REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1660 OF 1992

KIARIE MBUGUA.....APPLICANT

VERSUS

NJOKI MBUGUA.....DEFENDANT

RULING

On April 7, 1992, Kiarie Mbugua, who avers in his amended plaint that he is the registered proprietor of two pieces of land at Ndumberi, came to the High Court and sought judgment against Njoki Mbugua, stated from the bar to be his step-sister, in terms that she delivers up vacant possession of the two pieces of land, and that she be restrained by a permanent injunction, from the remaining or continuing in occupation of the said two pieces of land and not to bury her son or any of her children on those lands. Messrs JA Otumba & Co Advocates drew and filed that plaint.

On the same day, apparently in company of the plaint was a chamber summons under order 39 rules 1 and 2 of the Civil Procedure Rules, in which the plaintiff sought from the Court an "interim injunction" to issue against the defendant to restrain her from burying her late son on any of the two pieces of land named in application and the plaint. This application was made *ex-parte*. The supporting affidavit also made it clear that the defendant is a stepsister to the plaintiff.

And on that very day the Court, presided over by my elder and very revered brother Akiwumi (J), in chambers, granted the *ex-parte* injunction. All this because, among other things, the advocate for the plaintiff, Mr James Apollo Otumba, certified under certificate of urgency, that this was a very urgent application because the defendant threatened to bury "her son" on the plaintiff's land any day from 7th April, 1992. The order was made that day, and issued on the same day. It was in these terms:-

> "It is ordered
>
> 1. That: an interim injunction be and is hereby issued against the defendant her servant and or agents restraining her from burying her late son on any of the two pieces of land known as Ndumberi/Ndumberi/T85 and Ndumberi/Ndumberi/402.
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> 2. That: this order do remain in force until 21st April 1992 when the application of 7th April 1992 will be heard inter parties.
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> 3. That: the respondent be served.
>
> 4. That: the costs be in the cause."

On the following day, April 8, 1992, James Apollo Otumba, the advocate for the plaintiff, was back here

in Court, with another chamber summons under order 39 rule 2(3), under another certificate of urgency, certifying that this was an urgent application as the defendant in violation of the court order issued the previous day, had buried the deceased on the plaintiff's land, and that in the interest of justice the defendant should immediately be brought under arrest before the Court. The application sought orders that a warrant of arrest should issue against the defendant for being in contempt of court order given and issued on April 7, 1992 that the warrant of arrest "be executed by the officer commanding Kiambu Police Division", and other orders not consequential for the present moment.

Kiarie Mbugua, the plaintiff and Paul Orenya Ochanda, a process server, swore two affidavits between them, all saying that earlier in the day, April 8, 1992, at 8.00 am in company of the Assistant Chief of Ndumberi location one S M Mariako and Sgt James Mwangi, they had served on the defendant the injunction order by tendering to her a copy thereof. She refused to sign acknowledging its receipt: and that before it was served on her, it was read to her by the process server who also translated it to her in the Kikuyu language although she said she understood the English language and did not require any translation. She was left with a copy of the order, which she retained.

The two deponents further stated in their respective affidavits, that when the process server served the defendant with the order "the grave had already been dug" (per the process server) and the defendant "had already dug the grave for burying her son" (per the plaintiff), and she defiantly told the Assistant Chief that she would not obey the order, (according to the process server), or that he should go away (according to the plaintiff). So, at 11.30 she buried her dead son on the suit premises, namely Ndumberi/Ndumberi/402, so depones the plaintiff, but according to the process server, she buried the body at 11:00 am.

A warrant of arrest went out. It was given under the hand of a senior deputy registrar. It was on the same day. Again it was *ex-parte*. My learned, elder and most revered brother Akiwumi, (J), issued the order of arrest; It seemed to him to be a "flagrant case of flouting the order of the court." He said "The orders sought in the chamber summons of 8.4.1992 are hereby granted and to be executed as soon as convenient." He left costs to be in the cause.

The warrant was executed by No 54855 PC Gichambati, on the following day, April 9, 1992. According to the record on the case file, on that day the learned Judge observed that his order of the previous day was *per incuriam*; adding that the proper procedure was for the orders to be sought for in contempt proceedings to be brought. He ended, "I have no alternative but to discharge my order of yesterday including the warrant of arrest issued as a result. The defendant is free to go. The applicant has liberty to apply".

A week later, that is seven days after the commencement of the suit and *ex-parte* application for "interim" injunction, on April 14, 1992, another firm of advocates, called C M Maina & Co Advocates, not previously on record, entered the scene, with a chamber summons, *ex-parte*. A notice of change of advocates accompanied it. This time the plaintiff through that firm, sought leave to file an application for contempt of court in that Njoki Mbugua be committed to civil jail for a period of at least six months for contempt of court.

The application was supported by annexed grounds and reasons. The grounds were that having full knowledge and being seized of the fact that the Court had on April 7, 1992, issued an order restraining her from burying her deceased son on any of the two pieces of land, she committed an act that amounted to contempt of court by interfering by that act with the due administration of justice in that on the 8th day of April, 1992 she buried her deceased son on the specified pieces of the suit land, in total defiance of the court order that had been served on her early that morning. The said act was calculated to prejudice and or interfere with the administration due of justice in that the application filed on 7th April, 1992, was to be heard on April 21, 1992 and would be rendered nugatory. As I said the application came before the Court on 14th April, 1992; and on the same day, my very illustrious elder brother Akiwumi, J, granted the leave to bring proceedings, as prayed in the chamber summons aforesaid; with an order that the contempt proceedings be mentioned on the following day, to wit April 15, 1992. When that day came, there was an order that they be stood over generally.

On the very day, a chamber summons under order 39, rule 2(3) of the Civil Procedure Rules, section 3A of the Civil Procedure Act, and "all other enabling provisions of the law", was filed. In it the plaintiff wanted orders that the defendant be committed to civil jail for at least six months for being in contempt of court, and that the body of the defendant's son buried on the 8th day of April, 1992 on the land specified, be exhumed. Again, it was under a certificate of urgency "in that the defendant has gone ahead and buried her son on the land. In contempt of the order of this Court given on 7th April, 1992". Coming during vacation time, the application was followed by another one seeking orders that it be admitted to be heard during vacation. So it was to be heard on 23rd April 1992. That, however, was not to be, for on that day, when the matter came before the learned Githinji, J, it was adjourned to May 11, 1992, by consent, to enable the respondent to file a replying affidavit. Nor did anything happen on May 11, 1992 because on that day Tank, J, stood over the matter to June 11, 1992, that is to say, a month away. On this date a deputy registrar fixed the hearing of the chamber summons dated 14th April 1992, on 24th June 1992.

So, by this tortuous route, the application reached me yesterday. I heard it. At this juncture, let me pause a little while to bring to the fore, one important matter. At no stage in all this flurry and apparently agitated spate of applications, appearances, orders, adjournments and waitings, did it occur to anybody - counsel and Judges - that behind all this was an *ex-parte* injunction. The spasmodic activities clouded memory of the law on orders made *ex-parte* under order 39 rules 1 and 2 of the type made in this case. It is, by rule 3(2), that no injunction may be granted *ex-parte* for longer than is shown to be necessary and in no case shall it be for more than 14 days. So after 14 days, the *ex-parte* injunction must expire. In the instant case the *ex-parte* injunction having been granted on April 7, 1992, the injunction was to expire 14 days later, namely on 21st April, 1992, the date to which Akiwumi, J, stood the application for inter parties hearing.

But as it turned out, the application for injunction was never heard *inter-partes* on April 21, 1992 as ordered. Instead, it was again fixed for April 23, 1992, by a deputy registrar; and on the latter date Githinji, J, stood it over, by consent, to May 11, 1992. And so, to this day no hearing *inter-partes* has been held on the application for the temporary injunction. And, very importantly, the *ex parte* injunction had, in the meantime expired. As we speak now, the plaintiff (applicant) has no injunction. And all have been diverted to the committal proceedings.

It is, of course, obvious, that at the time the defendant is said to have committed the contempt, the *ex-parte* order was still in force, and fourteen days had not expired. One question now, for disposal, is whether, if contempt is proved, the defendant can, and should be committed for disregarding an *ex-parte* injunction which has since expired. Should a Court still commit a person for having disobeyed an injunction which has since withered, dried up and died a natural death after it was disobeyed, but when it was still alive?

The answer may be searched for in the light of the object of committal for contempt. The object of the process of contempt in injunction situations is to aid a civil remedy. It has been propounded on eminent authority, that the central object of applying for committal in the context of injunction orders, is not to punish disobedience of a court order. It is to secure compliance with the injunction. In this connection there comes to the fore the age old maxim of equity that equity, like nature, will do nothing in vain on the basis of which Courts have reiterated the proposition that a Court cannot stultify itself by making any orders which, for practical and legal purposes cannot be complied with or are impossible for compliance.

In this case, the injunction having expired after 14 days there is nothing to be complied with. Compliance would be impossible because the order no longer exists. The Court cannot indulge in mere primitive orders at this stage. This being a civil matter, the primary objective should be to secure obedience of live orders. Not penalizing parties for failure to obey a transient order that no longer exists. The defendant, even if she was now willing to purge her contempt and obey the order in order to escape being committed to civil jail, will be unable to do so, because the injunction has expired. Why should she not be able to be sorry and escape from commital? Defendants should be accorded a chance to comply. Here no chance exists. It is not her mistake that the injunction expired thereby taking away her opportunity to do penance and comply.

Look at this matter from another perspective: Service of the injunction order. I accept the plaintiff's

position that the defendant was infact served with it. The denials on behalf of the defendant are baseless. The Assistant Chief, the policeman accompanying the process server, the plaintiff, and the process server, have all said that service was effected. Nothing is before the Court in which the Court can reasonably disbelieve them.

The trouble here is this: The service was after the grave had been dug. At that time the defendant must have been in a sorrowful, mournful and possibly agitated state, sad, dejected and deserving consolation, kindness and tenderness. She was bereaved. Her late son, probably a beloved one had passed away. She was mourning and burying her dead. Then entered the law's entourage –the process server, Assistant Chief, a policeman and the escorting plaintiff (perhaps as guide or to witness how the law bites).

As the defendant was paying her last respects to her late son, the process server without regard to what was happening around and the sombre atmosphere one might expect at a funeral such as this one, belched out the injunction order. First in the English language. Then, despite the fact that the defendant did not need a Kikuyu translation in translated Kikuyu language, either in *abudandi cautela* or as a result of automatic routine for this process server. Paying, or pretending to pay, the last respect to the deceased who was obviously not known to these law enforcers and having feelings of sympathy for the defendant in distress, and considerations of whether in the fog of death it was practically reasonable and fair to expect a bereaved person to compose oneself to pay heed to a sudden, unexpected *ex-parte* injunctive order, were of no concern or consequence to the plaintiff who was a step brother to the defendant, the process server, the Assistant Chief and the policeman. To these people human considerations were irrelevant. The law, they considered, must be obeyed and enforced at that time in those circumstances however indecent it would be.

What these gentlemen, a litigant and agents of law enforcement, overlooked was the view of the law itself-the law which they were so enthusiastic to enforce in the most unfeeling manner. They forgot what the purpose of serving an injunction order is. It is not for showing disrespect to the dead, or to injure the feelings of the bereaved. And, in this case, unless it was exactly for that purpose, reading out and translating into the vernacular the court order was not the function of the process server. As Paul Orenya Ochanda himself did swear in his "affidavit of service" of April 8th 1992, he was a duly authorized court process server, instructed to "serve" the injunction order. He was not a duly authorized court interpreter instructed to interpret the injunction order, let alone to read it to the recipient.

The company of a policeman and an Assistant Chief, at the time the order was served has not been explained. At that time there was no administrative or security problem. The plaintiff was present to identify the defendant to the process server. In what capacity were the police sergeant and Assistant Chief present to grace the occasion with fun fare or to register a menacing arm twisting possibility looming over the desolate defendant even without any contemplated trouble from anybody? In law, the process server did his work; he served the order. He cannot be blamed; he was only an agent of law enforcement. He is a free Kenyan with liberty to be accompanied with a policeman and Assistant Chief as he went about serving a court order. He was at no fault in law even though moralists and humanists might have their eyebrows raised at or they might condemn the timing of the order to coincide with the burial hour.

The people who may not go down well with the law are the plaintiff and his legal advisors, with regard to the service of the injunction order at the very last hour. Service of injunction orders is neither intended to lay snares and technical traps, nor to be a mere matter of irrelevant and unmeaningful symbolical ceremony of a ritual without purpose. Service of an injunction order or notice of it must be effected in such a manner and leaving the recipient reasonable time between the time of service and the time of expected compliance, within which he has a fair opportunity to comply with the order or take appropriate legal steps to resist it should he wish to do so. This proposition applies with added force in respect of orders snatched stealthy by way of *ex-parte* applications. Injunctions surreptitiously obtained without notice, for no fault of those to be injuncted, and served at breakneck speed without regard for the interest of the defendant, and before he has been accorded a fair or any opportunity to be heard unless enforced with moderation and care, are going to wreck the administration of civil justice. They will cause unbearable hardship. They will stain justice. They will be abused. They may turn into immoralities.

Law protects rights, enforces duty and stems injustice. It stands for decency and civility. It must be enforced in a civilized manner by decent methods and moderation. Courts will not enforce the law by sanctioning unnecessary indulgence in grotesque processes when civil, fitting, seemly and modest alternatives have not been shown to be impossible and inadequate. A profession which does not attempt to avoid the bizarre and does not flinch from the fantastic, is a decadent one. The legal profession ranks among divinity and medicine as the learned professions, or beyond courtesy, the three professions. They are distinguished by the learnedness of their members who must think and act learnedly; not "learned" in the early use of the word as meaning one that has been taught or instructed but in the later use with a narrowed sense denoting profound knowledge gained by study, or being deeply- read, erudite and possessing scholastic learning including such learning's in the dealings in the affairs of man as man.

So, as I administer justice with the help of the legal profession, I must fulfill my bounden duty of ensuring that members of the legal profession-that noble vocation-do not degenerate to making applications and engaging in disputes which are designed or likely to bring into contempt or abloquy our cherished cultural values including correct funerary and burial rights and customs meant for the protection of the dead and of the social and religious sentiments of the living. Age after age, the public interest has commanded a disposition of human remains consonant with existing mores. The dictates of modern civilization require burial so that neither public sentiment nor public health be violated. In determining any conflicting claims and opposition to burial and places of burial, Courts must exercise a benevolent discretion, giving heed to all those promptings and emotions that men and women hold for sacred in the disposition of their dead, and must render judgment as it appraises the worth of competing forces. We must shudder at, and eschew grisly undertakings. Kenya is above rustic justice.

Here I am asked to have a bereaved mother committed to civil jail for at least six months, and that the body of the late son of the bereaved mother be exhumed. To commit her to jail in the condition in which she is, still mourning her dead, is a mockery of justice inflicting a wrong great enough to move the inanimate. If I grant that prayer, stones will cry out. It is a cultural abomination, too odious to bear irrespective of what ethnic community one may regard in this country. It is contrary to our usages: good usages by any standards. The committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory or revengeful. As Courts administering civil justice we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitory. In this case if I send the defendant to jail for six months, the wrong will not have been redressed; her sojourn in jail will be punishment to her, but it will not enforce the order said to have been disobeyed. That being the case, the Court does not consider civil jail appropriate.

Should I order the exhumation of the body? A number of considerations come to the fore. Once a body is buried, the law guards the grave against unwarranted intrusion. The dead should be let to rest forever in peace. The living, ie the surviving potential diers, should not disturb the dead. In psychological terms exhumation itself is derisive, offensive, obnoxious and horrendous thing. My chamber is a chamber of justice that is civil and decent; it is not a chamber of horrors from whence horrid orders go forth. Statute may permit exhumation in the public interest, principally, to aid in the detection of crime. But when exhumation is sought for private reasons, it must be strictly regulated, and the reasons for exhumation shown to be compelling. When removal is sought by the next-of-kin for religious or sentimental reasons or when it is intended to be temporary and all concerned consent, removal may be permitted. The reluctance to order exhumation is usually to ensure that communicable diseases are not transmitted, that bodies are unexposed and that even the friendless, indigent and landless, are given prompt and decent burial, and that the bodies are not mutilated or otherwise torn, or made liable to emit noxious smells or present the unsightly. So, for reasons of health and sentiment Courts must aim to protect graves of the dead from desecration. Underlying these safeguards is the adherence to standards of respect for the dead and protection of the health and sentiments of the living.

In the instant case the application has not as yet, been heard *inter-partes*. The order said to have been violated was made *ex-parte* the defendant has not been heard as yet. The suit itself has not been heard. It may be heard many years from today. The prayers to day do not go far enough to tell us what to do with the body after exhumation. One wonders whether it will be enough compliance with the *ex-parte* court

order if the body will be exhumed and left lying on the land in dispute, unburied. Probably the applicant wishes to come with another piecemeal application to ask for the removal of the body from the land after disinterment. The manner in which the court order will be sufficiently complied with is not indicated. The Court is not going to encourage being approached for assistance by installment applications.

Taking every material factor into consideration, the Court finds that the notice of the *ex-parte* order was unreasonably too short to allow for compliance therewith; it was impossible to comply with, and obey, the *ex-parte* order at the stage where the funerary rituals and preparations for burial had reached. Less offensive remedies equally efficient as committal to civil jail, and exhumation, have not been shown to be non-existent or unavailable to the applicant. The Court is being asked to help the applicant in the satisfaction of his vengeance only, and not for obtaining a remedy at law. Obedience of the *ex-parte* order is now impossible. Failure to obey was not willful.

For these reasons and underlying principles to which I have adumbrated, this application is dismissed. Costs of the application shall be costs in the cause.

Dated and delivered at Nairobi this 25th day of June 1992

R.C.N KULOBA

Ag JUDGE