



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC. CASE NO. 69 OF 2019

KILONZO KITHEKA.....PLAINTIFF/RESPONDENT

VERSUS

ALEXANDER MWENDWA MWOVA.....1ST DEFENDANT/APPLICANT

LAND ADJUDICATION OFFICER-KYUSO.....2ND DEFENDANT/RESPONDENT

DISTRICT SURVEYOR, KYUSO.....3RD DEFENDANT/RESPONDENT

DISTRICT REGISTRAR (MWINGI).....4TH DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 17th August, 2020 and filed on 25th August, 2020, the Applicant/1st Defendant seeks the following orders:-

a. That the Honourable Court be pleased to issue summons to the following persons to show cause why they should not be punished for contempt:

- a. Mr. Kilonzo Kitheka
- b. Muithya Kitheka Mweta
- c. Mutua Kitheka Mweta
- d. Sammy Kitheka Mweta
- e. OCS Kyuso Police Station

b. That the Honourable Court be pleased to order the persons mentioned in order (2) above be committed to civil jail for a term not exceeding six (6) months for contempt of court due to the willful disobedience of the court orders issued on 15th May, 2020 in Machakos ELC No. 69 of 2019.

c. That the Honourable Court be pleased to order exhumation of the body that was buried on the suit property on 15th August, 2020 at the Plaintiff's cost.

d. That the Honourable Court be pleased to issue any just order as it deems appropriate in the circumstances; and

e. That the costs of this Application be borne by the Plaintiff.

2. The 1st Defendant/Applicant asserts that the Plaintiff, with the assistance of the OCS, Kyuso Police Station, disobeyed the court orders of 13th August, 2020 in respect of Plot No.597 in Kyuso "A" Adjudication Section by constructing a grave site; that on 15th August, 2020, the Plaintiff proceeded to bury his deceased mother on the suit plot and that the contemnors should be punished for contempt of court orders.

3. The 1st Defendant/Applicant swore a Supporting Affidavit on 17th August, 2020 in support of his Application. The Applicant deponed that

on 12th May, 2020, he was granted by this court the orders of *status quo* to protect the suit property pending the hearing and determination of the Preliminary Objection dated 7th August, 2019.

4. According to the 1st Defendant/Applicant, he instructed his advocates to serve the court order that was issued on 15th May, 2020 upon the OCS Kyuso Police station, OCPD Kyuso area and Deputy County Commissioner Kyuso Sub-County and that a copy of the court order was sent to the Plaintiff's advocates via an email address mutinda.advocates55@gmail.com.

5. According to the 1st Defendant/Applicant, on 29th May, 2020, the Plaintiff's advocate replied to their email and attached a letter addressed to the OCS Kyuso Police Station to stop and arrest any person acting contrary to the court order of 15th May, 2020; that on 4th August, 2020, he received information from a reliable source that the Plaintiff had initiated plans to bury his deceased relative on Plot No. 597 and that his advocates sent a letter dated 4th August, 2020 to the Plaintiff/Respondent's advocates to alert them of the intended burial which would be treated as contempt of court order.

6. The 1st Defendant/Applicant deponed that on 13th August, 2020, he sent his son to inform the OCS Kyuso of the burial plans but the OCS dismissed the information and that on 15th August, 2020, he received news that the Plaintiff and his relatives proceeded to bury the deceased on the suit property as planned contrary to the court orders.

7. In response to the Application, the Plaintiff swore an Affidavit on 9th September, 2020. The Plaintiff deponed that neither himself nor his family members have interfered with the suit property since they are all aware of the *status quo* order of the court issued on 15th May, 2020 and that they buried their relative on parcel of land known as Kyuso/Kyuso 'A'/734 which belongs to their father.

8. It was deponed by the Plaintiff that parcel of land number 734 is not one of the parcels of land which was affected by the court order; that their late father was buried on parcel No. 179 which borders parcel No. 597 and that they have not defied or ignored the court orders hence the Applicant's application should be dismissed with costs. The other alleged contemnors: Muithya Kitheka Mweta, Mutua Kitheka Mweta and Sammy Kitheka Mweta also filed Affidavits in which they reiterated the Plaintiff's depositions.

9. In response, the 1st Defendant/Applicant swore and filed a Supplementary Affidavit on 21st September 2020. The 1st Defendant/Applicant deponed that the 1st Defendant has failed to demonstrate that the deceased was buried on Plot Kyuso/Kyuso "A" 734. Both the 1st Defendant's and the Plaintiff's advocate filed written submissions which I have considered.

10. The 1st Defendant's/Applicant's Application is premised, *inter alia*, on Rules 81.4 of the English Civil Procedure (Amendment No.2) Rules, 2012. The Rule is provided for under Part 81 (*Applications and Proceedings in Relation to Contempt of Court*) of 2012 Rules and provides as follows: -

"Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

11. The standard of proof in contempt proceedings is now settled. In *Gatharia K. Mutikika vs. Baharini Farm Ltd (1985) KLR 227*, the court stated that:

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt...it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

12. The South African High Court in *Kristen Carla Burchell vs. Barry Grant Burchell Eastern Cape Division Case No. 364 of 2005* held that in order to succeed in civil contempt proceedings, the Applicant has to prove the terms of the order; knowledge of these terms by the Respondent and failure by the Respondent to comply with the terms of the order.

13. According to *G. Bonnie & N. Lowe, "The Law of Contempt" 4th Edition, London Butterworth's, 2010, P.129* the grounds to be proved by an Applicant include:

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Respondent;
- b. The Respondent had knowledge of a proper notice of the terms of the order;
- c. The Respondent has acted in breach of the terms of the order; and

d. The Respondent's conduct was deliberate.

14. It is not in dispute that the Plaintiff/Respondent and the alleged contemnors were aware of the *status quo* order of the court dated 13th May, 2020 and issued on 15th May, 2020. According to the said order, the court restrained all the parties from constructing, selling, planting, cultivating and disposition in plot number 597 in Kyuso 'A' Adjudication Section pending the hearing and determination of the Preliminary Objection dated 7th August, 2019.

15. In support of his case, the 1st Defendant/Applicant has annexed photographs of an ongoing construction of a grave and family meetings purportedly on Plot No. 597. The said photographs are neither dated neither are they accompanied by a certificate by the person who took them.

16. The Plaintiff/Respondent has asserted that the burial of their relative was not on Plot No. 597 as alleged by the 1st Defendant; that the burial of their relative took place on parcel of land known as Kyuso/Kyuso 'A'/734 and that there was no evidence to show that the burial and the alleged meetings were conducted on Plot No.597.

17. Contempt of court is quasi-criminal in nature. For one to be held to have been in contempt of the orders of the court, the Applicant must prove that the alleged contemnor has actually disobeyed the court order on a standard of proof higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.

18. The 1st Defendant/Applicant alleged that the burial of the deceased took place on the suit property. The Plaintiff and the other alleged contemnors having denied that the burial took place on the suit property, it was upon the 1st Defendant/Applicant to provide to this court by way of a survey report, or any other evidence, that indeed the burial was on plot number 597 in Kyuso and not on plot number Kyuso/Kyuso 'A'/734 as stated by the Plaintiff/Respondent.

19. The burden of proof in contempt proceedings cannot shift to the Respondent unless and until the Applicant provides proof that indeed the burial of the deceased was done contrary to the orders of the court. The 1st Defendant/Applicant having not placed any documentary evidence to show that the deceased was buried on the suit property contrary to the orders of this court, it is my finding that the Application dated 17th August, 2020 is unmeritorious.

20. For those reasons, the Application dated 17th August, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021

O. A. ANGOTE

JUDGE