



**Chami v Chami & another (Environment and Land Case 31 of 2017)
[2023] KEELC 21196 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 31 OF 2017**

BN OLAO, J

NOVEMBER 6, 2023

BETWEEN

ALOIS WAFULA CHAMI PLAINTIFF

AND

JULIA AKELLO CHAMI 1ST DEFENDANT

PATRICK OUMA CHAMI 2ND DEFENDANT

RULING

1. Alois Wafula Chami(the Applicant) moved to this Court vide his application dated 3rd February 2023 and filed under Certificate of Urgency. Upon hearing the application ex-parte, this Court issued the following substantive orders on 6th February 2023:

“That pending the hearing an determination of this application, the Defendants/ Respondents by themselves, their servants, agents, representatives, workers, assignees, the funeral committee of the burial arrangements of the late Willimina Knight whose body and remains is pending for burial or interment be and are hereby restrained by way of an order of temporary injunction from burying the said remains or body on the Applicant’s land comprised in land reference number Bukhayo/Bugengi/16478 otherwise created from the initial title deed of the suit land comprised in land reference number Bukhayo/Bugengi/1.”

2. The Court further directed that the inter parte hearing would proceed by way of written submissions to be filed on or before 27th February 2023. On that day however, Ms Chunge counsel for the Applicant informed the Court that the order issued on 6th February 2023 had been defied and the body of the deceased had been buried on the suit land.



3. The Applicant has now approached this Court by his Notice of Motion dated 16th March 2023 seeking the following orders against Julia Akello Chami and Patrick Ouma Chami (the 1st and 2nd Respondents respectively):
 1. That this Honourable Court be pleased to order for the arrest and committal to imprisonment for a period of 6 months or both of the Respondents for contempt of Court orders.
 2. That the costs of this application be provided for by the Respondents.
 3. Any other and further orders as this Honourable Court deems fit and appropriate.
4. That application which is the subject of this ruling is predicated on the provisions of Sections 5 and 28 of the *contempt of Court Act*, Sections 1, 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 40(3) of the *Civil Procedure Rules* as well as all other provisions of the law. It is also supported by the affidavit of the Applicant.
5. The crux of the application is that the Applicant is the owner of all that parcel of land designated as Bukhayo/Bugengi/16478 otherwise created from the initial title being Bukhayo/Bugengi/1. That this Court, following the application dated 3rd February 2023, made an order restraining the Respondents by themselves, their servants, agents representatives, workers, assignees and the funeral committee of the burial arrangements of the late Willimina Knight from burying her remains on the Applicant's land comprised in land reference Bukhayo/Bugengi/16478 created from the land Bukhayo/Bugengi/1. That order was duly served upon the Respondents and their counsel but in flagrant breach, contempt and disregard and disobedience of the same, the Respondents buried the said remains on the suit land notwithstanding humble requests made by the Applicant against doing so. There is no good reason why the Respondents went against the Court orders which amounts to a criminal offence. In view of the foregoing, the Respondents should be summoned and show cause why they should not be committed to civil jail for a period of 6 months or fined or both.
6. Annexed to the application are several documents being Green cards but which are quite illegible. They are not really relevant for purposes of this application but hopefully, counsel for the Applicant will ensure that by the time the main suit is set down for hearing, legible documents will have been filed. For now, this Court is only concerned about the orders issued on 6th February 2023.
7. The application is opposed and the Respondents filed both grounds of opposition dated 24th April 2023 and a replying affidavit by the 1st Respondent dated 10th July 2023.
8. In the grounds of opposition, the Respondents have raised the following:
 1. That the application lacks merit and should be declined.
 2. That the application is ambiguous and lacks adequate proof.
 3. That the Applicant stole the title to the land parcel No Bukhayo/Bugengi/1 on 7th July 1995 from its deceased owner Yohana Chami who had died on 13th October 1992 hence he lacks any proprietary rights therein that could support the application.
 4. That the application is a vindictive venture by the Applicant who has his own separate piece of land against the Respondents who respectively rank in priority and at per in succeeding land parcel No Bukhayo/Bugengi/1 which they exclusively possess and occupy.
9. In his replying affidavit the 1st Respondent has deposed, inter alia, that in his plaint, the Applicant had identified the land in dispute as Bukhayo/Bugengi/1 but has now filed the present application and identified it as Bukhayo/Bugengi/16478 yet there is no single document to show that such land exists.



That the extent of land parcel No Bukhaya/Bugengi/16478 has never been demarcated on the ground and its boundaries remain un-known and so the application is ambiguous since the land parcel No Bukhaya/Bugengi/16478 remains a floating title.

10. That the Respondents were not served with the order issued by this Court and the burial of the deceased who was un-married was undertaken by members of their extended family and that the 2nd Respondent who was away in Nairobi for work only arrived on that morning of the burial and was not served. That the land parcel No Bukhaya/Bugengi/1 was owned by her husband Yohana Chami who had settled the 1st Applicant and her children on the land parcel No Bukhaya/Bugengi/1 and the Applicant had forged the transfer documents after stealing the title.
11. The following documents are annexed to the replying affidavit:
 1. Certificate of death for Yohana Chami Amboko.
 2. Green card for the land parcel No Bukhaya/Bugengi/1.
12. When the application was placed before me on 27th April 2023, I directed that it be canvassed by way of written submissions.
13. The submissions were subsequently filed both by Ms Chunge instructed by the firm of Elizabeth Chunge & Company Advocates for the Applicant and by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Respondents.
14. I have considered the application, the rival affidavits and the grounds of opposition as well as the submissions by counsel.
15. I must first start by considering whether the grounds of opposition filed by the Respondents qualify as such.
16. I have reproduced the said grounds earlier in this ruling. It is clear that they refer to factual issues including that the Applicant stole the land parcel No Bukhaya/Bugengi/1 and that the application is vindictive etc. Grounds of opposition must be confined only to the law and not facts.
17. Moving now to the application, it is common knowledge that indeed this Court issued the injunctive order date 6th February 2023 and which I have already cited in extenso at the commencement of this ruling. That order is very clear and un-ambiguous and I have not heard the Respondents allege that they did not understand it.
18. The Respondents, by paragraph 10 of the 1st Respondent's replying affidavit, complain that the said order was not served upon them. However, a copy of the order issued on 6th February 2023 and signed by the Deputy Registrar on 7th February 2023 shows that it was stamped upon receipt by the firm of Wanyama Advocates who are on record for the Respondents. Indeed I have also not heard counsel deny that service upon his office in his submission. What counsel has stated in those submissions in paragraph 1 is that:

“The issue of service is integral to an application for punishment for contempt and requires such evidence to form part of the pleadings. The Respondents have been called upon to answer the application which alleges that service of the orders from Court was done but the subject application is devoid of the relevant evidence of service to avail the Respondents an opportunity to interrogate such evidence or even pray for cross-examination of the concerned process server who has not been disclosed in the said application. To the extent



that there is lack of proof of service which was also not annexed to the subject application, the same ought to be refused.”

19. While it is true that the order of this Court issued on 6th February 2023 was not annexed to the application as I have already stated above, a copy of that order forms part of the record and it is stamped on 7th February 2023 with the following comments:

“Received on 7/2/2023 without the submissions Wanyama”.

There is a signature against the name of Wanyama which, unless proved otherwise, can only be the signature of counsel for the Respondents because he did not dispute it yet that would have been the easiest thing to do in the circumstances. Besides, there is the affidavit of service by Hillary Okanga Ongwetea process server at this Court and dated 21st February 2023 in which at paragraphs 2 and 3 thereof, he confirms having received the order issued on 6th February 2023 and having served it both on the firm of Wanyama Advocates and on the Respondents at their Suo Village who however declined to sign. Service of the order cannot therefore be disputed both by the Respondents and their counsel.

20. The Respondents have also averred, in their replying affidavit, that there is nothing to show that the land parcel No Bukhayo/Bugengi/16478 exists on the ground or that such land was indeed demarcated from the land parcel No Bukhayo/Bugengi/1. Further, that in fact the Applicant stole the said land parcel No Bukhayo/Bugengi/1 which was the property of the 1st Respondent’s husband one Yohana Chami and which the Applicant transferred to himself using forged documents. That may be so. However, whether in fact the Applicant forged any documents to steal any land from Yohana Chami will be a matter for trial. It is not the subject of the application now before me. If the Respondents buried the body of the deceased on any other parcel of land other than the land identified in the order issued on 6th February 2023, that would have been a good defence and nothing would have been easier than stating so.

21. The 1st Respondent has also pleaded in paragraph 11 of her replying affidavit that the remains of the deceased were buried “by members of our extended family.” Again it cannot be disputed that a burial is an event involving many parties. However, the having been served both on them and their counsel, it was their responsibility to ensure that not only they, but also all those acting through them, complied with it’s terms since they were the immediate family of the deceased. The burial was not conducted by strangers forcefully or without their knowledge. If anything, and it was not rebutted, the Applicant has deposed in paragraph 10 of his supporting affidavit as follows:

10: “That despite my humble requests personally to the Respondents and through my authorized agents or servants for them not to proceed and bury the remains of the deceased in the suit land, the Respondents who informed me that they could bury the remains of the deceased herein elsewhere, they later on secretly ganged up, mobilized their funeral arrangements committee, their agents, servants or representatives and proceeded to dig a grave on part of the suit land and buried the remains of the deceased in it.” Emphasis mine.

That can only mean that apart from serving the Respondents and their counsel with the Court order, the Applicant went further to make a personal plea to the Respondents to abide by the order. His entreats appear to have fallen on deaf ears.

22. The law *vide* Section 29 of the [Environment and Land Court Act](#) is that:

29: “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 a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years or both.”



Order 40 Rule 3(1) of the Civil Procedure Rules and which has been cited by the Applicants reads:

3(1): “In cases 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.”

Similarly, Section 5(1) of the Judicature Act vests in this Court the powers to punish any party who violates its orders.

23. In the case of Samuel M. N. Mweru & Others v National Land Commission & Others 2020 eKLR, the Court citing the book *Contempt In Newzealand* said:

“There are essentially four elements that must be proved to make the case for civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- a. The terms of the order (or injunction or undertaking were clear and unambiguous and were binding on the Defendant;
- b. The Defendant had knowledge of or proper notice of the terms of the order;
- c. The Defendant has acted in breach of the terms of the order; and
- d. The Defendant’s conduct was deliberate”

As I have already stated above, this Court’s injunctive order was clear and unambiguous. It was binding on the Respondents who were served both personally and through counsel. And the order was breached deliberately notwithstanding the Applicant’s personal effort to plead with the Respondents to comply with it.

24. Much of the Respondent’s response is directed towards challenging the Applicant’s right to the land in dispute including arguing that he is in fact a trustee. However, once the order was served upon them, they were obliged to obey it or return to this Court to have it discharged. This Court is reminded of the words of Romer J in the case of Hadkinson v Hadkinson 1952 2 ALL E.R 567 that:

“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 to cases where the person affected by the order believes it to be irregular or even void.”

Further, in the English case of M v Home Office & Another 1992 ALL E.R. 97, it was held thus:

“An order which is made by a Court with unlimited jurisdiction is binding unless and until it is set aside. Common sense suggests that this must be so. Were it otherwise, Court orders would be consistently ignored in the belief, sometimes justified, that at some time in the future they would be set aside. This would be a recipe for chaos.”

25. Obedience of Court orders is not a matter of choice. It is a duty imposed on all persons. It may very well turn out during the trial that the Applicant, as alleged by the Respondents, has no right over the suit land or that he is in fact only a trustee. However, before that determination is made after this Court has heard the evidence adduced by the parties, any Court orders must be respected as failure to do so



can only cause harm to the administration of justice and disrespect to the judicial system. That can only be a recipe for chaos. As was held by the Court of Appeal in the case of *Refrigeration And Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another* C.a. Civil Application No 39 of 1990:

“It is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all time.”

26. Having considered all the matters herein, I am persuaded that the Applicant has proved, to the required standard, that the Respondents are in contempt of the orders issued by this Court on 6th February 2023. I therefore direct as follows:

1. The Notice of Motion dated 16th March 2023 is hereby allowed.
2. Counsel for the Respondents shall produce them in this Court for mitigation and sentence on 14th November 2023 at 9am.
3. In default of (2) above, this Court will make any other appropriate orders including issuing warrants for their arrest.
4. The pleadings herein suggests that the parties are family. I shall therefore make an order that each party meets their own costs.
5. Further, and in view of the above and notwithstanding the orders which this Court will make on 14th November 2023, I encourage the parties to see if they can try and settle this dispute outside the Court.

BOAZ N. OLAO

JUDGE

6TH NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 6TH DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

6TH NOVEMBER 2023

