



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 444 OF 2017**

**TIMOTHY OMANJO**

**FRANCIS OTIENO OJOSH**

**FREDRICK OTIENO**

**DONALD YURI OWINO**

**EZEKEIEL ONYANGO OMANJO & FIVE OTHERS.....PLAINTIFFS**

**VERSUS**

**JULIUS ODUKADO OWITI**

**JOHN OWITI ODUKADO**

**SAMWEL ODERO**

**JOSEPH OTIENO ODUKADO**

**GEORGE ONYANGO ODUKADO.....DEFENDANTS**

**RULING**

1. The plaintiff/ applicant filed an application by way of chamber summons dated 27<sup>th</sup> February 2018 under Order 40, Rule 1 & 2 of the Civil Procedure Rules, and Sections 3A, 6 & 63 (e) of Civil Procedure Act and all enabling provisions of law for orders that:

a) Spent.

b) Pending the hearing and determination of the instant application, the Honorable Court be pleased to order for exhumation, directing the OCS, Migori Police Station to proceed and exhume the body of JULIUS ODUKADO OWITI, which was buried on 16/2/2018, in disobedience of lawful orders issued on 12.2.2018.

c) That the Honorable Court be pleased to cite the Defendants/Respondents for disobedience or lawful court order, and the defendants/respondents be committed to jail, for a duration not exceeding 6 months as court shall deem fit to grant.

d) Consequent to prayer (3) above, the Honorable Court be pleased to issue warrants of arrest directed to the OCS against the Defendants/Respondents, to bring them before this Honorable Court for punishment for breaching and or disobeying lawful court order dated 12/2/2018.

e) **IN THE ALTERNATIVE** and without prejudice to the foregoing, the Honorable Court be pleased to grant order for sequestration directed against the properties of the Defendants/Respondents, so that the same maybe attached and sold for disobedience of the court orders by the Defendant/Defendants.

f) Cost of the application be borne by the Defendants/ Respondents.

2. The application is anchored on the 1<sup>st</sup> applicant's supporting affidavit sworn on the even date, grounds (a) to (h) on the face of it, amended plaint of the even date and a copy of a letter by assistant chief, Timjope sub-location.

3. The defendants/respondents opposed the application by grounds of opposition dated 31<sup>st</sup> July 2018. The grounds are: 1 to 7

- a) **THAT** the application lacks merit as the same does not meet the threshold for the grant of the prayers sought.
- b) **THAT** the application is frivolous, vexatious, a sham bad in law and is incurably defective in form and substance.
- c) **THAT** no order or penal notice was validly previously displaced or served upon the respondents personally as required.
- d) **THAT** the applicants are guilty of indolence hence do not merit the grant of the prayers sought.
- e) **THAT** the affidavit of service relied on is deficient in detail and manner of service hence cannot be the basis of the contempt proceedings.
- f) **THAT** the application serves no useful purpose in the fair and just disposal of the substantive issue in this suit.
- g) **THAT** the application is an abuse of due process of this court and is only mean to settle personal vendetta and scores.

4. Mr. Agure Odera, learned counsel for the plaintiffs/applicants filed submissions dated 19<sup>th</sup> July 2018 and list of authorities namely **Mwangi Kibura v Attorney General Nairobi HC Misc. Civil Case No. 1445 of 2003**. He made reference to court orders issued on 13/2/2018, the instant application, section 8 of the Law Reform Act, an affidavit of service sworn by a process server and substituted service on the respondents. He urged that the respondents be punished for disobedience of court orders as the opposition thereto has no basis and the application is merited accordingly.

5. Mr. Sam Onyango learned counsel for the defendants/respondents filed submissions dated 31<sup>st</sup> July 2018 together with list of authorities of the even date. Counsel submitted that the respondents were not served with court orders of 12<sup>th</sup> February 2018 as shown on an affidavit of service sworn on 27<sup>th</sup> February 2018 by a process server, Julius Juma Otindo. That the affidavit of service is contradictory and refers to 2<sup>nd</sup> defendant as John Owiti Odukado which is not correct in the instant case. He relied on **Re – Bramble Vale Ltd (1970) ICH 128 at 137 and Woburn Estate Ltd vs Margaret Bashforth (2016) eKLR** in respect of the character of contempt of court to buttress his submissions.

6. I have carefully considered the application, the grounds of opposition and submissions. Have the applicants met the threshold for the grant of the orders sought?

7. The applicants contend that the respondents disobeyed lawful orders made on 12<sup>th</sup> February 2018. It is clear from the court record that the orders were made on 14<sup>th</sup> February 2018 pursuant to a notice of motion application dated 12<sup>th</sup> February 2018 and filed in court on 13<sup>th</sup> February 2018. The orders were extracted on 13<sup>th</sup> February 2018 to be served on the respondents for inter parties hearing on 28<sup>th</sup> February 2018. There is common baseline that lawful orders were duly issued for service upon the respondents for compliance.

8. The applicants further contend that the lawful orders were duly served on the 2<sup>nd</sup> defendant/respondent referred to as one JOHN OWITI ODUKADO in the affidavit of service sworn on 27<sup>th</sup> Feb 2018 by a court process server, Julius Juma Otindo. Paragraph 5 of the affidavit reads :

***“That sons and relatives of the deceased gathered around me with animosity shouted at me and lastly one son John Owiti Odukado- 2<sup>nd</sup> Defendant received the above named paragraph 2 (two documents, kept them and signed on the front page of the order returned to this Honorable Court).”***

9. The process server further averred at paragraph 6 of his affidavit as follows:

***“That I believe that the said service was properly effected upon the 4 Defendants through 1<sup>st</sup> Defendant John and same is returned to this Honorable Court.”***

10. The respondents’ counsel cast doubt at the service of the orders on the respondents. He submitted that the 2<sup>nd</sup> respondent is not one John Owiti Odukado and that the other defendants/respondents were not served personally as required by the law.

11. I am guided by the basis of contempt of court of law in Kenya at section 5(1) of the Judicature Act (Cap 8 Laws of Kenya) as well as the right of appeal at section 5 (2) of the Act. I further note section 63 (c) of the Civil Procedure Act (cap 21 Laws of Kenya) regarding punishment for disobedience of an order of temporary injunction. Essentially, contempt proceedings are quasi-criminal in nature and the court in punishing for it, exercises ordinary criminal jurisdiction as the standard of proof is beyond any reasonable doubt.

12. In the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others (2011) eKLR** , the Court of Appeal held, inter alia :

***“The need for a local law on the subject of contempt of court has been raised in several cases. We can only hope that....we shall continue relying on foreign law to guide us. Because in terms of section 5(2) of the Judicature Act, the court in punishing for contempt exercises ordinary criminal jurisdiction, it is paramount that the procedure for instituting proceedings be scrupulously followed.”*** (emphasis added)

13. In a nutshell, it is common baseline that the lawful orders of 12<sup>th</sup> February 2018 were duly extracted. There is doubt especially at paragraphs 5 and 6 of the process server's affidavit of service as to whether the respondents were served with the orders. That being the paramount procedure and there is a clear lapse, the application is bound to fail.

14. Accordingly, I decline to grant orders 2,3,4, and 5 sought in the applicants' application dated 27<sup>th</sup> February, 2018.

15. Costs of the application be in the cause.

**Delivered Signed and Dated in open court at MIGORI this 26<sup>th</sup> September 2018.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

MR. AGURE ODERO Learned counsel for the applicants

SAM ONYANGO learned counsel for the RESPONDENTS

Tom Maurice, court assistant