



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 592 OF 2016

PETER KARUIKI KARINGE.....1ST PLAINTIFF

PETER GITHUTHA KARINGE.....2ND PLAINTIFF

SIMON MWANGI KARINGE.....3RD PLAINTIFF

VERSUS

KARUIKI MUCHAI.....DEFENDANT

RULING

Introduction

1. The plaintiffs filed this case on the 21st December 2016. They aver that they are the registered proprietors of all that parcel of land known as Mau Summit/Molo Block 2/158 (Mona).
2. The plaintiffs accuse the defendant of invading the aforesaid suit land and staying on it. The prayers sought in the plaint include:
 - a) **A declaration that the plaintiffs are the owners of all that parcel of land known as Mau Summit/Molo Block 2/158 (Mona)**
 - b) **A permanent injunction restraining the defendant, his servants or agents from burying Wangari Muchai (deceased) on the subject land namely Mau Summit/Molo Block 2/158 (Mona)**
 - c) **An eviction order against the defendant from the parcel of land known as Mau Summit/Molo Block 2/158 (Mona)**
3. Alongside the plaint, the plaintiffs filed a Notice of Motion dated 21st December 2016 in which they sought, under certificate of urgency, an injunction restraining the defendant from burying the body of Wangari Muchai on the suit land pending hearing and determination of the application.
4. The Certificate of Urgency was argued on 21st December 2016 before the Hon. Justice A. Ombwayo who granted an injunction restraining the defendant from burying the body of Wangari Muchai on the suit land pending hearing and determination of the application.
5. An extracted order along the above terms was issued and signed by the Deputy Registrar on 22nd

December 2016.

6. On 18th January 2017 the plaintiffs filed a Notice of Motion dated 16th January 2017 seeking the following orders:

1.

2. **THAT this honourable court be pleased to commit the defendant/respondent to civil jail for contempt of and/or for disobeying a court order issued on the 22nd December 2016.**

3. **THAT this honourable court be pleased to issue a warrant of arrest to effect the arrest of the defendant/respondent.**

4. **THAT this honourable court be pleased to order the body of Wangari Muchai be exhumed from the parcel of land known as Mau Summit/Molo Block 2/158 (Mona) pending the hearing of this suit.**

5. **THAT the Officer Commanding Molo Police Station to oversee the exhumation.**

7. It is this latest Notice of Motion dated 16th January 2017 which is the subject of this ruling.

Submissions

8. Though there was evidence that the defendant was served with the Notice of Motion dated 16th January 2017. The defendant neither filed any response to the application nor attended its hearing. As a result, the hearing proceeded unopposed.

9. The plaintiffs' advocate submitted that the order given by the court on 21st December 2016 and issued by the Deputy Registrar on 22nd December 2016 was served upon the defendant on 22nd December 2016.

10. It was further submitted that despite service of the order, the defendant disregarded the order by burying the body of Wangari Muchai on the parcel of land known as Mau Summit/Molo Block 2/158 (Mona) on 23rd December 2016.

11. The plaintiffs argued that the defendant's action amounted to abuse of court process and contempt of court. Further, such action was said to cause the plaintiffs intense frustration and humiliation.

Analysis and determination

12. From the record and the evidence put before the court, there is no dispute that on 21st December 2016 the Hon. Justice A. Ombwayo granted an injunction restraining the defendant from burying the body of Wangari Muchai on the plaintiffs' parcel of land known as Mau Summit/Molo Block 2/158 (Mona).

13. There is also no dispute that the extracted order was served upon the defendant on 22nd December 2016. An affidavit of service was annexed to the supporting affidavit as proof of service.

14. Court orders are not issued in vain. They are meant to be obeyed and acted upon. Any person who willfully disobeys a court order does so at his own peril. Indeed, the order that was served in the instant case had a penal notice stating thus:

“Any person served with this orders and disobeys the same shall be in contempt of the court and shall be liable to six months imprisonment and/or a fine or both”

15. It follows that the obligation to obey the order and the consequences for disobedience were all made

abundantly clear to the defendant.

16. In the case of **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others** **Petition No. 23 of 2013** the court stated:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

17. An allegation of contempt of court is therefore a matter that goes to the core of the proceedings before the court, administration of justice and the rule of law generally.

18. As I have already noted, there is evidence that the defendant was served with the order herein. The plaintiffs have stated on oath that despite service, the defendant went ahead and buried the body of Wangari Muchai on the plaintiffs' parcel of land known as Mau Summit/Molo Block 2/158 (Mona). There is no evidence on record which contradicts this position.

19. Clearly, the defendant's action is in violation of the court order made on 21st December 2016. I therefore have no hesitation in finding, as I hereby do, that the defendant is in contempt of court.

20. Prayer 4 of the application before the court is for an order that the body of Wangari Muchai be exhumed from the parcel of land known as Mau Summit/Molo Block 2/158 (Mona) pending the hearing of this suit.

21. I have considered this particular prayer in the wider context of the claim before the court. As already noted, the plaintiffs seek a declaration that they are the owners of all that parcel of land known as Mau Summit/Molo Block 2/158 (Mona). Upon hearing of the case on its merits, the court will have occasion to make a final determination on who owns the suit land.

22. The plaintiffs also seek a permanent injunction restraining the defendant, his servants or agents from burying Wangari Muchai (deceased) on the subject land namely Mau Summit/Molo Block 2/158 (Mona). Though this particular prayer appears to be overtaken by events, the issue of exhumation is best dealt with conclusively at the final hearing of the suit, once a final determination is made on who owns the suit land.

23. Exhumation is a draconian and an untidy measure that the court should only order in exceptional situations. As was observed by D. A. Onyancha J. in **HELLEN CHERONO KIMURGOR V ESTHER JELAGAT KOSGEI [2008] eKLR**

From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions, however arise when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so

....

24. I am of the view that in the circumstances of the present case, justice is best served by dealing with the issue of exhumation at the conclusion of the case.

Conclusion

25. In the end I find that the defendant is in contempt of court. I order that the plaintiff's advocate serves the defendant with notice to attend court to show cause why he should not be punished for contempt of court. The date of attendance will be fixed by the court upon delivery of this ruling.

26. I further order that the issue of exhumation be dealt with at the hearing of the main suit. In that regard, I hereby grant the plaintiffs leave to amend the plaint so as to incorporate the issue of exhumation. The amended plaint to be filed and served within 14 (fourteen) days from the date of delivery of this ruling.

27. So as to bring the matter to an early conclusion, I order that the hearing of the suit be fast tracked. Directions in this regard will be given by the court upon delivery of this ruling.

28. Costs to the plaintiffs.

29. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2017.

D. O. OHUNGO

JUDGE

In the presence of: