



REPUBLIC OF KENYA



KENYA LAW
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**Makundi v Makundi & another (Environment and Land Case
764 of 2013) [2025] KEELC 5724 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 764 OF 2013**

**AA OMOLLO, J
JULY 29, 2025**

BETWEEN

SYLVESTER MUNYALO MAKUNDI PLAINTIFF

AND

MALOMBE MUTE MI MAKUNDI 1ST DEFENDANT

GEORGE MUTE MI MAKUNDI 2ND DEFENDANT

RULING

1. The 2nd Defendant/Applicant has filed a notice of motion dated 21st January 2025 supported by an affidavit sworn by Antony Malombe Mutemi on the same date premised on the provisions of article 129(2) of *the Constitution*; sections 1A and 3A of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and all enabling laws. The 2nd Defendant/Applicant is seeking for the following orders;
 - i. Spent
 - ii. That in accordance with section 26(1) of the *Environment and Land Court Act*, this Honourable Court be pleased to transfer this suit to the Environment and Land Court in Kitui for hearing and disposal since the parties and the property in dispute (Kyangwithya/ Misewani/1639) is situate in Kitui, within the local limits of the Kitui Environment and Land Court.
 - iii. Spent
 - iv. That this Honourable Court be pleased to review, vary or set aside the following orders issued on 31st October, 2024:
 - a. The Order adjudging the 2nd Defendant/Applicant guilty of contempt of the orders of this Court; and



- b. The Order requiring the 2nd Defendant/Respondent exhume the remains of his late father from Land Parcel No. Kyangwithya/Misewani/1639 and to bury it elsewhere.
 - v. In the alternative, this honourable Court do suspend the enforcement of the orders issued on 31st October, 2024 until the eventual outcome of the instant suit.
 - vi. In the alternative, this honourable Court do settle the terms of the order of the exhumation, and do extend time for compliance, accordingly.
 - vii. In terms of Article 159(2)(c) of *the Constitution* and section 20 of the *Environment and Land Court Act*, this honourable Court be pleased to find that this suit is not justiciable as the matters in issue were resolved through two decisions of the Muusini Clan in the year 1999, and the suit be accordingly dismissed with costs to the Defendant.
 - viii. That the costs of this application be provided for.
2. The motion was based on the grounds that the parcel of land in dispute is situate in Kitui, within the local limits of the Environment and Land Court in Kitui thus it is more efficient to have suit transferred to Kitui where the witnesses are based. The Applicant stated that on 18th January, 2025, the order issued by this on 31st October 2024 and extracted on 5th November, 2024 was thrown over the fence and into the 2nd Defendant's compound, while he was away.
3. That the order of exhumation requires to be clarified, as he is not capable by himself, of carrying out such an order. He also stated that the issues in this suit were determined by the Muusini Clan in the year 1999 and are no longer available for resolution by this Court.
4. That in view of the fact that the 2nd Defendant lives on the parcel No. Kyangwithya/Misewani/1639 and that is where his deceased father is buried, it is in the interest of justice that the orders issued on 31st October, 2024, and particularly the order requiring the exhumation of the remains of the 1st Defendant, be suspended until the eventual outcome of this suit.
5. That it is in the interest of justice that the orders sought be granted as the suit land is ancestral land, and was allocated to the 1st Defendant by his late father and mother, and which allocation was confirmed through two formal decisions by the Muusini Clan.
6. In the supporting affidavit, the Applicant stated that his name is Antony Malombe Mutemi and not Malombe Mutemi Makundi as indicated in the documents filed in court. He added that for considerable part of the year 2024, he was unwell attending to a psychiatrist for his mental wellbeing due to the death of his father and the events that ensued thereafter. He was not around his Kitui home when the service was effected and he got a call informing him of the papers that had been thrown into his compound.
7. The Applicant stated that it is a taboo under the Kamba Customary practices to exhume the body as ordered by the court and that he cannot get anyone who can assist him to access the body and remove it from the grave. Further, the Applicant argued that the issue of land in subject was determined by Muusini Clan which decision is valid under Article 159(2)(c) of *the Constitution* and enforceable by this court.
8. He stated that he was not aware that the decisions of the clan were of significant import and as such the rulings were not tabled before the court during the hearing of the contempt of court application.
9. The motion was strongly opposed by the Plaintiff/Respondent vide relying affidavit sworn by Sylvester Munyalo Makundi on 24/2/2025 stating inter alia, that the same misconceived, incompetent,



frivolous, and an abuse of court process, made in bad faith and as an afterthought aimed at obstructing justice. The Plaintiff stated that the 2nd defendant has deliberately disobeyed valid court orders, including failing to exhume the deceased from the suit land despite having not appealed or contested the ruling since 31/10/2024.

10. That the application was filed late, in January 2025 without sufficient explanation for the delay and the legal grounds for review or stay of execution are misplaced and untenable as the 2nd Defendant has not demonstrated any error on the face of the record, or presented new evidence to justify a review. The Plaintiff argued that the cited reasons, including jurisdiction issues, name misdescription, and clan adjudication (Muusini clan, 1999), are irrelevant or long-abandoned arguments.
11. That the allegations by the 2nd defendant regarding lack of knowledge of the court order are false and misleading, as his advocate was present during delivery of the ruling. The Plaintiff stated that the 2nd Defendant is misusing court process to delay sentencing for contempt noting that he has not expressed any intention to comply with the original court orders.

Submissions:

12. In support of his motion, the 2nd Defendant filed submissions dated 29/4/2025 and in opposition of the motion, the Plaintiff filed submissions dated 14/7/2025. The 2nd Defendant submitted that it is not disputed, that the 1st Defendant, the Applicant's father, was buried on the suit land, a place he called home, has permanent houses and he buried other people thereon.
13. The Applicant stated that since the remains of the 1st Defendant have been interred, and the substantive dispute is still pending resolution, it is necessary, in the interest of justice, to suspend the order of exhumation until the eventual determination of the suit, when the rights of the parties will be finally settlement.
14. That additionally, an exhumation is final and also comes with great emotional distress to the family of the deceased and the court record show that the application seeking to stop the burial was not heard on its merits thus there is no telling which way justice would go if that application were to be heard on its merits.
15. The Applicant submitted that it is necessary in the interests of justice, to have his application heard on its merits before exhumation is considered. That the order of exhumation is incapable of compliance as it is, since he cannot exhume the body of his late father on his own and that he will need to be facilitated with additional court directions and orders, directed at the public authorities who can carry out the exercise.
16. The Plaintiff/Respondent submitted that a party seeking equitable relief must come to court with clean hands and the 2nd Defendant has disobeyed valid court orders particularly those made on 31/10/2024 and is now attempting to benefit from his own wrongdoing. In support, the Plaintiff cited the case of *Kilima Limited & Another v Samuel Ruto, Chairman & 21 Others Eklr and Nahashon Njage Nyaggah v Savings & Loan Kenya Limited & Another* [2006] eKLR.
17. The Plaintiff stated that the orders of 31/10/2024 are incapable of being stayed because they relate to contempt sentencing which can only be suspended not stayed. That there is no executable order presented to court that would support a stay.
18. The Plaintiff submitted that the 2nd defendant has not extracted nor annexed the order sought to be reviewed which is a procedural requirement and further has failed to meet the statutory threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure



Rules, 2010. In support the Plaintiff cited the case of Rose Kaiza v Angelo Mpanju Kaiza [2009] Eklr, Francis Origo & Another v James Kumali Mungala [2005] eKLR and Stephen Gathua Kimani v Nancy Wanjira Waruingi [2016] eKLR.

19. The Plaintiff also submitted that the ruling in question was issued on 31/10/2024, but the application herein was filed in January 2025 with an inexcusable delay and no explanation was provided for the delay or for failure to act within the 30-day window. The Plaintiff stated that the claims by the 2nd defendant that exhumation required coordination with public authorities are unsubstantiated and that he never sought help from the court nor demonstrated any genuine attempt to comply.
20. The Plaintiff stated that the 2nd Defendant's argument about being known as "Anthony Malombe Mutemi" is legally irrelevant and frivolous and misdescription of a party's name cannot defeat a suit or serve as a ground for review.

Analysis and Determination:

21. This is application presupposes that it is for orders of review under Order 45 Rule 1 by the 2nd Defendant/Applicant seeking among other orders to review the orders dated 31st October 2024. However, going by the various orders sought, it fits the description of an omnibus application as the orders sought are unrelated.
22. The Plaintiff/Respondent opposed the motion inter alia that it had been filed after undue delay thus the same should be disregarded. In addressing the question of delay, I have considered the decision in Stephen Githua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR where the Court of Appeal held that:

“The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.”

23. On what an unreasonable delay, Justice Mativo in the Stephen Githua Kimani Case (Supra) further held that:

“I also find useful guidance in the decision of Mwera J in the case of Godfrey Ajuang Okumuvs Nicholas Odera Opinya (Kisumu High Court Civil Case No. 337 of 1996) where he held inter alia that

‘an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay.’ In the case of Abdulraham Adam Hassan vs National Bank of Kenya Ltd (Kisumu High Court Civil Case No. 446 of 2001), an unexplained delay of three months was found to be unreasonable. Similarly, in the case of Kenfreight (E.A.) Limited vs Star East Africa Company Limited (2002) 2 KLR 783 found a delay of three months to be unreasonable and disallowed an application for review... In Mbogo Gatuiku vs A.G. (HCCC 1983 of 1980, High Court, Nairobi), Mwera J emphasising on the need to file applications for review without delay stated that ‘even a delay of a day or two calls for an explanation’.”

24. In this case, the ruling to be reviewed was delivered on 31st October 2024 and the instant application is dated 21st January 2025, making a delay of less than three months. The Applicant explained the delay



stating that in the most part of the year 2024 he had been seeking care for his mental well being and attached a progress report from his doctor. It is therefore my view that the delay of less than three months occasioned was sufficiently explained by the Applicant.

25. On the first prayer seeking for an order of transfer, the same can only be transferred once this application is dispensed with particularly the prayer seeking to set aside the order adjudging the Applicant guilty of contempt. Thus, the file can be transferred once these questions are determined.

26. The governing law and rules for review of orders is found in section 80 of the *Civil Procedure Act* and Order 45 of the Rules. Order 45 (1) stipulates as follows:

“ 1 Any person considering himself aggrieved—

(1) (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

27. The Applicant avers that it has come across new and important evidence that was not within his knowledge when the order of contempt was made. One of the duties imposed on the Applicant is to demonstrate to court that the discovery of new and important matter or evidence was after the exercise of due diligence, not within his knowledge or could not be produced by him at the time when the decree/order was passed.

28. In this case, the Applicant has not expressly stated the specific ground the application for review is based on but looking at the grounds in the supporting affidavit it is deductible that he relies on the import of the decisions made by the Muusini Clan regarding the suit land claiming that the said rulings were not tabled before the court during the hearing of the contempt application because the applicant was not aware that the said decisions are valid and enforceable by court.

29. This matter was filed in 2013 under the new constitutional dispensation and therefore the Applicant having been represented by counsel, he is presumed to have been made aware of the provisions of article 159(2) of *the Constitution*. In any event, the order complained of disobeying was made pursuant to an interlocutory application and not for determination of who owns the suit land. The Applicant will still have the opportunity to use the new evidence to challenge the Plaintiff's case but does not change the fact that there were orders in place restraining any activities on the suit land.

30. It is settled law that an order once issued must be obeyed however illegal it is and what was required of the Applicant was to obey the order first then apply for its review. Since the time when the case of *Hadkinson vs. Hadkinson* (1952) 2 All ER 56, the position has not changed. The judges of the Court of Appeal of England in *Hardkinson's* case unanimously held that:

“ It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was



discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

31. The Applicant also stated that due to the circumstances of the matter herein, and the nature of orders issued, they should be reviewed (seemingly under the any other sufficient reason ground). An for review can be granted where sufficient reason is shown and what entails sufficient reason was discussed in the case of Omote & another v Ogutu (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) as follows;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the civil procedure act: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous” (Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993).

32. The Applicant stated that in the circumstances of the matter and the nature of the orders issued, he is not able to carry out the exhumation alone and due to the Kamba customs, he may not get assistance from anyone. In essence, the Applicant is asking this court to suspend the enforcement of the order on the basis of lack of capacity due to the Kamba culture but does offer alternative that if the suspension is given even in the long term how will he remedy the contempt?
33. The reason offered by the Applicant that the clan had awarded him the land where he has always lived sounds more as defence to the contempt application and not a ground for review. It appears the Applicant has not understood the purpose a contempt order is to serve. The parties were before court and an order was issued in the presence of his advocate. Whether he considered the land belongs to him, as long as there was an order in place, for the rule of law to prevail, he should have obeyed first then approach the court and persuade why he should be allowed to bury his deceased further on the land.
34. In K.G.G.A v. Francis Atwoli & Others (2012) eKLR the court cited Clarke & others v ChadBarn & others (1985) 1 ALL ER P.C 211, that willful disobedience to an order of the court is punishable as contempt of court even if the defendant thought that the injunction was improperly obtained or too wide in its terms, for that does not provide an excuse for disobeying it, the remedy is to vary or discharge it.
35. I am therefore not persuaded by the 2nd Defendant/Applicant to grant the orders of review and or suspension of the said order pending determination of the suit herein. The application dated 21st January 2025 is found to be without merit and is hereby dismissed with costs to the Plaintiff/ Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2025.

A. OMOLLO

JUDGE

