Nyanchora Nyatundo was his late mother.
- Him plus 2 other siblings are over 18 years. While the younger one was 10 years old.
- He is aware that the late mother left an oral will expressing a wish to be buried in her land in Kitale.
- That she was so buried on 6/3/2008 and by which time he was not aware of any orders having been made against him stopping the burial.

- Maintains the deceased subject of these proceedings was buried during the day according to her wishes and as such there is no justification for exhuming the body.
- He is not aware of any Kisii customary law which stipulates that a Kisii cannot be buried elsewhere save in Kisii.
- That the deceased had sour relationship with the Plaintiff/ Applicant who is the respondents grand father, by reason that the said applicant alleged that the deceased herein was responsible for the death of his (applicant) son who is the respondents father who died in 1991.
- That the deceased herein was ordered out of the ancestral land in 1991 upon death of her deceased husband, and since then she has never gone there. In addition to ordering out the deceased herein, from the said land, he also ordered out her children among them the deponent respondent.
- That burial arrangement for the deceased were done in the open and infact the uncles of the deponent came to the deceaseds' residence at Kahawa West and had discussion with the deponent over the burial and were aware that the deceased was going to be buried at her home in Kitale.
- He maintains his and the welfare of his siblings have nothing to do with the burial site of their late mother.
- Maintains that R/S exhibited does not reveal that him the deponent was served with the said court orders.

In his oral arguments, the learned counsel relied on the written skeleton arguments filed in court on 9th January 2009 and dated 5th December 2008. A reading of same reveals that it is a reiteration of the content of the grounds set out in the body of the application as well as the supporting affidavit already set out herein.

On case law counsel for the applicant referred the court to the case of **COMMERCIAL BANK OF AFRICA LIMITED VERSUS ISAAC KAMAU NDIRANGU NAIROBI HCCA NO. 157 OF 1991.** In the judgement of R.O. Kwach JA as he then was, dated 26th day of June 1992, at page 3 thereof, line 8 from the bottom the learned judge as he then was made the following observations: - *“It is to be noted that the consent order was made in the presence of counsel for both parties. So I am entitled to hold as I do, that it’s meaning and import was clear to the Advocates and the parties. The status quo was to be maintained, the sale of plot L.R. NO. 122 was stayed except that the respondent was given 60 days within which to sell the plot if he could sell it at more than Ksh. 4ml... The reason for this stipulation was because on the 16th January 1989 the Bank had entered into a contract with one Richard Maina to sell this property to him at Ksh. 4,000,000.00. The original date of completion was 31st March 1987, which was later changed to 15th April 1987. The respondent felt the Bank was trying to sell at a gross under value and for that reason it was agreed that the respondent could try to sell elsewhere at a higher price.....*

As ill luck would have, the respondent failed to get a buyer at more than Kshs. 4m within 60 day. Apparent on the advice of its Advocates, and without reverting back to court, the Bank in purported exercise of its statutory power of sale, sold and transferred plot L.R. NO. 12241, Nairobi to Richard Maina on 17th August 1987 at a consideration of Kshs. 4m”

At page 12 line 1 from the top it is stated:- *“ The order did not give the bank the power to sell even if the respondent did not find a buyer. The banks’ right to sell in exercise of its statutory power had been expressly stayed under the terms of the order. The bank had no right to sell either in the exercise of its statutory powers of sale or under the terms of the order without the sanction of the court.....*

It is only by acting swiftly and firmly when an order of the court is flouted that the dignity and authority of the court can be upheld”

.M. Cocker as he then was, in the same case, in his judgement also dated 26th day of June 1992 at page 7 line 8 from the bottom made the following observations:-“ *Rules of natural justice are the foundation of a judicial system. Their observance is universal. But at the same time, a flagrant disobedience of a court order, if allowed to go unchecked, will result in the onset of an erosion of judicial authority*”

The case of **REFRIGERATOR AND KITCHEN UTENSILS LIMITED VERSUS GULABCHAND POPATLAISHA AND OTHERS AND SHANT 191 KHETSHI SHAH AND OTHERS NAIROBI CA NAIZA OF 1990** decided by the CA on 13th day of July 1990. At page 6 of the said judgement the law lords of the CA made the following observations:-

“It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts’ are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. In relation to these, respondents there are no mitigating factors. They swore no affidavit and tendered no apologies”

The case of **LEONARD NJOROGE KARIUKI VERSUS MUOROTO THUITA INVESTMENT MILIMANI COMMERCIAL COURTS HCCC NO. 1872 OF 2001** decided by J.W. Mwera on 7/2/2007 A perusal of the same reveals that at stake was the mode of procedure when citing a contemnor for disobedience of an injunctive order issued under order 39 CPR and the learned judge being guided by the reasoning of Bosire J as he then was (now JA) in the case of **ISAAC WANJOHI AND ANOTHER VERSUS MACHARIA NRI HCCC NO. 450/95** which decision the learned judge approved of, came to the conclusion that no leave and penal notice is required under the order 39 procedures. Secondly at page 6-7 of the ruling, quoted Bosire J, as he then was with approval as follows:-

“It would appear to me that applications for committal for contempt of court made in this country fall in the category of those applications in England made to courts other than the Divisional courts. Consequently no leave would ordinarily be necessary, although it is common practice in Kenya improperly so in my view, to commence committal proceedings in every case by an application. The authority for that cannot be possibly the rules of the supreme court of England.”

The case of **DINAH BHOKE MAKINI ALIAS DR. MARY MAKINI, JACKSON NGECHU MAKINI t/a MAKINI HERBAL CLINIC VERSUS WILLIS WANJALA MUSA, AYUB ALIA, MUSA GATI MAGIGE, ISAAC MAGIGE t/a MAKINI HERBS CLINIC** decided by O.K. Mutungi J on the 21st day of December 2004. At page 2 of the said ruling line 8 from the bottom under (c) it is noted that:-

“(c) The defendants know the said orders remain in force and have not lapsed as the same have been extended in their presence and /or their advocates”

At page 5 of the ruling line 4 from the bottom the learned judge went on to state:-

“ Hence, notwithstanding lack of personal service, and relying on Halisburry laws of England, 4th Edition volume 9, paragraph 65 and 66, I have no doubt that the defendants should not be allowed to trample this courts order under the guise of lack of personal service”

On the courts assessment herein, the following appear not to be indispute:-

1. That the orders sought to be vindicated were injunctive orders made in pursuance of the provision of order 39 CPR.
2. That these orders were made on the 6th day of March 2008. The said orders contained a restraint order to the effect that the remains of the deceased subject of these proceedings were not to be removed from Chiromo mortuary where they were alleged to have been held or preserved pending the hearing inter parties of the injunctive relief application.

3. The law is also very clear that when an aggrieved party moves against a contemnor of orders made under these provisions, no leave of court, is required. As such it is the findings of this court, that the application subject of this ruling is properly before this court.

4. The law on contempt of court, orders as evidenced by decisions of both the superior court as well as the court of appeal has crystalized and or settled and it is simply to the effect that:-

- (a). Court orders must be obeyed at all times
- (b). It is the duty of the court to ensure that its orders are obeyed.
- (c). If court orders are obeyed, respect for the rule of law and the authority and the dignity of court are preserved.
- (d). A party should not be allowed to trample on court orders under the guise of lack of personal service of the said orders and lack of service of a penol notice.
- (e). Where court orders are made by consent in the presence of counsel and both parties, lack of personal service of the order and penal notice will not operate to shield the contemnor from facing the consequences for the disobedience of the said orders.

When the above are applied to the rival arguments herein, it is clear that the stand of the Plaintiff/Applicant is that, as at the time the orders were made on 6/3/2008, the body was still lying at Chiromo mortuary evidenced by annexure OM1 the funeral programme which showed clearly that the body was to be removed from the mortuary at 7.30 am, taken to Kahawa church for viewing and service and then departure for Kitale at 9.00 a.m. with burial sated for the following day on the 7th March 2008. It is not disputed that counsel for the Defendant/Respondent was present in court. He is on record as having expressed doubt as to whether the body was still at Chiromo or already removed from the mortuary but was to confirm the position. When he next appeared in court, the learned counsel informed the court, that according to information gathered from the clients, the body had already been buried the time the orders were made and the applicant was free to commence contempt of court proceedings if they so wished, hence the filing of the current application. As mentioned by this court, indeed a perusal of the funeral programme if the funeral programme is anything to go by, it would tend to show that as at the time the orders were made the body was still lying at Chiromo mortuary. There is however no deponent in the supporting affidavit as to how that funeral programme was obtained. There is also no supporting affidavit from any witness who can testify as to the exact time and date of the removal of the body from the mortuary. The Defendant/Respondent simply deponed that he was not served with the court orders and that the body was buried at 10.00 a.m. on 6/3/2008.

There is also reliance placed on the letter from the assistant chief also marked OM1 which does not help much because the assistant chief did not witness the burial of the body at night. He relied on information from a village elder. The information from the chief is therefore hearsay evidence. It would have been of much weight if the said elder had sworn an affidavit. In the absence of that there is nothing to show that the body was removed from the mortuary on 6th March 2008 and ferried to Kitale and buried the same night. The position is therefore 50-50.

Applying the above reasoning to the facts herein, and considered in the light of the case law cited, the court, proceeds to make the following findings:-

1. On the issue of issuance of a mandatory injunction ordering the Defendant/Respondent to exhume the body, it should be borne in mind that the relief is being sought as an interlocutory relief in an interlocutory application. The general rule that this court, has judicial notice of concerning interlocutory applications is that it has to be anchored on a pleading in the first instance and on a relief in the said pleadings in the second instance. Herein the entire plaint as well as its relief do not mention exhumation of the body as the same had not occurred or anticipated. It was therefore necessary for the Plaintiff/Applicant to amend the plaint, plead exhumation, seek a relief on exhumation before anchoring

on them an interim relief of exhumation. Prayer II of the application dated 30/6/2008 and filed on 1/7/2008 cannot therefore issue in the first instance. In the second instance, the same cannot also issue, because it is inconclusive, in that, it has simply prayed for the exhumation of the body which no further instructions as to what is to be done to the exhumed body. In this regard even if the relief had been properly anchored, it would not have been granted by reason of its inconclusiveness.

As regards prayer 3 it hinged on proof that indeed as at the time the orders were made, the body was still lying at Chiromo mortuary. In the absence of such proof there is nothing to suggest that the applicants move to court to block the burial triggered the abandoning of the annexed programme and removal of the body for burial earlier than scheduled.

Even if this court, were to find that this is what the Defendant/Respondents did, their conduct does not come within the ambit of the law on vindication of breach of court orders, because vindication only arises where the breach occurs when the orders sought to be vindicated are already in place, are alive and kicking, a situation which is in doubt herein. For this reason prayer 3 also fails.

As for the costs though the respondent filed a replying affidavit did not urge the same and so each party will bear own costs. The plaintiff is advised to amend the plaint to reflect the new changed state of affairs and proceeds to have the suit disposed off in merit.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2009.

R.N. NAMBUYE

JUDGE