



Oteba (Suing as the Administrator and Legal Representative of the Estate of Elijah Oteba Alfayo - Deceased) v Amaid & 2 others (Environment and Land Case 103 of 2013) [2025] KEELC 5342 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 103 OF 2013**

**BN OLAO, J
JULY 17, 2025**

BETWEEN

**JOSEPH OKIRADO OTEBA APPLICANT
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF ELIJAH OTEBA ALFAYO - DECEASED**

AND

**CAROLYNE ADUKE AMAID 1ST RESPONDENT
WICKLIFFE EPIN 2ND RESPONDENT
GABRIEL OKIRADU 3RD RESPONDENT**

RULING

1. By a plaint dated 14th June 2010 and filed on 16th November 2010, Yokesofat Okiring Okiradi Alias Josphat Ikiring Elijah Oteba alias Allan Odeke And Amos Iteba (the Plaintiff herein) filed this suit against Stephen Okiradu Alfayo (the Defendant) seeking judgment in the following terms with respect to the land parcel No North Teso/Kamuriai/219 (the suit land):
 - a. An order of eviction to remove the Defendant, his servants, agents, assigns and or legal representatives and their structures from the aforesaid Land Parcel No North Teso/Kamuriai/219.
 - b. An injunction to restrain and prohibit the Defendant, his servants, agents, assigns and legal representatives from cutting down trees and committing other wanton acts of destruction and/or using the Plaintiffs' said parcel of land in any manner whatsoever without the Plaintiffs consent.
 - c. Costs of this suit and interest at Court rates.



d. Any other or further relief this Honourable Court may deem just to grant.

The Plaintiffs' claim was that they are the registered proprietors of the suit land and although they had allowed the Defendant to live on the same as he sought his own land, the Defendant had refused to vacate.

2. The Defendant filed a defence denying that claim and adding that in fact the Plaintiffs hold the suit land in trust for him and that he has been in occupation of a portion thereof measuring 6 acres for over 35 years peacefully, uninterrupted, openly and with the knowledge of the Plaintiffs. He pleaded therefore that the Plaintiffs' suit was statutorily time barred and should be struck out.
3. The suit was heard by S.M. Kibunja J who, in a judgment delivered on 4th June 2013, found in favour of the Plaintiffs. A decree followed dated 19th June 2013 in the following terms:
 1. "The Defendant his servants, agents, assigns and/or legal representatives be and are hereby given 90 days to vacate Land Parcel No North Teso/Kamuriai/219 belonging to the Plaintiffs and in default, be forcefully evicted.
 2. An order of injunction be and is hereby issued to restrain and prohibit the Defendant, his servants, agents, assigns and/or legal representatives from cutting down trees and committing other wanton acts of destruction on the said parcel of land.
 3. The Defendant shall pay costs of this suit."

The record shows that the hearing proceeded *ex-parte* on 20th February 2013 because, though served, neither the Defendant nor his counsel attended Court. A decree was issued. No appeal was filed.

4. The record further shows that vide a Notice of Motion dated 8th November 2013, the Defendant approached the Court seeking an order to stay his eviction, set aside the *ex-parte* judgment and grant him leave to file his defence. That application was compromised by a consent order dated 16th December 2013 which stated as follows:

"By consent, pursuant to the order of this Court made on 4/12/2013, thrown away costs have been agreed at Kshs.54,653 to be paid by the Defendant to the Plaintiffs within 30 days from the date hereof and in default of such payment, order, order No (1) that set aside the *ex-parte* proceedings, judgment, decree and all consequential orders and order No (2) that granted leave to amend shall stand vacated."

5. The Defendant did not pay the agreed thrown away costs of Kshs.54,653 within the 30 days as agreed by consent. Vide a letter dated 7th February 2014, counsel for the Plaintiffs addressed the Deputy Registrar notifying him of the default and requesting that an eviction order do issue against the Defendant and be addressed to the Officer Commanding Station (OCS Malaba Police Station) for execution. An eviction order dated 4th March 2014 was subsequently issued by the Deputy Registrar directing the OCS Malaba Police Station to evict the Defendant, his agents, servants and/or any person claiming title under him from the suit land i.e. parcel No North Teso/Kamuriai/219. It would appear that the eviction order was never executed as directed. Not very surprising when it comes to execution of orders of eviction directed to the police. In this case, as will soon become clear, the failure to execute the decree herein has fatal consequences to the Plaintiffs.
6. I now have for my determination the Notice of Motion dated 20th December 2024 by Joseph Okirado Oteba (the Applicant herein and acting as the legal Representative of Elijah Oteba Alfayo who was the 1st Plaintiff in this suit). The Applicant has impleaded Carolyne Aduke Amaid, Wickliffe Epin And



Gabriel Okiradu (the 1st, 2nd and 3rd Respondents herein). Citing the provisions of Order 40 Rules 1, 2 and 3 as well as Order 3 Rules 4 and 5 of the Civil Procedure Rules, the Applicant seeks the following orders:

1. Spent
2. That it please this Honourable Court to order the 1st Respondent and her family to exhume the body of her father Stephen Okiradu Alfayo (the deceased) from the Land Parcel No North Teso/Kamuriai/5344 where the Respondents have encroached.
3. That this Honourable Court finds the Respondents in contempt of Court.
4. That this Honourable Court issues an order to maintain the *status quo* of the land, restrain the Respondents from building, fencing or planting until the final determination of this application.
5. That the Police in Charge OCS Teso North to assist the enforcement of the exhumation of the deceased's body back to the morgue pending the hearing and determination of this suit.
6. That costs of this application be in the cause.
7. The Motion is premised on the grounds set out therein and is supported by the Applicant's affidavit also dated 20th December 2024. The gravamen of the Motion, which is the subject of this ruling, is that the 1st Respondent has already buried her late father Stephen Okiradu Alfayo (the deceased) despite orders issued in Bungoma CC No 15 of 2010. That the 2nd Respondent issued the burial permit to the 1st Respondent to bury the deceased on the Land Parcel No North Teso/Kamuriai/5344 while the 3rd Respondent is the one who stayed in the structure constructed during the burial. This is despite the fact that the Defendant Stephen Okiradu Alfayo the deceased father to the 1st Respondent, was sued for eviction from the Land Parcel No North Teso/Kamuriai/219 (the suit land) which gave rise to the Land Parcel No North Teso/Kamuriai/5344 and which belonged to the Applicant's father Elijah Oteba Alfayo. That the Applicant and her family are in occupation of the Land Parcel No North Teso/Kamuriai/5344 and they stand to suffer hardship and curses from a stranger buried on their land and will also be prejudiced. It is therefore in the interest of justice that the application be allowed.
8. The following documents are annexed to the Motion:
 1. Copy of a Limited Grant of Letters of Administration issued to the Applicant in respect to the Estate of Elijah Oteba Alfayo .
 2. Copy of the title deed to the Land Parcel No North Teso/Kamuriai/5344 issued to Elijah Oteba Alfayo on 30th August 2019.

When the Motion was placed before me for directions on 24th December 2024, I did not certify it as urgent but directed that it be canvassed by way of written submissions to be served upon the Respondents within 10 days. The Respondent would then have 15 days to file and serve their responses and submissions. The matter would then be mentioned on 20th January 2025 to confirm compliance and take a date for ruling.

9. When the matter was mentioned on 20th January 2025, none of the parties attended Court and I listed it for further mention on 12th February 2025 to confirm compliance.
10. On 12th February 2025, only Mr Muyala counsel for the Applicant attended the Court virtually. He told the Court that the Respondents though served, had not filed any response while he had served his submissions. The Motion is therefore not opposed.



11. I have considered the Motion, un-opposed as it is, as well as the submissions by Mr Muyala instructed by the firm of Muyala Law & Associates Advocates for the Applicant.
12. There are only two issues which call for my determination in this Motion. These are:
 1. Whether this Court should order for the exhumation of the body of the deceased Stephen Okiradu Alfayo from the Land Parcel No North Teso/Kamuriai/5344 belonging to Elijah Oteba Alfayo .
 2. Whether the Respondents are in contempt of the orders issued by this Court vide the judgment delivered on 4th March 2013.

I shall consider those prayers in that sequence.

1. Order to Exhume the Body of Stephen Okiradu Alfayo From The Land Parcel No North Teso/kamuriai/5344:

13. It is common knowledge that vide a judgment delivered by S. M. Kibunja J on 4th June 2013 the Defendant Stephen Okiradu Alfayo, his servants, agents, assigns and legal representatives were given 90 days to vacate from the Land Parcel No North Teso/Kamuriai/219 (the suit land) and in default, be evicted therefrom forcefully. They were also injuncted from cutting down trees or committing other acts of destruction on the said land. Therefore, the subject matter of the suit and the resultant judgment was the suit land i.e. North Teso/Kamuriai/219. It was not the Land Parcel No North Teso/Kamuriai/5344 which is the subject of this application. The Applicant is therefore seeking the exhumation of the deceased Stephen Okiradu Alfayo from land which was not the subject of the judgment herein. The Applicant has suggested that the suit land is the one which gave rise to the Land Parcel No North Teso/Kamuriai/5344 where the deceased Stephen Okiradu Alfayo is buried and should be exhumed. In paragraphs 4 and 5 of his supporting affidavit, the Applicant has deposed thus:

4:

“That the deceased one Stephen Okiradu Alfayo father to the 1st Respondent herein was sued for eviction from the suit No North Teso/Kamuriai/219 that gave birth to Land Parcel No Teso/North/Kamuriai/5344 which belong to my father one Elijah Oteba Alfayo (find annexed copy of order and title deed marked and (sic) JOO-2 respectively).”

5:

“That the Respondents herein have already buried the body of her father in Elijah Eteba Alfay’s land despite the orders made by the Honourable Court as per the judgment in the suit Busia ELC No 103/2013 herein.”

As I have already stated above, the annexed copy of the title deed to the Land Parcel No North Teso/Kamuriai/5344 is in the name of Elijah Oteba Alfayo . If the 1st Respondent has buried the body of her father Stephen Okiradu Alfayo on the Land Parcel No North Teso/Kamuriai/5344 from which the Applicant seeks an order for exhumation of the body, that can only be pursued through another suit. This suit and the resultant judgment was in respect to the Land Parcel No North Teso/Kamuriai/219 – the suit land. It had nothing to do with the Land Parcel No North Teso/Kamuriai/5344 which is the subject of this application. And further, there is no evidence to show that the Land Parcel No North Teso/Kamuriai/5344 was a resultant sub-division of the suit land. In any event, even if the Land Parcel No North Teso/Kamuriai/5344 was hived off from the suit land, further evidence would be required



to prove that allegation. the bottom line, however, is that this Court cannot order the exhumation of the body of Stephen Okiradu Alfayo from the Land Parcel No North Teso/Kamuriai/5344 when it was not the subject of the suit herein and in respect of which no orders were made in the judgment.

14. On that ground alone, the prayer for the exhumation of the body of Stephen Okiradu Alfayo from the Land Parcel No North Teso/Kamuriai/5344 is devoid of merit. It is for dismissal.

2. Whether the Respondents Are in Contempt of the Judgment Delivered on 4th March 2013

15. Arising from what I have found in (1) above with regard to what was the subject matter in this suit, it follows that the Respondents cannot be said to be in contempt of the judgment delivered herein on 4th June 2013.

16. With respect to the 1st Respondent, there was no order evicting her or her deceased father from the Land Parcel No North Teso/Kamuriai/5344. The judgment delivered on 4th June 2013 only directed the deceased Stephen Okiradu Alfayo to vacate the suit land i.e. North-teso/kamuriaI/219 or be evicted therefrom and further, that he be enjoined from interfering with it.

17. As regards the 2nd Respondent, the allegation against him is that he issued the burial permit for the burial of Stephen Okiradu Alfayo on the land parcel NO North Teso/Kamuriai/5344. In ground No 2 on which the Motion is premised, the Applicant stated that:

2:

“The 2nd Respondent with lack of knowledge and clear information of the suit Land Parcel No Teso North/Kamuriai/5344 wrongly and unlawfully prepared the burial permit to the 1st Respondent.”

It is clear from the Applicant’s own assertion that the 2nd Respondent acted “with lack of knowledge and clear information” when he issued the burial permit to the 1st Respondent. The Applicant has himself exonerated the 2nd Respondent from blame by admitting that he (2nd Respondent) had “lack of knowledge and clear information.” Besides, even if the judgment had been in respect to the Land Parcel No North Teso/Kamuriai/5344, there is nothing to show that the 2nd Respondent was ever served with the said judgment. The 2nd Respondent cannot be held in contempt of any orders which he knew nothing about.

18. Finally, in respect to the 3rd Respondent, the Applicant has stated in paragraph 3 of his grounds upon which the Motion is grounded that:

3:

“That 3rd Respondent with ignorance of the Court order unlawfully trespasses on the suit land and stayed in the structure constructed when burying the deceased.”

Again, the Applicant has himself exonerated the 3rd Respondent from any blame by using the words “with ignorance of the Court order”. If the 3rd Respondent acted in ignorance of any Court order, he cannot be held in contempt of an order whose existence he did not know.



19. The law is of course well settled that a person who ignores a Court order can be punished for contempt. In the case of *Shimmers Plaza Ltd -v- National Bank of Kenya Ltd* CA. Civil Appeal No 33 of 2012, the Court stated that:

“It is important however that the Court satisfies beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

The Court went on to cite with approval the following words of Romer L.J In the case of *Hadkinson -v- Hadkinson* 1952 All E.R 567:

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

Romer LJ then goes on to quote Lord Cottenham L.C in *Chuck -v- Cremer* (1) coop.temp. Cott 342 that:

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it exists it must not be disobeyed.”

It is clear from the above that once a person knows of the existence of a Court order requiring them to do or not to do a particular act, obedience of the same is not optional.

20. Having considered the Notice of Motion dated 20th December 2024, un-opposed as it is, it is clear from the Applicant’s own evidence that the 2nd and 3rd Respondents were not aware about any Court order relating to the Land Parcel No North Teso/Kamuriai/5344 and as regards also the 1st Respondent, the orders herein related to the Land Parcel No North Teso/Kamuriai/219 and not Land Parcel No North Teso/Kamuriai/5344 where Stephen Okiradu Alfayo was buried. No orders can therefore be made to exhume the body of Stephen Okiradu Alfayo from a parcel of land which was not the subject of the dispute and no orders of contempt can be issued against the Respondents in respect of orders which did not relate to the Land Parcel No North Teso/Kamuriai/5344.
21. The up-shot of all the above is that this Court makes the following disposal orders:
1. The Notice of Motion dated 20th December 2024 is devoid of merit. It is accordingly dismissed.
 2. No orders as to costs.
 3. The Deputy Registrar to have a copy of this ruling served upon the Respondents.

RULING DATED, SIGNED AND DELIVERED TO THE APPLICANT BY WAY OF ELECTRONIC MAIL ON THIS 17TH DAY OF JULY 2025.

BOAZ N. OLAO



JUDGE

The Respondents be served personally with a copy of the ruling.

