



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

ELC NO. 199 OF 2016

MOHAMED KAI GARI.....PLAINTIFF/APPLICANT

= VERSUS =

JOYCE CHAKWE DECHE.....DEFENDANT/RESPONDENT

RULING

1. I have before me a Notice of Motion application dated 14th September 2016. The Plaintiff/ Applicant Mohamed Kai Gari is praying for Orders: -

2. THAT the Defendant/Respondent be summoned to appear before court and show cause why she should not be committed to civil jail for a period not exceeding six months for disobeying the orders of this court issued on 5th August 2016.

3. THAT an order be issued to exhume the remains of the Defendant's brother's wife one Rose Mutete Mrima at the Defendant's costs from land parcel known as Portion 2234 which portion is within plot 2211 the suit property herein which was buried while there existed restraining orders(sic).

4. THAT the costs of the application be provided for.

2. The Application is supported by an Affidavit sworn by the Applicant on 14th September 2016. The gist of the Application is that the Respondent has deliberately disobeyed court orders issued herein on 5th August 2016. The said orders restrained the Respondent, her family members, servants, agents and any persons acting under her authority from burying the body of her brother's wife one Rose Mutete Mrima in Portion No. 2234 which is within Plot No. 2211 situated at Mafisini. It is the Plaintiff's case that inspite of the existence of the said orders, the Defendant proceeded to bury the body on the suitland on 6th August 2016. Accordingly, the Plaintiff prays that the Defendant be punished for contempt and that the body buried in the suit property, be exhumed forthwith.

3. The Respondent Joyce Chakwe Dache is opposed to the grant of the orders sought. In a Replying Affidavit sworn and filed herein on 1st November 2016, the Respondent denies that she was ever served with any court orders prior to the burial of her brother's wife. She avers that in any event while it is true that her sister-in-law was buried on Plot No. 2234 within Mafisini Adjudication Section, it is not true that the said Plot is within Plot No. 2211 as alleged by the Plaintiff. The Defendant further states that the said Plot No. 2234 Mwembe Kati/Kasidi belongs to 3 allotees, namely herself, Joseph Mrima and Reuben Deche Kai and she does not understand why she is the only one being singled out and being sued. It is

her case that as a woman under the Mijikenda Customary Law, she could not take a leading or active role in the burial ceremonies for her sister-in-law and that the suit against her is therefore brought for other ulterior motives.

4. I have considered the Application and the Affidavit in Reply. I have also considered the Plaintiff's submissions filed herein. The Defendant did not file submissions within the time provided.

5. It is not contested that on 5th August 2016, the Honourable Justice PJ Otieno sitting in Mombasa granted interim orders herein when an application dated 2nd August 2016 was placed before him ex-parte under Certificate of Urgency. The said orders read as follows: -

1. That the Application dated 2nd August 2016 be and is hereby certified as urgent.

2. That a temporary injunction order be and is hereby issued for 14 days restraining the defendants, her family, servants, agents and any person acting under her authority from burying the dead body of his brother's wife in Portion No. 2234 which portion is within Plot No. 2211 situate at Mafisini on condition that the application is fixed for hearing before this Order is extracted and the same be served before close of business on 8th August 2016.

3. That the application(sic) fixed for inter-partes hearing on 18th August 2016."

6. By an Affidavit of Service sworn by the plaintiff himself on 9th August 2016, the Plaintiff avers that he served the said orders upon the Defendant on 6th August 2016 at about 8.00 a.m. at the DO's Office at Mafisini Chonyi and that she acknowledged service thereof by signing at the front of his copy. Attached to the Affidavit is a document titled "List of Witnesses" showing the name Joyce C Deche scribbled thereon with a date for 6th August 2016. A copy of the order allegedly served and/or received is not annexed thereto and I am unable to state for sure if the said Order was indeed served upon the Respondent in person.

7. Be that as it may, I note that at paragraph 6 of the Plaint, the plaintiff states as follows:

6. "The Defendant and his brothers and her sister have been building houses without permission or consent from the owners of Plot No. 2211.

9. On 24th July 2016, the Defendant's brother's wife died and the Defendant and his brothers and sisters are intending to bury her in the Plaintiff's shamba 2234 being a Portion of Plot No. 2211.

8. From the two Paragraphs of the Plaint, it is clear to me that the Defendant has brothers and sisters. It has not been made clear to me why the Defendant is the one who should take responsibility for the decision and actual fact of burying her sister-in-law on the suitland when her brother whose wife has died has not been sued. I do not at any rate think that her brothers and sisters were her agents and/or servants and/or that she had any overall control on the decision to bury and the actual act of the burial of her sister-in-law in the suit land. Indeed, nothing has been placed before me to demonstrate that the Defendant herself as a person was responsible for the said burial.

9. At the same time, it was the Defendant's contention that the burial was done on Plot No. 2234 which is separate and distinct from Plot No. 2211. The Plaintiff has not denied or placed anything before me to show that that is not the case.

10. In the circumstances, I find no merit in the application dated 14th September 2016. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J. O. OLOLA

JUDGE