



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELCA NO. 6 OF 2015

SAMUEL CHEGE (Administrator of

the estate of Kimani Kihethu).....APPELLANT/APPLICANT

VERSUS

CHARLES KIPCHUMBA BIWOT KIPUTIA.....RESPONDENT

RULING

This ruling is in respect of two applications dated 31st January 2018 and 14th February 2018. The application dated 31st January 2018 seeks an order of injunction against the respondent to bar him from interring the body of his son on the parcel of land known as NGERIA/KESSES BLOCK 5 (BAYETE) 30 presently registered in the name of the deceased.

The application dated 14th February 2018 sought an order for committal of the respondent to civil jail for disobeying the orders issued in the application dated 31st January 2018. It also sought an order directing the respondent to exhume the remains of his deceased son from the suit land.

APPLICANT'S CASE

The applicant filed submissions on 13th December 2018. The application dated 31st January 2018 was placed before the judge on 1st December 2018 and orders were granted. The order was duly served on the respondent and this is evidenced by the affidavit of service dated 5th February 2018 which was filed on 12th February 2018. The application was unopposed.

It was the applicant's submission that the respondent buried his son on the suit land belonging to the applicant in contempt of the court order and therefore should be committed to civil jail. Applicant stated that the respondent was personally served and signed the copy of the order.

The applicant urged the court to uphold the dignity of the court and punish the respondent for disobeying the orders of the court.

RESPONDENT'S CASE

The respondent did not file any submissions. There is a replying affidavit to the application on record that was filed on 12th March 2018. The respondent deponed that the appellant's case in the trial court was dismissed. He had claimed ownership of the suit land which the court dismissed and he appealed.

It was the respondent's case that he divided the suit land and gave part of it to his son where he was interred. And that there has been no court order evicting him from the suit land. It was his averment that he only came to know of the court order on the evening of 22nd February 2018 after burying his son.

He also stated that there is no proof of service annexed to prove he was served with the order personally. That the suit land which is subject matter of the appeal is Ngeria/Kesses Block 5 (Bayete) 30 therefore it is baseless for the applicant to bring in Ngeria/Kesses Block 5 (Bayete) 31 which is not the subject matter in this court. He urged the court to dismiss both applications with costs.

ANALYSIS AND DETERMINATION

The issues for determination are as follows;

- a) Whether the respondent acted in contempt of court orders

b) Whether the respondent should be committed to civil jail

c) Whether the respondent should exhume the remains of his son from the suit land

WHETHER THE RESPONDENT ACTED IN CONTEMPT OF COURT ORDERS

The applicant claims the respondent was served with orders restraining him from burying his son on the suit land on 2nd February 2018. I noted that the order referenced in the supporting affidavit as 'D' was not annexed accordingly. There is a copy of an undated order on record that contains orders of a temporary injunction. Further, there was an order also issued by the court on 22nd February 2018 for the respondent to show cause why he should not be committed to civil jail for disobeying court orders. He appeared in court and his advocate submitted that the court cannot deal with an application for contempt without hearing the contemnor. In the interest of justice, he was granted 2 days leave to file a replying affidavit. He filed a replying affidavit and stated that he received the order on 23/2/2018 after the burial.

The court must determine whether there was proof of service. In the Court of Appeal case of **Dickson Daniel Karaba –vs- John Ngata Kariuki & 2 Others, Nairobi Civil Appeal No. 125 of 2008 (unreported)**, the court stated that: -

“There is a presumption that the court process was properly served unless such presumption is rebutted and that the burden lies on the party questioning the affidavit of service to show that the same is incorrect.”

In the same case the court stated further that: -

“Where service is denied it is normally desirable that the process server be put in the witness box and the opportunity given to those who deny service to cross-examine him.”

The process server was not put in the witness box for cross examination. The affidavit of service filed on 6th March 2018 does not contain a signed copy of the order despite claiming that the respondent signed the same.

WHETHER THE RESPONDENT SHOULD BE COMMITTED TO CIVIL JAIL

The respondent filed a replying affidavit wherein he deposed that he was served with the order after the burial. In the premises he cannot be considered to have been a contemnor as the applicant has not proven that he served the respondent in time for the order to be effected. This does not make him a candidate for committal to civil jail.

WHETHER THE RESPONDENT SHOULD EXHUME THE REMAINS OF HIS SON FROM THE SUIT LAND

The appellant lost the case in the lower court. The application to exhume the body of the deceased is an interlocutory one. In the case of **Hellen Cheron Kimurgor –vs- Esther Chelagat Kosgei [2008] eKLR** the court stated

“As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases, the court will have regard to the supposed wishes of the deceased”.

In **Elliud Kingwara Adawo v Philip Achieng John & another [2015] eKLR** the court held;

Due to the foregoing, I am not inclined to make an order for the exhumation of the body of the deceased at this stage. Although, I have found that the burial of the deceased on the suit property was carried out illegally, I would for the reasons that I have given above defer the order for exhumation until the hearing and determination of this suit when final orders would be made with respect to the rights of the parties over the suit property. The remains of the body of the deceased on the suit property would in no way prejudice the plaintiff's claim or rights herein. On the other hand, if the body was to be exhumed and it turns out after the trial that the plaintiff has no right over the suit property, the body of the deceased would have been disturbed unnecessarily and may have to undergo a second burial ceremony on the suit property. I am not satisfied that there are very compelling reasons that would justify the exhumation of the body of the deceased from the suit property at this stage. I have said enough to show that an order for the exhumation of the body of the deceased from the suit property is not for granting in the present application.

I am also of the view that the dead should be left in peace to rest and if the final orders of determination of ownership is arrived at the appeal, then the court will make the appropriate orders. Further there is also an unclear issue that has not been proven whether the order was served before or after the burial of the deceased.

I therefore find that the applications for orders of exhumation and committal to civil jail lack merit and are therefore dismissed with cost to abide the outcome of the appeal.

DATED and DELIVERED at ELDORET this 19TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Ngugi for Respondent and Mr.Misoi holding brief for Mr.Miyienda for Appellant.

Ms. Christine – Court Assistant