



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 102 OF 2017

CHEMA HOLDINGS LIMITED.....PLAINTIFF

VERSUS

JULIUS JUMA KUYOYI.....1STDEFENDANT

ELIZABETH NANYAMA KUTOYI.....2ND DEFENDANT

RULING

1. The application dated **11/7/2017** seeks an orders that the defendants be cited for contempt of court and that they be committed civil jail for a term of six (6) months for having deliberately disobeyed the orders of this court issued on **8/6/2017**. It also seeks two more orders: an order that the body of **Peter Kutoyi** (deceased) interred on the night of **10/6/2017** on **LR. No. 6656 (IR.No.19633)** within Trans-Nzoia County be exhumed and removed from the suit property and that an order of permanent injunction be issued restraining the defendants or their agents from trespassing and/or in any way interfering with the suit land.

2. The grounds upon which the application is made are set out at its foot, namely, that the plaintiff is the registered owner of the suit land; that the defendants deliberately and without any justifiable cause whatsoever disobeyed the orders of this court issued on 8/6/2017 restraining them from burying the remains of Peter Kuyoyi (deceased) on the suit land that the dignity and authority of the court must be protected at all times and the court must now exercise its Constitutional authority by punishing the defendants for contempt of court and that the interment of the remains of Peter Kutoyi (deceased) on the suit land is an infringement of the plaintiff's constitutional rights to free ownership of private property.

3. The application is supported by the sworn affidavit of Nancy Atsango Chesoni sworn on 19/6/2017. Annexed to that affidavit is Exhibit "NAC 2", a copy of the order of this court issued on 8/6/2017. The deponent states that this document is evidence that service of the order was effected upon the defendants, the O.C.S. Kitale and the Medical Superintendent of Trans-Nzoia County Hospital on 9/6/2017. An affidavit of service is also exhibited as "NAC3". It is sworn by one Jackson Nyongesa Simiyu.

4. The deponent further states that the defendants employed a ruse to get the deceased's body released to one Isaac Wekesa fraudulently on the premises that they intended to bury the deceased in Bungoma County. However, in contravention of the court order issued by this court on 8/6/2017, the defendants proceeded to bury the remains of the deceased on the plaintiff's land on the night of 10/6/2017. This, the deponent states, on the basis of advice rendered by his advocate, amounts to contempt of court and calls for penal sanctions.

5. The application is opposed. Three affidavits, one sworn by Juma Peter Kutoyi on 18/8/2017, a second

one sworn by Elizabeth Nanyama Kutoyi on 18/8/2017 and a third one sworn by Gladys Namoreme Namunyu were all filed together in the court record on 18/8/2017 in opposition to the motion.

6. The theme of the first two affidavits is that the defendants' names are not as spelt in the title to the suit and order and that they were not served with the court order issued on 8/6/2017 hence they were not aware of the same and cannot therefore be said to have disobeyed it. The 1st defendant avers that on 9/6/2017 when he is said to have been served with the order at Big Tree, he was at Naivasha. The 2nd defendant avers that on 9/6/2017 when she is said to have been served with the order at Big Tree, she was at a place called Kambi ya Miwa in her matrimonial home. She states that, she never stepped into her parent's home at Chema Estate or Big Tree on 9/6/2017.

7. The affidavit of Gladys Namorome Namunyu avers that the deponent was with the 2nd defendant at her salon business situated near High View Hotel on 9/6/2017 between the hours of 12.30 pm and 5.30 pm. The affidavit of service states that the defendants were served with the copies of inter alia, the order at about 1.30pm at their home at Big Tree. Besides, the defendants aver that they were not in charge of the burial arrangements of the deceased. The third affidavit is ostensibly an alibi, stating that the 2nd defendant was in Kitale Town on the day of the purported service.

8. In her further affidavit sworn on 11/9/2011 Nancy Atsango Chesoni reiterates her averments that the defendants were served and that they took charge of the burial of their deceased father.

9. Regarding their descriptions the applicant responded that the 1st defendant is known by the name Julius Juma Kutoyi and that the mere fact that the names in his identity card reflect as Juma Peter Kutoyi should not be construed to mean Juma Peter Kutoyi is a different person. The deponent states that the 1st defendant does not deny that he is the son to the deceased.

10. As regards the 2nd defendant, the plaintiff avers that she is known as Elizabeth Nanyama Kutoyi and the mere fact that the name her identity card reads Elizabeth Nanyama Karani should not be construed to mean she is a different person other than the person named. The deponent also points out that the 2nd defendant does not deny that she is the daughter of the deceased.

11. The plaintiffs filed their written submissions on 11/9/2017 and the defendants filed theirs on 16/10/2017.

12. The plaintiff urges that the order was served. The plaintiff also urges that that the conduct of the respondents clearly demonstrated that they had full knowledge of the order. This conduct included obtaining the body from the mortuary vide a burial permit indicating that the burial would be in Bungoma and not Trans-Nzoia County and conducting the burial of the deceased at night on the night of 10/6/2017 when the police had left the premises.

13. The plaintiff cites the case of ***Basil Criticos -vs- Attorney General & 8 Others 2012 eKLR*** for the proposition that where a party acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary and I agree with the holding in that case. The plaintiff submits that the order was clear and unambiguous yet the defendants tried to circumvent it by using one Isaac Wekesa to fraudulently obtain a burial permit indicating that they intended to bury the remains of the deceased elsewhere.

14. The defendants' submission is that the name on the order is different from the name on his identity card hence he could not have been the person served with the court order. He also reiterates that on 9/6/2017 he was at Naivasha and only travelled to Kitale on 10/6/2017 for his father's burial which was allegedly conducted on 11/6/2017. A similar argument regarding the 2nd defendant's name is advanced in the submissions. She avers that she does not know anyone by the name Elizabeth Nanyama Kutoyi, and that owing to these differences in the names of the defendants and the names on the order, it is not possible to know the person who the plaintiff intended to sue. It is urged that the orders of 8/6/2017 were obtained *ex parte* hence the defendants could not have been said that the defendants were aware of the

orders so as to deliberately choose to ignore or fail to comply with the same.

15. It is averred that if service was effected, it must have been effected on persons other than the defendants. The defendants rely on the case of *Kiarie Mbugua –vs- Njoki Mbugua NBI HC 1660 of 1992*. The defendants also submit that no sufficient evidence has been adduced to warrant exhumation of the deceased’s remains and that nothing has been said about the steps that should be taken once the exhumation has taken place, if the orders sought are granted. The defendants state that there is no evidence that burial took place at night. The defendants further aver that the plaint does not form a good anchor to the application because it does not contain any prayer relating to exhumation. They cite the case of *Ondima Mongeri -vs- Jeff Ombati Ondima & Another NBI HCCC No. 58 of 2008* for this proposition.

16. This court has to determine the following issues:-

(1) Was the order served upon the defendants and did they know of the order?

(2) If served does the difference in the names in these proceedings and the names in the Identity Cards held by the defendants render that service, invalid for the purposes of these committal proceedings?

(3) What orders should issue on the application dated 18/7/2017?

17. A striking feature of the two defendants’ defence in their reliance on technicalities relating to the difference in the names used in these proceedings and the names on their identity cards. However it must suffice to state that even the Civil Procedure Rules do recognize that no proceedings shall be defeated by solely by reason of misjoinder or misdescription of the parties and the court is able to order amendment to pleadings at any stage to reflect the proper person who was intended to be sued.

18. **Order 1 Rules 9 and 10** are relevant in this regard. It is obvious that though plaintiffs may know the persons they intend to sue by certain names by which the intended defendants are commonly referred to in social circles, it is a tall order to expect and require the plaintiffs to know each and every name by which the intended defendants are registered for the reason that registration documents, which may not be of great consequence where for example a pseudonym is acknowledged and generally used anyway, are in the sole and private custody of the intended defendants.

19. It is also noted that even in the further affidavit, the fact is reiterated that the names in the proceedings are the names the defendants are known by. In this court’s view, that defence therefore falls to the ground.

20. Secondly, the defendants are said to have taken charge over the burial arrangements of their deceased father. The deceased was 84 years old as per the records and his wife though mentioned as having taken charge over the burial, is not assigned any age bracket in the affidavits sworn by the defendants to show that she was up to the task. This court’s presumption is that she is aged. It is also inconceivable that in an African setting where matters relating to the burial of deceased loved ones are given priority and conducted openly the 1st defendant, after learning of the demise of the deceased, only travelled to Kitale on 10/6/2017 only to attend the burial. There is no evidence submitted to show that the 1st defendant was at Naivasha at the material time upto 10th June, 2017 when he alleged to have begun travelling to Kitale for the burial. The court takes judicial notice of matters of common notoriety in burial ceremonies that take place nowadays: drawn up programmes and photography - even chance mobile phone photography. Evidence of whoever attended would have been available through scrutiny of pictures. The other notorious feature, the presence of an area chief or other “*mtu wa serikali*” (as they are commonly referred to, in such gatherings) to address the gathering if it was done during the day, is also missing. The lack of evidence of these features attracts the court’s eye and may explain the plaintiff’s insistence that the burial was knowingly conducted at night in order to sidestep the court order.

21. The identity of Isaac Wekesa is also not revealed by the defendants, who have also not submitted his sworn affidavit to detail how he is related to the deceased to the point that the deceased’s body could be

released to him by the hospital, and why there was an indication misleading though, that the deceased was resident in Bungoma and not Trans-Nzoia. Whenever, despite the opportunity to controvert being availed in a serious matter like the instant one, only silence meets an allegation, or economy of facts is detected in a defendant's response, there is likelihood that the allegation being evaded has some truth in it. The allegations of fraudulent procurement of the deceased's body for burial has not been sufficiently dispelled by the defendants. The question remains: if the Police and the Hospital Superintendent's office were evidently served with the order, there is little probability that the defendants did not know that an order had issued. None of the defendants avers positively that they were not informed by either the police or the hospital management that there was a court order. I find that both institutions acknowledged receipt by stamping upon the copy of the order, so the chances of the defendants not being informed that there existed an order are quite minimal. For this reason I find that the defendants were served and that further, they knew of the existence of the court order and that they took measures to sidestep it to ensure that the burial took place. I find that the said Wekesa obtained release of the body of the deceased by fraudulent means and that he must be presumed to have been acting for the two defendants who had knowledge of the court order against them.

22. As to whether the orders of exhumation should issue, it is proper to apply caution and observe that that order is in the form of a mandatory injunction and that mandatory injunctions are only issued in a limited number of cases. In the case of *Beatrice Ngima Mwai V Gichine Mwai & Another [2010] eKLR* the court revisited the principles for the grant of a mandatory injunction as settled in two other prior cases. The court in that case stated as follows:

“The main order sought by the Applicant is that of a mandatory order of injunction in which the Applicant has prayed for the 1st Respondent to be forcefully evicted from L. R. NO. KIINE/KIANGAI/33. Before granting an order of mandatory injunction the court must consider the well settled principles. In *SHARIFF ABDI HASSAN =VS= NADHIF JAMA ADAN C.A. NO. 121 of 2005 (unreported)* the Court of Appeal restated those principles at page 11 as follows:

“The law as regards the principle to be applied when considering the two prayers is different from the principles set out in *Giella's* case for the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. The case of *LOCABAIL INTERNATIONAL FINANCE LTD =VS= AGRO- EXPORT AND ANOTHER [1986] 1 ALL E.R. 901* set out the principles applicable in cases of mandatory injunction. It states as follows:-

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

23. In this court's view, where the party against whom a mandatory injunction has been sought has committed an act calculated to ensure that he steals a march on his adversary a mandatory injunction can be issued even at the interlocutory stage. That is the observation in the *Locabail case*. The defendants in this case were clearly aware of pending litigation in respect of the suit land. They are culpable of an action that can be deemed as an attempt to steal a march on the plaintiff. Should this court then be deterred from issuing a mandatory order on the basis that authorities have been cited showing that where no other step has been sought in the prayers the orders of exhumation would not issue? I think not. Had the order been complied with in the first place the defendants would not have been put to the inconvenience that now looms. I find that the defendants tried to alter the situation to the disadvantage of the plaintiff after an injunction had issued and this cannot be condoned by this court. It should have been

their concern to determine what course of action to legally take in respect of the deceased's remains.

24. I therefore allow the prayer on exhumation and order that the defendants, who have responded to this application, do conduct the exhumation and re-interment in any public cemetery at their own expense. In default the plaintiff shall be at liberty to consult with the concerned Public Health Officer and effect the exhumation as he may prescribe for burial at any public cemetery also at the defendant's expense. Since I have found that the defendants were in contempt, I hereby convict them of the offence of contempt of court and order that they shall appear before this court on the **8th November, 2017** for sentencing, failure to which warrants of arrest will promptly issue against them both.

Dated, signed and delivered at Kitale on this **31st** day of **October, 2017**.

MWANGI NJOROGE

JUDGE

31/10/2017

Coram: Before Mwangi Njoroge - Judge

Court Assistant – Picoty

Ms. Bett for the respondent

Mr. Analo for the applicant

COURT

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

31/10/2017