



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 830 OF 2015 (FORMERLY HCC 02 OF 1999)

FRANCIS ODHIAMBO OTURU (Suing as the

Administrator of the Estate of the Late SAMUEL

OTURU ADUONGA (Deceased).....PLAINTIFF

VERSUS

JACTON OKULA ODUOGO..... DEFENDANT

RULING

The application herein is dated 7/9/2020. The Plaintiff seeks the following orders namely that an order of committal to be made against the Respondent herein Jacton Okula Aduogo, for such period as this Honourable Court may deem fit and just. Moreover, an order does issue for the exhumation of the deceased on Geoffrey Aduogo ak. Jeff from the Applicant's land parcel Kisumu/Bar/1762. The Respondent to pay the costs of this application.

The application is based on grounds that this honourable court had on 10th September 2020 issued interim orders restraining the Respondent from interring the remains of Geoffrey Aduogo a.k.a Jeff on the Applicant's land parcel number Kisumu/Bar/1762. The said orders were extracted and served upon the Respondents together with a penal notice on 12th September, 2020 at 9.30 a.m wherein the Respondent acknowledged service by signing on the served copy of the order. The Respondent despite knowledge of the orders proceeded with the barred burial and interred the remains of his deceased grandchild at 3.00 a.m, same day, on the same parcel of land. The contemnor is the Defendant/Respondent. The said Respondent is in disobedience of the court order and thus his action is contemptuous and punishable only by imprisonment.

In the supporting affidavit the plaintiff states that after a long-contested hearing, judgment in this matter was entered in his favour on 22nd November, 2017 where the court ordered for the eviction of the Respondent from land parcel Kisumu/Bar/1762. That the Respondent has to date not given vacant possession.

That unfortunately, the Respondent lost his grandson one Geoffrey Aduogo a.k.a Jeff from an illness. That the Respondent had plans to inter the remains of his deceased grandson in the suit property on Sunday the 12th September, 2020 despite the eviction order. That the Plaintiff filed a Notice of Motion application dated 9th September 2020 to stop the intended burial on his land.

That this honourable court upon hearing the plaintiff exparte, on 10th September 2020 issued interim orders restraining the Respondent from interring the remains of one Geoffrey Aduogo a.k.a Jeff on the Applicant's land parcel number Kisumu/Bar/1762.

That the said orders were extracted and served upon the Respondents together with a penal notice on 12th September 2020 at 9.30 a.m wherein the Respondent acknowledged service by signing on the served copy of the order.

That the Respondent despite knowledge of the orders proceeded with the barred burial and interred the remains of his deceased grandchild at 3.00 p.m., same day on the same parcel of land. That the said Respondent is in disobedience of the court order and thus his action is contemptuous and punishable only by imprisonment.

That the interred remains of the deceased ought to be exhumed as the land belonged to the Plaintiff.

That the continued stay of the remains of the deceased on Plaintiff's land is adversely affecting him. It will be next to impossible for him and his family to use the said land and the memory of the remains of the deceased is bound to haunt them.

That the Respondent had other lands to inter the remains of his grandchild but he deliberately buried him on the plaintiff's parcel so as to

prevent him from making any use of the same upon his ultimate eviction. That the Plaintiff has no other way of enforcing the said order.

In the replying affidavit the defendant states that he denies that he is in contempt and or in disobedience of a court order as alleged by the Plaintiff/Applicant or at all.

That he knows that the dispute in respect of all that parcel of land known as Kisumu/Bar/1762 is currently the subject matter in the Court of Appeal Kisumu, Civil Appeal No. 95 of 2018, Jacton Okula Aduogo vs Francis Odhiambo Otoru.

That the Court of Appeal issued an order staying the execution of the decree in Kisumu Environment & Land Case No. 830 of 2015 pending the hearing and determination of the appeal. That he was served with an order issued at Busia on the 10th September 2020.

The person known as Geoffrey Aduogo alias Jeff is not his son and he had nothing to do with his burial/interment. There is no way he would have adhered to, purported to obey and or comply with the said order and yet he was not involved in the exercise of burying and or interring the remains of the said deceased. That he is not aware of how, when, by who, where and in what circumstances the deceased was buried.

That he had the Plaintiff/Applicant intended to have the order complied with and or obeyed, he ought to have filed a suit against those who were directly involved in the exercise of burying/interring the remains of the said deceased, obtained an order restraining them from doing so and served the said order on them.

That having failed to institute a suit against the persons involved in the burying/interment of the deceased and obtained an order against them and served the same on them, the Plaintiff cannot purport to cite him for contempt on behalf of other persons.

I have considered the application and rival submissions and do find that the respondent was aware that this court had issued an order restraining the burial body of his deceased grandson on the suit property but went ahead to allow the body to be buried on the suit land. The order was directed to the respondent and not his son. He was obligated to stop the burial of the grandson on the suit property.

I do find that the applicant has discharged his burden of proof that the Respondent willingly disobeyed a court order. He was the one in charge of the parcel of land where the deceased was buried. I am satisfied that the deceased was buried in the suit property and that is why the respondent is alleging that there is a stay pending appeal. The respondent had a duty to demonstrate that the deceased was not buried on the suit property after the applicant had given evidence that the deceased was buried on the suit property. The upshot of the above is that the application is allowed.

The defendant is hereby imprisoned for a period of 2 months with an option of a fine of ksh 100,000/= (Ksh one hundred thousand only) for contempt of court orders. Moreover, the defendant to exhume the body buried in the suit land within the next 30 days.

Costs of the application to the applicant.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE