



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

BUSIA

ELC CASE NO. 99 OF 2017

BARASA OBANGO OKWAKO (suing as legal representative **APULUNGARY**

OKWAKO (Deceased.....1ST PLAINTIFF/RESPONDENT

SAMEDAY CLASSMATES FUNERAL PARLOUR2ND RESPONDENT

-VERSUS -

ALEX WANDERA MAKOKHADEFENDANT/APPLICANT

R U L I N G

1.The Defendant/Applicant filed an application dated 20/1/2021 under Certificate of Urgency for the following orders;

a. Spent.

b. That Director of Sameday Classmates Funeral Parlour and Barasa Obango Okwako be and are hereby committed to civil jail for a period of six months or condemned to pay Kshs.200,000 or both for disobeying the Honourable Court's Order dated 12th January 2021.

c. That the O.C.S Busia Police Station be and hereby directed to effect this order.

d. That costs be provided for.

2. The application was based on the following grounds inter alia;

i. That an order dated 12th January 2021 was granted and served upon the Respondents named herein but have deliberately disobeyed the same.

ii. That the order which was endorsed with a Notice of Penal consequences was duly served on the Plaintiff/Respondent and his advocate on record.

iii. That it is unqualified obligation to every person against whom an order is issued and served to obey such order.

iv. That the 1st Respondent has so far hired goons to set a blaze on the Applicant's 5 residential houses destroying properties worth millions of shillings at the same time has forcefully and deliberately deter the remains of his late wife Roseline Osinya Barasa on LR. NO. BUKHAYO/MATAYOS/1340 in violation of the orders of this honourable court issued on 12th January 2021.

v. That this is contrary to the court order to the court order and it is flagrant disobedient of the said order.

vi. That the Respondent conduct undermines the authority and dignity of this Honourable Court.

3. In the affidavit in support of the application, the Defendant/Applicant deposed that the court issued an order of temporary injunction against the Plaintiff/1st Respondent on 12.01.2021. The order was extracted and served upon the Plaintiff/1st Respondent on 12th January

2021 and upon the 1st Respondent's advocate on 13th January 2021 as shown in the affidavit of service annexed as AWM-2. The Applicant further deposed that despite of being served with the order, the Respondent defied it and has indeed dug a grave on the suit land and destroyed his residential houses by setting them ablaze and demolishing them as shown in the pictures annexed as **AWM-3 (a) & (b)**. Therefore, the Respondent should be punished for the disobedience of the court order.

4. The Plaintiff/1st Respondent filed a Replying Affidavit dated 26th January 2021 denying that he was never served with the Order dated 12/01/2021. That the Applicant does not states the name of the agent who was served. He further deposed that he is an old man of 79 years and he is not capable of being violent nor denying the Applicant accessibility to the suit land. He further denied that he hired goons who set ablaze the Applicant's property. He stated that the contradictions in the affidavit of service tells that he was never served.

5. The plaintiff denied colluding with the 2nd Respondent instead stating that the Applicant's property was probably destroyed by angry villagers as a reaction towards the injustice suffered by the deceased owner of the land. He also stated that his grandparents, mother and other relatives were born and buried on the suit land and he was also born there and brought up on the suit land. He stated that he stays on the land with his three sons as shown in the pictures annexed as **BOO 2(a), (b) & (c)**.

6. The Plaintiff/1st Respondent Advocate, Mr. Onsongo also filed a Replying Affidavit deposing that he was never served with any order by the Defendant/Applicant as claimed in the contradictory affidavit of service. He deposed that on the dates stated on the affidavit of service 12/1/2021 and 13/1/2021 he had travelled to Nairobi and thus the allegations that he was served personally are not true. He further stated that his secretary is not called Lydia and that he had asked all his staff whether they were served with the said order and they have all denied. It is his contention that the appearance of his official rubber stamp on the order is suspect. He denied service of the said order.

7. The parties argued the application via written submissions which the court has looked at and considered. The Applicant has submitted that service of the order upon the 1st Respondent and his advocate was proper and if it was doubtful and improper as alleged, the 1st Respondent's advocate had the benefit of calling the process server for cross-examination. The Applicant submitted that the 1st Respondent action is wilful disobedience of the court order and he is liable to answer for contempt. He cited the following decisions in support of his application;

a. Teachers Service Commission v Kenya National Union of Teachers and 2 others (2013) eKLR, where the court held that;

'A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy...'

b. Eluid Muturi Mwangi v LSG Lufthansa Services Europe/Africa GMBH & another (2015) eKLR where it was held, **'The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court.'**

8. The 1st Respondent on his part submitted that neither him nor his advocate were served as alleged. He further stated that the Applicant has failed to prove the four requisite ingredients for contempt against the Respondents and his application must therefore fail. They stated that though they are not holding brief for the 2nd Respondent, citing them for contempt is preposterous as they were not agents of the 1st Respondent and also the order did not bar them from releasing the body from its mortuary. He contended that the 2nd Respondent ought to have been served in person. He urged the court to dismiss the application. He cited the following decisions in support of his submissions;

a. Rophina Imo Amai v Lawrence Isogol Karani Busia (2020) eKLR, where this court cited **Simmers Plaza Ltd v National Bank of Kenya Ltd (2015) eKLR**, held that where a party was represented when the orders are made, personal service was not necessary to be effected on the contemnors.

b. Samuel M. N. Mweru & Others v. National Land Commission & 2 others (2020) eKLR.

9. The element of a Civil Contempt as espoused in a book titled **"Contempt in Modern Newzealand**, were set out as follows:

- 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 conduct was deliberate.

10. Contempt has been described as quasi-criminal hence the burden of proof is set higher than on a balance of probabilities. The plaintiff/1st Respondent has denied both service and disobedience of the impugned order. The impugned order at paragraph 2 read thus, *"An Order of temporary injunction be and is hereby issued restraining the plaintiff/Respondent agents, servants, and/or his family members from interring the remains of the late Roseline Osinya Barasa (Deceased) on LR No. Bukhayo/Matayos/1340 pending hearing and determination of this application inter parties."*

11. The order was issued exparte thus it was imperative to prove service against the Respondents. In an attempt to discharge this burden, the Applicant annexed an affidavit of service sworn by Peter Charles Mkado on 19th January 2021. The process server's affidavit refers to returning documents served duly signed by the 2nd Respondent and the 1st Respondent's advocate. I have perused the court file and did not

find the stamped documents referred to. It was incumbent upon the Applicant to ensure that the documents filed are incomplete. In the absence of such evidence and with the 1st Respondent and his counsel denying service, it is my finding that service has not been proved.

12. The second limb assuming service was effected (which the court finds otherwise) is whether there has been proof of the disobedience. The application dated 11th January 2021 sought orders directed against the 1st Respondent only. The orders issued on 12th January 2021 required the 1st Respondent and or his servants not to bury one Roseline Osinya Barasa on L.R No. Bukhayo/Matayos/1340. There was nothing required of the 2nd Respondent to refrain from doing. There is nothing pleaded on the face of the current application implicating the 2nd Respondent of doing. Neither was evidence presented to show that the 2nd Respondent is an agent of the 1st Respondent.

13. In respect of the 1st Respondent, the Applicant pleaded that the 1st Respondent forcefully and deliberately interred the remains of his wife Roseline Osinya Barasa on L.R No. Bukhayo/Matayos/1340. The Applicant deposed further in paragraph 5 and 8 of the supporting affidavit thus;

“5. That the plaintiff/Respondent with the help of his agent the 2nd Respondent colluded to release and retrieve the remains of the late Roseline Osinya Barasa for burial on 16th January 2021 in fragrant disobedience of this court order issued on 12th January 2021.”

“8 That the plaintiff/Respondent has persisted in his obstruction and has infact dug the grave on my land in readiness to inter the remains of his late wife Roseline Osinya Barasa in violation of the said order.”

14. The depositions does not disclose the dates the body was removed, when the grave was dug or when the burial took place. The rest of the body of the supporting affidavit do not give any specifics of what the 1st Respondent did that contravenes the order. In my opinion and I so hold the Applicant has faulted to prove that the 1st Respondent contravened the impugned order.

15. Consequently, the application seeking to cite the Respondents for contempt fail for want of proof and is hereby dismissed. Costs of the application to abide the winner of the main suit.

DATED, SIGNED AND DELIVERED AT BUSIA THE 30TH DAY OF JUNE, 2021

A. OMOLLO

JUDGE