



**Ogutu v Budaha (Environment and Land Appeal E008 of 2023)  
[2024] KEELC 340 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 340 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

**BN OLAO, J**

**FEBRUARY 1, 2024**

**BETWEEN**

**CHARLES O. OGUTU ..... APPLICANT**

**AND**

**PRAKIDIS AUMA BUDAHA ..... RESPONDENT**

**RULING**

1. The appeal against the judgment of Hon Edna Nyaloti CM delivered on 30<sup>th</sup> May 2023 in Busia CM ELC Case No E126 of 2021 was admitted on 25<sup>th</sup> July 2023. The record of appeal is yet to be filed.
2. Meanwhile, by a Notice of Motion dated 10<sup>th</sup> August 2023, Charles Odhiambo Ogutu (the Applicant herein) sought the following substantive order against Praxidis Auma Budaha (the Respondent);
  1. Spent
  2. That a conservatory order by way of a temporary injunction is hereby issued stopping and/or barring the Respondent by herself or through her servants, agents and/or anyone related to her from burying the deceased Paul Wanyama in land parcel number Samia/Butabona/1266 pending the hearing and determination of this application interparties.

When the ex-parte application was placed before me on 11<sup>th</sup> August 2023, I allowed prayer No 2 above.

3. I also directed that the application would be canvassed by way of written submissions. The Applicant was to serve the Respondent with the application and submissions within 14 days. The Respondent would then have 21 days from the date of service to file and serve her response and submissions. I further directed that the Applicant, if he so wished, would have 3 days within which to file any supplementary affidavit. The matter would then be mentioned on 20<sup>th</sup> September 2023 to confirm compliance and take a date for ruling.



4. The order was duly extracted on 11<sup>th</sup> August 2023 and handed over to Lawrence Madialo an advocate of this Court and counsel for the Applicant who as per his affidavit of service dated 21<sup>st</sup> September 2023, then caused the Applicant to enlist the services of the area Assistant Chief to help in effecting the service by delivering the order to the Respondent whereupon Josephat Sunday Makokha the area Assistant Chief Namuduru sub-location in the company of two Police Officers delivered the order to the Respondent who was in the company of her sons (brothers to the deceased) identified as Boniface Wanyama and Luke Wanyama on 11<sup>th</sup> August 2023 at 1700hrs. That the Respondent and her sons requested the Assistant Chief to bring the existence of the order to the attention of her advocate M/ S Obwoye Onsongo & Company Advocates. On the basis of the above, Mr Madialo sent the order to Mr Onsongo through his telephone number +254722454980 on 11<sup>th</sup> August 2023 at 19.25 pm who acknowledged receipt at 20.29pm saying he was awaiting instructions.
5. Annexed to that affidavit of service are the following documents:
  1. Copy of report from the Assistant Chief Namuduru sub-location dated 12<sup>th</sup> August 2023.
  2. Print of screen shots of communication between counsel.
6. I now have for my determination the Applicant's Notice of Motion dated 21<sup>st</sup> September 2023 in which he seeks the following orders:
  1. That this Honourable Court be pleased to issue an order of imprisonment or committal to civil jail of Praxidis Auma Budaha the Respondent herein for such period as this Court may deem fit and just.
  2. That this Honourable Court be pleased to issue an order compelling the Respondent Praxidis Auma Budaha by herself or agents to exhume and remove the remains of her son Paul Wanyama (deceased) from the Applicant's parcel of land known as Samia/Butabona/1266.
  3. That the Respondent to bear the costs of this application.
7. The application is premised on the grounds set out therein and supported by the Applicant's affidavit of even date.
8. The gist of the application is that the Applicant is the registered proprietor of the land parcel No Samia/ Butabona/1266 (hereinafter the suit land) and on 11<sup>th</sup> August 2023, this Court issued an order of temporary injunction restraining the Respondent by herself or through her agents from burying the deceased on the suit land pending the hearing of the Notice of Motion dated 10<sup>th</sup> August 2023 inter partes. That the order was served upon the Respondent on 11<sup>th</sup> August 2023 and she acknowledged service by requesting the area Assistant Chief to read out and interpret to her the contents of the order after which she directed that her counsel Obwoye Onsongo & Company Advocates be informed. Despite knowledge of the order, the Respondent proceeded and buried the deceased at 2.00am on 12<sup>th</sup> August 2023 on the suit land. This was not only in disobedience of the Court order but was also an act of malice, disturbance a threat to peace, order and the rule of law. It is also an affront to the dignity and authority of the Court and undermines the respect to the *Constitution* and administration of justice. That unless this court intervenes and issues exhumation orders, the Applicant stands to suffer irreparable loss and damage due to the degradation and waste to the suit land.
9. The following documents are annexed to the Notice of Motion:
  1. Copy of this court's order issued on 11<sup>th</sup> August 2023.
  2. Copy of affidavit of service by Lawrence Madialo dated 21<sup>st</sup> September 2023.



3. Copy of report by the Assistant Chief Namuduru sub-location dated 12<sup>th</sup> August 2023.
4. Copy of print out of communication between counsel for the parties.
10. The application is opposed and the Respondent swore a replying affidavit dated 29<sup>th</sup> September 2023 while her counsel Mr Wycliffe Obwoye Onsongo swore two replying affidavits the first dated 29<sup>th</sup> September 2023 and a further affidavit dated 6<sup>th</sup> October 2023.
11. In her replying affidavit, the Respondent denied having been served with this court's orders dated 11<sup>th</sup> August 2023 nor having requested the assistant Chief to read the contents thereof to her. She added that it defeats logic for her, Boniface Wanyama and Luke Wanyama to have requested the Assistant Chief to read the order for them when both Boniface Wanyama and Luke Wanyama are literate. That at no time did she, Boniface Wanyama or Luke Wanyama request that the orders of this court be brought to the attention of her advocate Obwoye Onsongo and as a law abiding citizen, she could not have gone against the orders if it had been served on her.
12. He counsel Mr Wycliffe Obwoye Onsongo also swore a replying affidavit dated 29<sup>th</sup> September 2023. He confirmed that on 11<sup>th</sup> August 2023 he received the court order via his WhatsApp from counsel for the Applicant. He then tried to call the Respondent's step-son Benedict Wanyama who is her contact person but could not reach him on that day. He reached him the following day and when he asked him if the Respondent had been served with the court order, Benedict Wanyama promised to get back to him after confirming with the Respondent. He later called him and said the Respondent had not been served with the order so counsel advised him to tell the Respondent to visit his office and give him directions on the appeal and the application but the Respondent did not show up. So counsel forgot about the whole issue until he was served with this application.
13. It is counsel's view that the affidavit of service by Mr Lawrence Madialo does not confirm personal service upon the Respondent. That Mr Lawrence Madialo entrusted the service upon the Applicant who in turn entrusted the service upon the area Assistant Chief.
14. In his further affidavit dated 6<sup>th</sup> October 2023, Mr Wycliffe Obwoye Onsongo has clarified that the order of this court was sent to him on 12<sup>th</sup> August 2023 at 19.25 (7 pm) and not on 11<sup>th</sup> August 2023. By that time, the burial had already taken place.
15. In a supplementary affidavit dated 30<sup>th</sup> October 2023, the Applicant has deponed, inter alia, that the Respondent was made aware about the order by Assistant Chief on 11<sup>th</sup> August 2023 at 17.00 hours and this is confirmed by her counsel. That the Respondent is merely denying the Chief's testimony in disputing service and the stamp on the WhatsApp shows that the Respondent's counsel was served at 19.25pm on 11<sup>th</sup> August 2023 so she was aware about the order. That the Respondent has been occupying parcel No Samia/Butabona/286 for 33 years but buried the deceased on parcel No Samia/Butabona/1266 subject of this appeal.
16. When the application was placed before me, I did not certify it as urgent. I however directed that it be canvassed by way of written submissions.
17. Submissions have been filed both by S.O. Madialo & Company Advocates for the Applicant and by the firm of Obwoye Onsongo & Company Advocates for the Respondent.
18. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
19. In my view, the key issues that call for my considerations are:



- a. Whether the Respondent was aware about the orders issued by this court on 11<sup>th</sup> August 2023 or if she were duly served with the same, and;
  - b. If the answer to (a) above is in the affirmative, if this court should punish the Respondent for contempt and also order for the exhumation of the body of Paul Wanyama from the suit land.
20. As these are contempt proceedings, knowledge of the orders issued by this court on 11<sup>th</sup> August 2023 is crucial. There must also be no doubt about the contents of the order alleged to have been disobeyed. The import of the order issued on 11<sup>th</sup> August 2023 is not in doubt. It was clear that the Respondent by herself or through her servants or agents should not bury the body of Paul Wanyama on the suit land pending the inter parte hearing of the Motion dated 10<sup>th</sup> August 2023. I have not heard the Respondent allege that the contents of the order were unclear.
21. Neither the Respondent nor her counsel were in court on 11<sup>th</sup> August 2023 when the order was issued because it was issued on-line during the court’s vacation period. Therefore, personal knowledge of the order both by counsel and the Respondent was not possible until service was effected.
22. The next issue to determine therefore is if there was service upon the Respondent and her counsel and if so, when. The importance of service was emphasized in the case of *Shimmers Plaza Limited v National Bank of Kenya* C.A. Civil Appeal No 33 of 2012 [2015 eKLR] where the court said:

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

23. I shall start with the service of the court order upon the Respondent. It is clear from the affidavit of service by Mr Lawrence Madialo dated 21<sup>st</sup> September 2023 that he is;

“... an advocate of High Court of Kenya duly authorized to effect service of process and hence competent to swear this affidavit.”

Therefore counsel decided, in his capacity as an authorised process server, to serve this court’s order upon the Respondent. However, it is clear from paragraph 3 of that supporting affidavit that counsel then delegated the duty of serving the court order to an un-authorized person. He has deposed thus;

- “3. That I caused Applicant herein to enlist the services of the area Assistant Chief to help in effecting the service by delivering the order to the Respondent whereupon Josephat Sunday Makokha, the Assistant Chief Namuduru sub-location, in the company of two Police Officers delivered the order to the Respondent who was in the company of her sons (brothers to the deceased) identified as Boniface Wanyama and Luka Wanyama on 11<sup>th</sup> August 2023 at 17.00hours (Attached hereto and marked LM-1 is a copy of the Report from the Assistant Chief Namuduru sub-location.” Emphasis mine.

The Respondent has of course in paragraph 2 of her replying affidavit denied having been served with the court order at all. The onus was on Mr Lawrence Madialo to demonstrate that he served the Respondent with the Court order. Ordinarily, there is a presumption of service once a process



server files his affidavit of service – *Shadrack Arap Baiywo v Bodi Bach* 187 eKLR. Indeed the Applicant appreciates this and in paragraph 6 of his submissions dated 9<sup>th</sup> October 2023 his counsel states thus;

- “6. Your Lordship, the Applicant asserts contents of the affidavit of service deponed by Lawrence Madialo advocate, were he states in paragraph 2 that the Applicant was caused to enlist services of the area Assistant Chief to help in effecting the service by delivering the order to the Respondent. A duly stamped letter is attached as an annexure. We submit that in law, there is a presumption in favour of the affidavit of service that what is stated is correct and that this presumption can only be rebutted through cross-examination of the deponent on the contents of his affidavit. My Lord in this case, the veracity of the contents of Lawrence Madialo advocate has not been challenged through an application for cross-examination and as such the same must be taken to be correct.”

I have no doubt in my mind that the veracity of the affidavit of service by Mr Lawrence Madialo advocate dated 21<sup>st</sup> September 2023 cannot be impeached. Unfortunately, however, nowhere in that affidavit has Mr Lawrence Madialo deponed that he served the Respondent with the order of this court. Instead he has stated that he

“caused the Applicant to enlist the service of the area Assistant Chief to help in effecting the service by delivering the order to the Respondent.”

The Assistant Chief is not an authorised process server of this court. Besides, he has not sworn any affidavit detailing how he served the Respondent with the order. All that he has done is to avail a letter dated 12<sup>th</sup> April 2023 detailing how he delivered the order to the Respondent on 11<sup>th</sup> August 2023 at 17.00 hours (5 pm) in the company of two police officers while the Respondent sons Boniface and Luka Wanyama were also present. And although the Respondent denies that service, I am not convinced that the Assistant Chief lied when he wrote that letter confirming service of the order upon the Respondent. Indeed the Respondent has not suggested that the Assistant Chief would have any reason to mislead this court about the service.

24. In his replying affidavit, Mr Onsongo has averred how on 11<sup>th</sup> August 2023 he received the order although in his further affidavit he said he received it on 12<sup>th</sup> August 2023 at about 7.25pm. That by then burial had already taken place. He was however unable to reach the Respondent or her son. When he did, the Respondent told him that she had not received the order. I have no reason to doubt the averments by counsel.
25. However, I have no doubt that the Respondent was served with the order on 11<sup>th</sup> August 2023 at 5pm by her Assistant Chief in the company of police officers. She has not told this court when she buried the deceased and this court must therefore accept the un-rebutted averments by the Applicant that the burial took place on 12<sup>th</sup> August 2023 at 2am. Burials do not ordinarily take place at 2am unless the persons doing so have something to hide. Not only did the Respondent mislead her counsel when she denied having been served but she went further to bury the deceased at night. That is clear evidence that she was aware about the court order and what was required of her and the family.



26. The service was done by the Assistant Chief not by a process server as is the practice under Order 5 Rule 5 of the [Civil Procedure Rules](#). However, Order 5 Rule 5(3) of the [Civil Procedure Rules](#) provides that;

“No objection maybe made to the service of summons on the ground that the person who served the summons either was not authorized so to do or that he exceeded or failed to comply with his authority in any way.”

The service of this court’s order upon the Respondent cannot therefore be faulted. And the Assistant Chief even went further to confirm that he read the contents thereof to the Respondent in the presence of her family members. In any event, the competency of the Assistant Chief has not been challenged and as is now clear, the process was supported by Order 5 Rule 5(3) of the [Civil Procedure Rules](#).

27. Having been served with the Order, the Respondent was obliged to comply with it. If for any reasons she felt aggrieved, the only option was to return to this court to have it set aside or varied. As was stated in the case of *Hadkinson –v- Hadkinson* 1952 ALL ER 567;

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

In [Shimmers Plaza Ltd v National Bank of Kenya Ltd](#) C.A. Civil Appeal No 33 of 2012 [2015 eKLR], the court said the following about obedience of Court Orders;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court Orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.”

The court then went on to quote Theodore Roosevelt the 26<sup>th</sup> President of the United States of America who once said.

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

The court then ended with the following message:

“The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the [Constitution](#). The dignity and authority of the court must be protected and that is why those who flagrantly disobey them must be punished lest they lead us all to a state of anarchy.”

28. I am satisfied from the evidence before me that the Respondent was served with the order dated 11<sup>th</sup> August 2023 on the same day at 5pm.

29. The Respondent’s counsel has submitted at page 8 of his submission that the Applicant has cited provisions of the [contempt of Court Act](#) which was decided “invalid and unconstitutional” and therefore this court should not punish the Respondent for contempt. However, other than citing that Act the Applicant also cited other provisions including Order 40 of the [Civil Procedure Rules](#). Though not



cited, Section 5(1) of the Judicature Act empowers this court to punish for contempt of its orders. Similarly Section 63(c) of the Civil Procedure Act provides that:

“In order to prevent ends of justice from being defeated, the court may, if it is so prescribed –

- (a) -
- (b) -
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold,”

Order 40 Rule 3(1) of the Civil Procedure Rules provides that;

“In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

Finally, Section 29 of the Environment and Land Court Act reads;

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years or to both.”

30. Whereas the above provisions appears to suggest that a person must be taken through the usual criminal trial process conducted by a prosecutor after which, “on conviction, be liable to a fine ... or imprisonment,” the view I take of the provision is that it has donated to a civil court the power to invoke the criminal sanction to enforce compliance of it’s orders. That is why a court has the powers to punish for contempt committed on it’s face. Otherwise, courts would be rendered helpless in monitoring the enforcement of their own orders. That would in turn erode judicial authority and have a negative impact on the rule of law.
31. In an attempt to further shield the Respondent from culpability, her counsel, Mr Onsongo, has also submitted as follows at page 8 of his submissions:

“It has also been alleged that the deceased was interred in the wee hours of 2am to paint the picture that the Respondent did so to avoid compliance with the order. My Lord, he who alleges proves. The burial took place in broad day light. There is no iota of evidence on the part of the Applicant to prove that it took place at 2.00am as alleged. The onus of proof rested squarely with the Respondent to prove that.”

It is true that whoever alleges must prove the existence of what he alleges. Section 107(1) of the Evidence Act is clear on that. However, Section 112 of the Evidence Act also provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

Read together, therefore what both Sections 107(1) and 112 of the Evidence Act mean is that whereas the legal burden was on the Applicant to prove that the deceased was buried in defiance of the court order, once he discharged that legal burden by stating that the deceased was buried on the suit land at 2am on 12<sup>th</sup> August 2023, the evidential burden shifted to the Respondent to disprove that fact. In



the case of *Mbuthia Macharia v Annab Mutua & Another* C.A. Civil Appeal No 297 of 2015 [2017 eKLR], the Court discussed this issue in paragraph 16 of its judgment as follows:

“The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”

Similarly, the Supreme Court in the majority decision in *Raila Amolo Odinga & Another v IEBC & 2 Others* 2017 eKLR discussed the concepts and said at paragraph 132 thus:

“132: Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question to who would lose if no further evidence were adduced.”

32. Therefore, the moment the Applicant deposed in paragraph 6 of his supporting affidavit dated 21<sup>st</sup> September 2023 and in paragraph 3 of his supplementary affidavit dated 31<sup>st</sup> October 2023 that the Respondent was served with this Court’s Order on 11<sup>th</sup> August 2023 at 5pm but still proceeded, despite that knowledge, to bury the deceased on the suit land on 12<sup>th</sup> August 2023 at 2am, the evidential burden shifted to the Respondent to disprove that averment. Curiously, however, in her replying affidavit dated 29<sup>th</sup> September 2023, the Respondent has only denied having been served adding that she would not have disobeyed it. However, there is no mention of when and where she buried the deceased yet those are facts well within her knowledge.
33. The only inevitable conclusion which this Court can arrive at on the basis of all the evidence before me, and which I hereby do, is that the Respondent was served with the Order issued by this Court. She therefore had knowledge of the contents thereof. She however decided to disobey the Order and buried the deceased on the suit land at 2am on 12<sup>th</sup> August 2023 a day after she had been served with the Order on 11<sup>th</sup> August 2023 at 5pm. I find her to be in contempt of the Orders of this Court. She will therefore appear before this Court for further appropriate Orders on a date which I shall fix shortly.
34. The second prayer sought by the Applicant is that the Respondent by herself or her agents be compelled to exhume the remains of the deceased from the suit land.
35. At this stage, I have a pending appeal before me. The issue with regard to the ownership of the land parcel No Samia/Butabona/1266 will be central in the said appeal. It is therefore absolutely necessary that I refrain from making any conclusive orders with regard to the main issue which will be determined in the appeal itself by the court which will hear it. Orders should not be made which may pre-empt that appeal.
36. In the circumstances, I think the prudent thing to do at this stage is not to make any orders of exhumation of the deceased’s remains from the suit land. If the remains are exhumed and the Respondent succeeds in the appeal, the family of the deceased will have been inconvenienced in having to conduct a second burial ceremony with the antecedent costs that come with such ceremonies. On the other hand, the Applicant will not suffer any further prejudice apart from what he has already suffered if the impugned judgment is up-held on appeal. There are no compelling reasons at this stage



to justify the drastic order of exhumation of the body of the deceased from the suit land. That is an order that ought to await the final judgment of the court to be made after determining the appeal. That appeal, taking all the above into account, should be expedited. I shall therefore be giving directions in that regard shortly.

37. Ultimately therefore and having considered the Notice of Motion dated 21<sup>st</sup> September 2023, I hereby make the following directions and disposal orders:

1. The Respondent is in contempt of the Orders of this Court issued on 11<sup>th</sup> August 2023.
2. The Respondent is hereby directed to appear before this court on 14<sup>th</sup> February 2024 at 9am for mitigation and sentence.
3. The prayer seeking the exhumation of the body of the deceased is declined.
4. The appeal was admitted on 25<sup>th</sup> July 2023 and to-date, the record of appeal is yet to be filed. The record be lodged and served upon the Respondent within 45 days of this ruling and the appeal be listed for directions on 25<sup>th</sup> March 2024.
5. Costs of this application shall abide by the results of the appeal.

**BOAZ N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY 2024**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024 WITH NOTICES TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY 2024**

