



No. 196/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 66 OF 2006

JULIUS WAMBUA WAITA.....APPELLANT

VERSUS

DAVID KIMONYI MWISA.....1ST RESPONDENT

JUDAH MWANZA KATHUMBI.....2ND RESPONDENT

RULING

1. **Julius Wambua Waita** (*the appellant/applicant*) a brother to **Josephine Muendi Masaku** (*deceased*) filed a suit against the two (2) respondents seeking an order that they bury the mortal remains of the deceased in their capacity as the husbands and respectively in accordance with Kamba Customary law.
2. The matter was referred to a panel of arbitrators by **Onyancha, J.** Consequently, the court adopted the award of arbitrators. It was ordered that the 1st respondent buries the deceased at his ancestral land. This would enable the children of the marriage to inherit from the estate of the deceased. The 2nd respondent was to meet mortuary costs.
3. The respondents however refused to obey the order of the court. The Minister of Health consented to waiver of the hospital bill but the defendants have jointly and/or severally ignored the order.
4. These were circumstances that prompted the applicant to file the application dated **21st March, 2007**. He sought orders as follows:-
 - i. **That** this honourable court be pleased to certify this application as urgent, therefore do order that it be heard on a priority basis and service be dispensed with in the first instance.
 - ii. **That** this honourable court do grant leave to the appellant to initiate contempt of court proceedings against the 1st and 2nd respondents.
 - iii. **That** summons to issue to the 1st and 2nd defendants to attend court and state the reasons as to why they have ignored and refused to obey the orders of this honourable court.
 - iv. **That** the 1st defendant **David Kimonyi Mwisu** and the 2nd defendant, **Judah Mwanza Kathumbi** be detained in prison for contempt of court orders for a period of six (6) months or for such period as this honourable court shall deem necessary for being in disobedience of the Arbitration award adopted by this honourable court on **3rd August, 2006** and the further award adopted on **10th August, 2006**.
 - v. **That** the **Chief of Mutongo** area of **Kithembe** location within **Kilungu Division** be ordered to assist in the enforcement of the orders that this honourable court may grant in the plaintiff's favour

- vi. **That** this honourable court be pleased to make such orders as may be just to attain the ends of justice and to safeguard and protect the sanctity and dignity of this honourable court.
 - vii. That the 1st and 2nd respondents herein be considered to bear the costs of this application.
5. In a response thereto the 1st respondent denied having been served with any court order. He stated that the only communication he received from the applicant's counsel was a letter dated **29th December, 2006** asking him to avail himself at their offices on the **2nd January, 2007** at **8.00am** to go and collect the body of the deceased.
 6. Having separated from the deceased in **1993**, he argued that he could not be compelled to bury the deceased. He said that after their separation the deceased cohabited with the 2nd respondent with whom they sired children. He prayed for the dismissal of the application.
 7. At the hearing, **Mr. Kimemia** for the applicant notified the court that he was canvassing only prayers No. **4, 5, 6** and **7**. It was his contention that the 1st respondent refused to comply with the court order because he did not want to recognise the children sired by the deceased. He sought an order directing the 1st respondent to be detained in prison for contempt of court orders for a period of six (6) months or for such a period the court would deem necessary following the disobedience exhibited. With regard to the 2nd respondent, they abandoned the order sought against him as the fee at the morgue had been waived by the Minister of Health.
 8. This application was filed pursuant to the provisions **Section 5** of the **Judicature Act**, **Section 120** of the **Evidence Act** amongst other enabling provisions of the law. **Section 5(1)** of the Judicature act provides thus;-

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts”.

9. In England the procedure of instituting contempt proceedings is provided for **under Order 52** of the **Supreme Court Practice Rules** which stipulate as follows;-

“... 2(1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with the rule.

(2) An application for such leave must be made ex parte...and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and an affidavit, to be filed before the application is made, verifying the facts relied on.

3)The applicant must give notice of the application for leave not later than the preceding day of the crown office and must at the same time lodge in that office copies of the statement and affidavit.”

10. The law relating to contempt has not been enacted in Kenya therefore as clearly stated by statute the procedure obtaining in England is the one applicable. As stated in the case of **John Mugo Gachuki versus New Nyamakima Co. Ltd Civil Case No. 456 of 2011**; the applicant having invoked **Section 5** of the **Judicature Act**, he bound himself to the procedure provided for contempt proceedings as provided by the law in England. This means that he had to seek leave of the court to institute contempt proceedings.
11. **Prayer 2** in the application is for leave to institute contempt of court proceedings against the respondent. This prayer was not canvassed. Therefore at the time of canvassing prayers number 4 – 7 in the application, leave to institute contempt proceedings had not been obtained. The purpose of contempt proceedings is to protect the integrity of court proceedings. In an instance where an order issued by the court is flouted, it must be enforced. The contemnor must be punished. The

State will be expected to enforce orders granted by the court. In the premises, the office of the Attorney General must be notified of the intention to institute the proceedings.

12.The applicant herein having flouted the law, the application is incompetent.

13.Accordingly, it is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 12TH day of FEBRUARY 2014

L.N. MUTENDE

JUDGE