



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 412 OF 2012

KIMITI OLE NKAANGI.....PLAINTIFF/RESPONDENT

VERSUS

DAVID MUTUKU KILONZI.....1ST DEFENDANT/APPLICANT

PRISCILLA K. MUTUKU.....2ND DEFENDANT/APPLICANT

RULING

1. What is before me is the Application by the Defendants dated 31st July, 2018 seeking for the following orders:

- a. That this Honourable Court be pleased to order that the Respondent, Kimiti Ole Nkaangi, be committed to jail for such period as this Honourable Court may deem fit and just for disobedience of the orders given by this Honourable Court on 26th July, 2018.*
- b. That this Honourable Court be pleased to declare the interment of the remains of one William Nkaangi on Parcel No. L.R. 14776/1 as unlawful for being in contempt of the orders issued on 26th July, 2018 and to order the exhumation of the said body forthwith and in any event within seven (7) days of the order.*
- c. That this Honourable Court be pleased to declare the interment of the Plaintiff/Respondent's late mother on the suit property as an act of trespass and to order the exhumation of the said body forthwith and in any event within seven (7) days of the order.*
- d. That in default of the above, the Public Health Officer, Machakos, do undertake the exhumation and interment of the bodies at the Machakos Public Cemetery at the Plaintiff/Respondent's cost.*
- e. That further this Honourable Court declares as illegal the acts of trespass into the Applicants' property and the interment of the remains of the deceased William Nkaangi and the Plaintiff/Respondent's mother in light of the Judgment of this Honourable Court made on 13th April, 2018.*
- f. That the costs of this Application be borne by the Respondents.*

2. The Application is supported by the Affidavit of the 2nd Defendant who has deponed that on 24th July, 2018, he learnt that the Plaintiff was planning to inter the remains of his late brother on a parcel of land known as L.R. No. 14776/1 (*the suit land*); that an Application to stop the said burial was filed on 26th July, 2018 and that an order of injunction stopping the said burial was issued by the court.

3. The 2nd Defendant deponed that on the evening of 27th July, 2018, the Plaintiff was served with the order of the court by the area Chief but declined to receive or acknowledge receipt of the said order and that the order was read to the Plaintiff and his clan but they still proceeded to inter the remains of the deceased on the suit land. The 2nd Defendant stated that the Plaintiff should be committed to civil jail for disobeying the orders of this court and that the two bodies which have been buried on the suit land be exhumed and be buried in a public cemetery.

4. In response, the Plaintiff deponed that he never mobilized Maasai Morans to block the process-server from serving him with the court order; that he was never served with the order of the court of 26th July, 2018 and that the remains of his late mother and brother were interred on the suit land by his family members and the clan who are not parties to this suit.

5. Having not been personally served with the order of the court by the process-server, the Plaintiff deponed that the court lacks the jurisdiction to curtail his liberty by committing him to jail.

6. When the process-server was cross-examined on the contents of his Affidavit of Service, he stated that he received the order of this court to serve upon the Plaintiff on 27th July, 2018; that he met the Chief of the area where the suit property is situated and gave him the order of the court to serve upon the Plaintiff and that he left the order with the Chief because the Chief informed him that he could not guarantee his security.

7. PW1 informed the court that it is the Chief who served on the Plaintiff with the said order of the court and that he did not know the Plaintiff's residence, neither did he accompany the Chief during the said service of the order.

8. The Defendants'/Applicants' advocate submitted that given the hostility on the ground, the process-server gave to the Chief of the area the order of the court to serve upon the Plaintiff; that the said order was served on the Plaintiff on 28th July, 2018 by the Chief who was accompanied by police officers and that the Plaintiff was made aware of the existence of the said order.

9. According to the Defendants' advocate, all that was required was for the contemnor to be notified of the order of the court, either by email, telephone or otherwise. Counsel relied on the case of ***Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR***.

10. The Plaintiff's/Respondent's advocate submitted that there was no personal service or service by substituted service of the order of the court on the Plaintiff; that what is contained in the Affidavit of Service of the process-server is hearsay and that the people who purportedly effected service on the Plaintiff have not sworn an Affidavit of Service. Counsel relied on numerous authorities which I have considered.

11. It is not in dispute that on 26th July, 2018, this court restrained the Plaintiff or his agents and clansmen from interring the remains of William Nkaangi on land known as L.R. 14776/1 pending the hearing and determination of the Application inter-partes.

12. According to the evidence of the process-server, he was issued with the said order on 27th July, 2018 and after discussing the issue of service of the order on the Plaintiff with the Chief of the area, he was advised against serving the Plaintiff with the order. In the Affidavit of Service, the process-server deposed as follows:

“4. That due to the hostility on the ground, the Chief (David Keparon Lereiyan) asked me to give him copies of the order so that he can go and serve the Plaintiff/Respondent as he could not guarantee my safety.

5. That on 27th July, 2018 the Chief called me through his cell phone No. 0711-779835 and informed me that he had met the Plaintiff/Respondent at his home, informed and showed him a copy of the court order and also went further to explain to him what was required from him in the circumstances but he refused to hear and also declined to receive the court order.

6. That on 28th July, 2018, I received information that Mr. Timothy Kilonzi went to the Plaintiff's/Respondent's home with the police and the police read the court order to the Plaintiff's/Respondent's clansmen, relatives and villagers and asked them to respect the court order and wait for the court's decision on the matter on 31st July, 2018.”

13. In cross-examination, the process-server repeated the above depositions, and confirmed that indeed he did not personally serve the Plaintiff with the order of 26th July, 2018.

14. It is true, as submitted by the Defendants' counsel, that personal service of an order of the court is no longer a requirement. However, where a party is alleged to have disobeyed an order of the court, there must be cogent evidence to show that the alleged contemnor was aware of the order. In the ***Shimmers Plaza Limited vs. National Bank of Kenya (2015) eKLR case***, the Court of Appeal held as follows:

“The notice of the order is satisfied if the person or his agent can be said to either have been present when the Judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the Judgment and/or order.... once the Applicant has proved notice, the Respondent bear an evidential burden in relation to willfulness and mala fides disobedience.”

15. The burden of proving that the Plaintiff/Applicant was notified of the order of the court was on the Defendants. The process-server has admitted that he was not present when the Chief or the police officers served the Plaintiff with the order of 26th July, 2018. Indeed, the process-server's depositions are all based on what he was informed by the Chief and a Mr. Timothy Kilonzi.

16. If indeed the Chief served on the Plaintiff with the order of the court, then the Chief should have filed an Affidavit of Service. He never did that. In any event, the process-server should have accompanied the Chief and the police to serve the order of the court if indeed his security was threatened. The practice of process-server's delegating their statutory duties of effecting service of the orders of the court to other agencies is the last thing the court would encourage.

17. In the absence of evidence to show that the Plaintiff was served with the order of 26th July, 2018, or that he was made aware of the said order before the burial of the late William took place, I find that the Application dated 31st July, 2018 is unmeritorious. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE