



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.291 OF 2013

CHRISTOPHER
MBINDA.....1ST
PLAINTIFF

PANCREAS
MBINDA.....2ND
PLAINTIFF

VERSUS

CLAUDE MWENDE
1ST DEFENDANT

GEORGE
OGINGA.....2ND
DEFENDANT

ODHIAMBO
OGORO.....3RD
DEFENDANT

OTIENO
OGORO.....4TH
DEFENDANT

PHILEMON
OMONDI.....5TH
DEFENDANT

JOHN
OMONDI.....6TH
DEFENDANT

JOHN MARK OMONDI.....
.....7TH DEFENDANT

REUBEN ONYANGO OHOLA.....
.....8TH DEFENDANT

ORARE.....9TH
DEFENDANT

OOKO OMWANDA.....
.....10TH DEFENDANT

HENRY MOI MARANJE.....
.....11TH DEFENDANT

RULING

Christopher Mbinda, and Pancras Mbinda, hereinafter referred to as the 1st and 2nd Plaintiffs, filed the notice of motion dated 28th October 2015 seeking to have **John Omondi**, the 6th Defendant, committed to jail for a term not exceeding six months for breach and disobedience of court orders. They also pray that the Defendants be denied audience until after the 6th Defendant has purged his disobedience. The application is based on the four grounds on its face summarized as follows:

- a) That on 3rd September 2015 the court granted an order restraining the Defendants from among others burying the body of **Risper Omondi** on land parcel **North Ugenya/Ndenga/591**.
- b) That the order was served on all Defendants including the 6th.
- c) That the 6th Defendant, in disregard and contempt of the said order, buried the body of the deceased on the said land.

The application is supported by the affidavit of **Pancras Mbindah**, the 2nd Plaintiff, sworn on the 28th October 2015 who depones as follows among others;

- a) That he is the registered proprietor of the suit land from 11th July 1989.
- b) That the restraining order issued on 3rd September 2015 was served on the 6th Defendant on 4th September 2015.
- c) That on the 12th September 2015, the 6th Defendant brought the deceased body to the suit land and buried it there in total disregard of the court order.

2. That the 6th Defendant did not file any replying papers as required under **Order 51 Rule 14 (1)** of Civil Procedure Rules, though leave to file was granted when counsel for both sides appeared before this court on the 25th February 2016. That when the matter came up for mention on the 26th April 2016 in the absence of the Plaintiffs’ counsel, the counsel for the 6th Defendant informed the court that they had filed their submissions dated 29th March 2016 on 30th March 2016. The counsel for the Plaintiff later filed their written submissions dated 25th April 2016 on the same date.

3. The issues for determination are as follows:

- a) Whether the 6th Defendant buried the body of the late Risper Omondi on the suit land.
- b) Whether the order of 3rd September 2016 had restrained the 6th Defendant from burrying the body of the said deceased on the suit land.
- c) Whether the 6th Defendant had been served with the said order.

d) Whether the 6th Defendant is in contempt of the court order and if so whether he should be cited for contempt and punished.

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by 2nd Plaintiff, the record of the court, submissions by counsel and come to the following determinations;

a) That after the 6th Defendant failed to file and serve any of the replying papers to the notice of motion as provided for under **Order 51 Rule 14 (1)** of the Civil Procedure Rules the provisions of **sub rule (4)** of the said order came to play and allows the Plaintiffs to be heard *ex parte*. That effectively means the facts deposed to in the 2nd Plaintiff affidavit remains unchallenged by the 6th Defendant and the court will take them as unrebutted. That the facts include that the 6th Defendant had been served with the order and in disobedience buried the deceased on the land.

b) That further to the findings in (a) above, the court has perused the court record and confirmed that the counsel for the Plaintiffs appeared before Hon. T. Obutu, Principal Magistrate on the 3rd September 2015 in respect of the notice of motion dated 3rd September 2015 and had prayers 1 and 2 granted in the interim pending interpartes hearing on the 17th September 2015.

c) That the 6th Defendant was served by Denis Opio Oduor with a copy of an order erroneously dated the 2nd day of September 2015, as confirmed in his affidavit of service sworn on 15th September 2015 and filed in court on 16th September 2015. The court has also perused the court record and seen a copy of an order which though indicating it was given on 3rd September 2015, the date of issue is erroneously shown as 2nd September, 2015. That though the court was not addressed on this aspect, it would have been important for the counsel for the Plaintiffs to explain how the order could have been extracted and issued before the drawing and filing of the notice of motion that it is based on and the date it was granted being the 3rd September 2015.

d) That where an interim order is issued by the Deputy Registrar pursuant to **Rule 21** of the Chief Justice's practices directions of 28th July 2014, such an order is meant to be for a short and brief period awaiting the matter being placed before the judge for further directions or orders. That the interim order were to remain in force until the 17th September 2015 when the interpartes hearing was to take place. That a hearing notice had been served on the 6th Defendant on 4th September 2015 with the extracted order and other documents but instead the 6th Defendant opted to ignore the order and buried the body of the deceased on the 12th September 2015. That the conduct of the 6th Defendant amounts to contempt of court. That the 6th Defendant has not offered to purge the disobedience and the court finds that he is in disobedience and is cited for contempt of the court order as prayed. That the conduct of the 6th Defendant should not adversely affect the other Defendants right of audience before the court.

5. That in view of the foregoing the notice of motion dated 28th October 2015 is found meritorious and the 6th Defendant is hereby cited for contempt and the penal sanctions are to be issued after hearing the 6th Defendant in mitigation. That the 6th Defendant will also pay the costs of this application. That if the 6th

Defendant is not in court a warrant of his arrest is to issue forthwith.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel M/S Kirabu for Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016

23/11/2016

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

M/S Kirabu for the Plaintiff

Court: Ruling delivered dated in open court in presence of M/S Kirabu for Plaintiffs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016