



**Cherono (Suing for & on behalf of the Late Cherono Komen) v Mulamba (Suing for & on behalf of the Late Esther Osama Macharia) (Environment and Land Case 157 of 2013) [2025] KEELC 6314 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6314 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND CASE 157 OF 2013  
EM WASHE, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**JOHN CHERONO (SUING FOR & ON BEHALF OF THE LATE CHERONO KOMEN) ..... PLAINTIFF**

**AND**

**MUSA MULAMBA (SUING FOR & ON BEHALF OF THE LATE ESTHER OSAMA MACHARIA) ..... RESPONDENT**

**RULING**

1. The Plaintiff/Applicant moved this court through a Notice of Motion dated the 23<sup>rd</sup> June, 2025 (hereinafter referred to as “the present Application”) is seeking the following orders; -
  - a. Spent
  - b. That the Defendant/Respondent be cited and punished for contempt.
  - c. That the Defendant/Respondent be ordered to exhume the body of one Esther Osama Macharia interred on 14/6/2025 on the Plaintiff/Applicant’s known as L.R. NO. Ngeria/ Kesses Block 5(Bayete)/18.
  - d. The O.C.S Kiambaa Police Station be directed to oversee the exhumation upon grant of prayer no 3.
  - e. That costs of the application be provided for.
2. The prayers sought are premised on the grounds contained in the body of the present Application as well as the Supporting Affidavit therein and can be summarised as follows; -



- i. The late Cherono Komen was the registered owner of the parcel of land known as L.R. NO. Ngeria/Kesses Block 5(Bayete)/18 (hereinafter referred to as “the suit property”) herein.
  - ii. The Applicant pleaded that based on a previous pronouncement by this Court, the suit property was declared the asset of the deceased Cherono Komen and thereafter an eviction order was issued against the late Esther Osama Macharia.
  - iii. However., the late Esther Osama Macharia failed to yield vacant possession and/or vacate from the suit property despite being granted sufficient time to do so.
  - iv. Upon the demise of Esther Osama Macharia, the family members-initiated plans to bury her in the suit property which belongs to the Applicant.
  - v. The Applicant herein on discovering the Respondent’s intention, proceeded to file an Application for Injunction which was certified urgent and an Injunction Order barring the Respondent’s from burying the remains of Esther Osama Macharia on the suit property issued on the 12.06.2025.
  - vi. The Applicant then proceeded to serve the Respondent with the Order issued on 12.06.2025 together with the Application thereof on 12.06.2025 at 6.20 PM.
  - vii. The Applicant claimed that the deceased sold her land to third parties, with her son Musa Mulamba being a signatory to the transactions, yet he chose to bury his mother on land belonging to his father.
  - viii. The Applicant sought this Court to find the Respondent Musa Mulamba to be in contempt and punish him accordingly, by imprisonment and also order him to exhume the body of Esther Osama Macharia.
3. The Respondent upon service of the present Application opposed the same by filing a Replying Affidavit dated 08.07.2025 on the following grounds; -
- i. That the principal suit was between the late Cherono Komen and Esther Osama Macharia thus he was improperly joined into these proceedings as he was not a party to the suit but was only cited in an effort to prevent the burial.
  - ii. The Respondent averred that the contempt application was preferred against him without locus standi and that the same ought to have been made against his late mother or her personal representative.
  - iii. The Respondent deponed that he obtained a Limited Grant of Letters of Administration over his mother’s estate on 14<sup>th</sup> July, 2025 by which time the burial had taken place thus they will take effect retrospectively contrary to the law.
  - iv. The Respondent deponed that the attempt to introduce him to these proceedings and execute orders against him violates Articles 48 on his right to access justice and his right to a fair trial under 50 of the Constitution as well as amounts to litigation by placement as opposed to substitution as contemplated under Order 24 Rule 4(i).
  - v. The Respondent pointed out that no application for substitution was made to make him a party to this suit as required under order 24 Rule 5 of the Civil Procedure Rules.



- vi. The Respondent claimed that the post judgment Injunction Application and the present Application were made improperly, illegally, unlawfully and cannot be granted hence should be dismissed with costs.
- 4. The Court directed that the present application be canvassed by way of written submissions.
- 5. The Applicants complied and filed their submissions dated 06.08.2025 but the Respondent did not file any submissions.
- 6. The Court has perused the present Application, the response by the Respondent and the submissions filed and the issues for determination are as follows:-
  - Issue No. 1 - Whether the respondent the present application was wrongly lodged against the respondent?
  - Issue No. 2 - Whether the respondent is in contempt of the orders of the court?
  - Issue No. 3 - Whether the body of Esther Osama Macharia Ought to be exhumed?
  - Issue No. 4 - Who shall bear the costs of this application?\*
- 7. The Court having identified the issues above for determination, the same will now be discussed as provided below.

**Issue No. 1 - whether the respondent the present application was wrongly lodged against the respondent?**

- 8. the first issue has been raised by the Respondent on who are the rightful parties in the present Application.
- 9. According to the Respondent, the main suit was between the CHORONO KOMEN who is the Applicant's father and Esther Osama Macharia who was the Respondent's mother.
- 10. The Respondent now claims that the Application was wrongly lodged against him as he is neither a party nor a representative of the estate of his late mother, and for this reason he claims he has no locus standi to appear on behalf of the estate.
- 11. The Respondent claims that the Application ought to have been brought against his mother or her personal representative.
- 12. No doubt that at the time of making the Application, Esther Osama Macharia herein was already dead, this application could not in all honesty have been lodged against her.
- 13. However, annexed to the Respondent's Replying Affidavit as annexure MM2 is a Limited Grant of Letters of Administration Ad Litem issued by the Chief Magistrate's Court on 14<sup>th</sup> July, 2025 through which the Respondent Musa Mulamba was Appointed for purposes of prosecuting and defending this suit.
- 14. And even though the Respondent herein had not yet been appointed as personal representative to the late Esther Osama Macharia's estate at the time of filing this application, he did regularise the position and obtained the Grant prior to filing his response to this suit.
- 15. The Respondent has argued that the Application contravened Order 24 Rules 4 & 5.
- 16. For the avoidance of doubt, Order 24 Rule 4 provides that; -
  - 4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4]



- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
17. It must be noted that the above provision does not place the obligation of substitution of a Defendant solely on the Plaintiff and therefore nothing bars the Respondent herein as the Legal Representative of the Defendant from making the said application.
18. Furthermore, the present Application was not directed at the deceased but at the Respondent herein to have the body of the Defendant buried on the suit land exhumed and therefore the Application herein against the Respondent was lodged against the right party.

**Issue No. 2 - Whether the respondent is in contempt of the orders of the court?**

19. The Applicant has asked that the Court to find the Respondent in contempt of the Interim Injunctive Orders issued on 12.06.2025 restraining him from burying the body of the late Esther Osama Macharia on the suit property.
20. The Applicant in the present Application must prove beyond reasonable doubt that the alleged contemnor is guilty of contempt, in other words, it must be proved that the alleged contemnor has actually disobeyed the Court Order before they are cited for contempt.
21. The elements to be established for one to demonstrate civil contempt are set out in Samuel M.N. Mweru & Others -versus- National Land Commission & 2 Others (2020) eKLR, were identified as follows; -

“ 40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

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’...”



22. The Applicant herein filed an Application dated 11<sup>th</sup> June, 2025 seeking an Injunctive Order restraining the Respondent herein in particular, as well as his servants, agents and anyone acting on his instructions from interring and/or burying the late Esther Osama Macharia on the suit property.
23. The matter was placed before this court on 12.06.2025 and on that date, an Interim Injunctive Order was issued against the Respondent as follows: -
 

“That a temporary injunction be and is hereby issued restraining the Defendant/Respondent his servants, agents, representatives or any other persons acting for him or under his instructions from interring and/or burying the body of Esther Osama Macharia who died on 8/6/2025 on all that parcel of land namely Ngeria/Kesses Block 5 (Bayete)/18 pending hearing inter partes.”
24. The terms of the above Injunctive Order were clear, unambiguous and were undoubtedly binding on the Respondent as well as anyone acting for or under his instructions.
25. Going by the Affidavit of Vincent Ogutu, a duly licensed Court Process Server, he managed to serve the Interim Injunctive Orders and the pending Application which was fixed for hearing on 17.06.2025 on the Respondent on 12.06.2025 at 6.20pm.
26. As further proof that he was served, the Respondent personally appeared in court on 17.07.2025 claiming that he was not served with the pending application, but that they had in fact already buried.
27. His denial regarding proper service can only construe as an attempt to mislead the Court as there is no other way he would have known that the matter was fixed for hearing and attend Court on the appointed date if he was not served.
28. Evidently, the Respondent had knowledge of as well as proper notice of the existence and terms of the Interim Injunctive Orders issued against him.
29. The question now is whether the Respondent’s disobedience was deliberate.
30. The Respondent claims that the late Esther Osama Macharia was buried on 13<sup>th</sup> June, 2025 however going by the Funeral Service Programme annexed to his Replying Affidavit, she was buried on 14<sup>th</sup> June, 2025.
31. The Respondent did not bother to explain his actions to Court or give any reason as to why he disobeyed the Interim Injunctive Orders save to claim that he was not served.
32. That discrepancy on the burial date notwithstanding, the Respondent had clearly been served with the Interim Injunctive Order two days before the date of the burial, yet he deliberately chose to disobey the Order of the Court and proceeded to bury the deceased on the suit land.
33. There is no doubt therefore that the Respondent is in contempt of the order of this Court made on 12.06.2025.

**Issue No. 3 - Whether the body of esther osama macharia ought to be exhumed?**

34. In the Judgment in this suit delivered on 13.02.2014, the Court declared that the suit property belonged to the late Cherono Komen and Esther Osama Macharia had no rights over it.
35. The Court directed the Defendant late Cherono Komen, her servants, agents and assigns to vacate the land within 14 days, and he issued a permanent injunction restraining them from interfering with Cherono Komen’S possession.



36. Based on the above Judgement of the Court, an Order of Eviction was issued on the 06.05.2014 against the late Esther Osama Macharia including any servants, agents, employees and any other persons that claimed any ownership of the suit property based on the rights of Esther Osama Macharia.
37. The Applicant also presented a Title Deed over the suit property dated 23.10.2000 showing that the suit property belongs to the late Cherono Komen.
38. The issue of ownership of the suit land was already determined and notably, Respondent has not denied that the late Esther Osama Macharia had no proprietary interests over the suit property.
39. There has been no allegation that the late Esther Osama Macharia was buried on the suit property with permission and/or consent of the Applicant or the family of the late Cherono Komen.
40. Furthermore, the Respondent herein went against the Interim Injunctive Orders issued by this Court barring him and anyone acting under him from burying his late mother's body on the suit land.
41. That being the case, the Court is of the considered view that the burying of the late Esther Osama Macharia on the suit property which is the property of Cherono Komen was unlawful, unjustified and a clear violation of the Judgement earlier pronounced by this Court.
42. This action of burying the late Esther Osama Macharia on the property of Cherono Komen was no doubt perpetuated by the Respondent Musa Mulamba despite being aware of the earlier Judgement issued by this Court as well as the Injunctive Orders served on him after the demise of the late Esther Osama Macharia.
43. Based on the Respondent's personal behaviour against the Interim Injunctive Orders and the disobedience of the earlier Judgement pronounced by the Court, there is no other way to protect the suit property from being interfered by the family of the late Esther Osama Macharia and/or the Respondent but to remove the body that was buried thereon illegally.
44. As such, the Court is of the considered view and finding that the Applicant's prayer to have the body of Esther Osama Macharia exhumed from the suit property in the name of the late Cherono Komen is merited and allowed.

#### **Issue No. 4 - Who shall bear the costs of this Application?**

45. Generally, costs of any litigation abide by the outcome thereof.
46. The Application herein would not have been necessarily had the Respondent complied with the Interim Injunctive Orders and not buried the late Esther Osama Macharia on the suit property that belongs to the late Cherono Komen.
47. Keeping in mind the findings of this Court in Issue No. 1, 2 and 3, there is no doubt that the present Application is merited and therefore the Respondent is condemned to pay costs to the Applicant herein.

#### **Conclusion**

48. In conclusion, the Court hereby makes the following Orders in determination of the present Application; -
  - a. That the Defendant/Respondent be and is hereby cited hereby cited for contempt of the orders of this court issued on 12<sup>th</sup> june, 2025, and is hereby ordered to appear in person before this



court on a date to be assigned by the court to show cause why he should not be committed to civil jail.

- b. That the Defendant/Respondent be and is hereby ordered to exhume the body of one esther osama mahcaria interred on 14/6/2025 on the Plaintiff/Applicant's land ngeria/kesses block 5(bayete)/18.
- c. The county public health officer, uasin gishu is directed to ensure compliance with the public health protocols during the exhumation process of the late Esther Osama Macharia from the property known as L.R. NO. Ngeria/Kesses Block 5(Bayete)/18.
- d. The o.c.s kiambaa police station is hereby directed to oversee the exhumation granted at order (c) above.
- e. The applicant shall have the costs of this application.

**DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**EMMANUEL.M. WASHE**

**JUDGE**

In the presence of:

Court Assistant: Mr. Brian

Counsel for the Applicant: Mr. Miyienda

Counsel for the Respondent: Ms. Tanui Holding Brief For Mr. Mbugua Ngigi

