



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC CIVIL CASE NO. 100 OF 2014

PHILIP CHILUMO MBARU (*suing as the legal administrator ad litem of the Estate of BAYA NDALE BAYA*.....)**PLAINTIFF/**

APPLICANT

=VERSUS=

1. DZOMBO CHARLES CHAI

2. RAMA CHARLES CHAI

3. JUMA CHARLES CHAI

4. MATANO CHARLES CHAI

5. KITI CHARLES CHAI.....DEFENDANTS/RESPONDENTS

RULING

Introduction

1. Before me is the Plaintiff's Application dated 12th June, 2014 seeking for the following orders;-

a) **The Defendant be committed to Shimo La Tewa Prison for a period of six months for contempt of court order dated 6th June, 2014.**

b) **Costs of the Application be borne by the Respondents.**

The Applicant's case

2. It is the Plaintiff's case that on 7th June, 2014, he accompanied the process-server, Michael Otieno, and served the Defendant with the court order dated 6th June, 2014.

3. The Plaintiff has deponed that the Defendants despite being aware for the existence of the court order restraining them from burying the deceased on the suit property proceeded to do so.

The Respondent's case

4. According to the Respondent's affidavit, the Plaintiff has never resided on the suit property and that the Plaintiff and his late father have all along resided at their farm in Bandarasalama in Chonyi location.

5. According to the Defendants, they were served with the order of the Court on 7th June, 2014 at around 1.00 Pm and yet they had already interred their late father at 11.00am.

Analysis & findings

6. The only issue that I am supposed to determine in this Application is whether by the time the Defendants were served with the order of this court on 7th June, 2014, they had already buried the deceased.

7. The order of this court dated 6th June, 2014 and issued on the same date prohibited the Defendants, their agents, hirelings, employees or any person acting on their behalf from burying the body of their father, Charles Dzombo, on the suit property.

8. The Process Server, Michael Otieno swore an affidavit detailing how he served upon the Defendants the order of the court on 7th June, 2014.

9. According to the process-server, on 7th June, 2014, he was accompanied by the Chief of the area, Mr. Reuben Ndago and the Chief Inspector of Administration of Chasimba Division to plot number Choya/Galanama/37 where they found the Defendants were preparing to bury their late father.

10. When they reached the suit property, the process server, in the company of the Chief, found the grave was already cemented but the body had not been interred. The process server explained to the all the Defendants and the elders the contents of the order of the court and he served each of the Defendants a copy of the order.

11. The Process-server has deponed that while he was serving the Defendants with the order of 6th June, 2014, a representative of the Defendant's family, Kazungu Dzombo, moved a bit far. After moving from the tent, and while the process server was still talking to the elders, but after service of the order on the Defendants, the body was secretly taken to the grave and buried hurriedly.

12. The Defendants' advocate did not call the process-server or the Chief who accompanied the process server to cross-examine him on the contents of the affidavits. The process-server was all along accompanied by the Chief of the area and the Chief Inspector of Administration of police. He cannot therefore lie that as at the time he served the order of the court, the deceased's body had not been interred.

13. It is not therefore true that as the time the order of the court was served to the Defendants on 7th June, 2014, the Defendants had already buried their late father.

14. The Defendants and their servants deliberately disobeyed the order of the court. The said disobedience was done in the presence of the Chief who had accompanied the process-server.

15. In the circumstances, I find that the Defendants are in contempt of the order of 6th June, 2014. The Defendants are therefore liable to be committed to jail as provided for under Order 40 Rule 3 of the civil procedure Rules.

16. I shall however not commit the Defendants to jail considering that they could have been under pressure from the clan or the elders to bury the deceased. I shall in the circumstances allow the

Defendants to purge their contempt of the court order by exhuming the body and take it to the nearest morgue at their own cost.

17. For the reasons given above, I make the following orders;-

- a) **The Defendants to exhume the body of their late father, Charles Dzombo, from plot number Chonyi/Galanema/37 pending the hearing of the Application dated 6th June 2014 within seven (7) days from the date they are served with this order.**
- b) **The costs of exhuming the body and the morgue charge to be paid by the Defendants.**
- c) **The Officer Commanding Station (O.C.S) in charge of Chasimba Division and the public health officer in charge of the said Division to enforce this order.**
- d) **The Defendants to pay the costs of this application.**

Dated and delivered in Malindi this 31st day of **October**, 2014.

O. A. Angote

Judge