



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 213 OF 2016

JAMES NJIRAINI.....PLAINTIFF/APPLICANT

VERSUS

JOSPHINE W. MITHAMO.....1ST DEFENDANT

SUSAN W. KANGANGI.....2ND DEFENDANT

RULING

The application before me is the Notice of Motion dated 11th January 2018 brought under **Section 1A, 1B and 3A C.P.A** and all enabling provisions of the law. The applicant is seeking the following orders:

- 1. That the 2nd defendant/respondent be cited for contempt of Court and that she be committed to civil jail for a term of six (6) months for having deliberately ignored and/or disobeyed the consent order of this Court issued on 4th April 2017 that the status quo be maintained.***
- 2. That the body of JOSEPH MUTHII KANGANGI (deceased) a son to the 2nd defendant/respondent interred on 5th January 2018 on land parcel No. Mutira/Kanyei/2276 within Kerugoya County be exhumed and removed from the suit property.***
- 3. That the Officer Commanding Kerugoya Police Station be ordered to provide for security to ensure the above orders is adhered to.***
- 4. That the Public Health officer Kerugoya County do supervise the exhumation.***
- 5. That the 2nd defendant/respondent be ordered to cater for the costs of the exhumation.***
- 6. That the 2nd defendant/respondent do bear the costs of this application.***

APPLICANT'S CASE

The applicant's position is that he is the registered owner of the suit property L.R. No. MUTIRA/KANYEI/2276 which was previously owned by his father and which he acquired vide Succession Cause No. 836 (Kerugoya). He filed this suit against the respondents who were licencees of his father and cultivating on the suit property but they refused to vacate. An interlocutory judgment was entered on 15th May 2017 against the respondents and he had filed an application for injunction restraining the respondents from interfering with his occupation and cultivation of the suit property. The parties agreed on 4th April 2017 that the application be withdrawn and the status quo be maintained.

On 3rd January 2018, he learnt of the death of the 2nd respondent's son and her intention to inter the remains at the suit property. He attempted to file an application restraining her doing so during the Courts vacation but unfortunately was not able and the application was overtaken by events since the body was already buried on 5th January 2018. That the 2nd respondent was aware of the consent order of 4th April 2017. That the contempt can only be purged by ordering exhumation of the remains from the suit property.

2ND RESPONDENT'S CASE

The 2nd respondent's position is that she has not violated the status quo order of 4th April 2017 and therefore not in contempt of the Court order. That when her son passed away, she made arrangements of burying him on the portion she was utilizing and that the applicant was aware of her intention. That her family utilizes part of the suit land contrary to the allegations by the applicant. That her late husband and the 1st defendant's husband are also buried on the suit property. That her replying affidavit sworn on 14th March 2017 can easily establish

what the status quo was on 4th April 2017.

DECISION

I have considered the application and the replying affidavit by the respondent. I have also considered the submissions by counsels. The subject of this application is a consent order issued by the Court on 4th April 2017. That consent order reads as follows:

“By consent, the status quo obtaining on the land be maintained. No party should interfere with the boundaries appearing on the ground”.

Section 63 (C) CPA reads as follows:

“In order to prevent the ends of justice from being defeated, the Court may, if it is so presented, grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”.

In Shimmers Plaza Limited Vs National Bank of Kenya Ltd (2015) e K.L.R., the Court of Appeal stated as follows on contempt proceedings:

“We reiterate here that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a Court order or not

The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity and authority of the Court must be protected and that is why those who flagrantly disobey them must be punished lest they lead us all to a state of anarchy”.

Again in Ketsuri Limited Vs Kapurchand Depar Shal (2016) e K.L.R., the Court held:

***“In Peter K. Yego & another Vs Pauline Nekesa Kode, the Court recognizing that contempt of Court is criminal, held that it must be proved that one has actually disobeyed the Court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt* Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant’s conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order”.**

In the instant case, the consent order being complained of was to the effect that the status quo be maintained and no party should interfere with the boundaries. The consent order was also to the effect that each of the parties to occupy their respective portions. The 2nd respondent proceeded to bury her son on the portion she was ordered to restrict her activities and did not interfere with any boundary as ordered by the Court. The act of burying her deceased son within the portion she was occupying cannot in my view be construed to be contempt of Court.

In the upshot, the application dated 11th January 2018 lacks merit and the same is hereby dismissed with costs to be in the cause.

READ and SIGNED in open Court at Kerugoya this 28th day of June 2019.

E.C. CHERONO

ELC JJUDGE

28TH JUNE, 2019

In the presence of:

- 1. Ms Githaiga holding brief for Mr. Magee for Respondent**
- 2. Ms Nyangati holding brief for Charles Mbugua for Plaintiff/Applicant**
- 3. Court clerk - Mbogo**