



**Nyakundi v Makundi & another (Environment & Land Case
764 of 2013) [2024] KEELC 7476 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7476 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 764 OF 2013
AA OMOLLO, J
OCTOBER 31, 2024**

BETWEEN

SYLVESTER MUNYALO NYAKUNDI PLAINTIFF

AND

GEORGE MUTEKI MAKUNDI 1ST DEFENDANT

MALOMBE MUTEKI MAKUNDI 2ND DEFENDANT

RULING

1. The plaintiff did file the motion dated 18th April, 2024 premised on the provisions of section 63, 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 40 rule 3 of the Civil Procedure Rules. The orders sought are:
 1. That this application be certified as urgent and be heard ex parte in the first instance.
 2. That this Honourable Court be pleased to order the 2nd defendant herein Malombe Mutemi Makundi be committed to civil jail for a term of six (6) months and/or for such a term as the court may determine and/or the property of the 2nd defendant herein be attached and sold for disobedience of this Honourable court's order made on 3/4/2024.
 3. This Honourable court be pleased to order the remains of the 1st Defendant, George Mutemi Mukundi be exhumed from Land Parcel No. Kyangwithya/Misewani/1639.
 4. That this Honourable court be pleased to give further orders and/or directions as it may deem fit and just to grant.
 5. That costs of this application be provided for.
2. The application is premised on the grounds that the 2nd Defendant/Respondent has acted in disobedience of the court order issued on 3rd April, 2024 which was served on him on 5th April, 2024.



The Applicant avers that the orders of 3rd April, 2024 were again extended on 9th April, 2024. The order made on 3rd April, 2024 read thus;

“That in the interim, pending the hearing of this Application inter partes, an order of temporary injunction is issued restraining the 2nd Defendant together with his siblings and other relatives of George Mutemi Makundi, the 1st Defendant either by themselves, their authorised agents, servants and/or any other person whomsoever from interfering the remains of the 1st Defendant, George Mutemi Mukundi on Land Parcel No. Kyangwithya/Misewani/1639.”

3. The Applicant explained the act of disobedience thus “that an or about 12th April 2024 and despite the 2nd defendant, who is a son of the deceased, together with his siblings and other relatives of the deceased having been fully and vividly aware of the existence of the said orders aforesaid, they completely and blatantly disregarded and/or disobeyed the orders issued on 3/4/2024 and extended on 9/4/2024 and with impunity interred the remains of the deceased on Land Parcel No. Kyangwithya/Misewani/1639.”
4. The 2nd Defendant/Respondent vide a Replying affidavit allegedly sworn on 7th March, 2024 denied being in disobedience. He deposes that he was never served with any order dated 4th April, 2024 as alleged in the process server’s affidavit sworn by Moses Mutie. He also avers that he has never met the said process server and he was not in Kitui County on 5th April, 2024 when the alleged service was affected.
5. The Respondent added that there is no place known as Kwa Ukundu in Kitui County. Further that the persons named Loyd Mate and James Masila who were said to be present have not sworn any affidavit to confirm they were present. He asserted that one cannot be accused of disobeying an order he was not aware of.
6. The 2nd Respondent further contended that the deceased was not buried on the property owned by the plaintiff as alleged and that the chiefs letter does not say the plot No. Kyangwithya/Misewani 1639 where the deceased was buried is owned by the plaintiff. He urged that the application for contempt be dismissed with costs.
7. In response to the facts set out in the replying affidavit, the Applicant avers that the 2nd Defendant did not bring any evidence to corroborate his assertion that he was not in Kitui on 5th April, 2024. He affirms that the 2nd Defendant was served with the application dated 2nd April, 2024 together with the order of 3/4/2024 and he proceeded to instruct an advocate to file a replying affidavit dated 8th April, 2024 to that application. That the advocate so instructed attended court on 9th April, 2024.
8. The plaintiff continued that if the 2nd defendant was not aware of the orders of 3rd April, 2024, the same were extended on 9th April, 2024 in the presence of his advocate who then ought to have informed him. He asserted that the law treats knowledge of the court order as superseding service. That the orders were clear and binding on the Defendants. The Plaintiff states that he is the registered owner of Kyangwithya/Misewani/1639 and that the surveyor’s report filed in court confirmed the Defendants homestead is built on the suit land. He urged this court to find the 2nd Defendant guilty of disobedience.



9. The Applicant cited the case of Katsuri Ltd vs. Kuparchud Deepar Shah (2016) eKLR on essential elements for proving contempt which held;

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand[22] have authoritatively stated as follows:-

“ There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

10. It is the submission of the Applicant that the terms of the order herein was clear and the 2nd Defendant was duly served and or had knowledge of it. That the 2nd defendant acted in breach of that order so he should be punished.

11. On the other hand, the 2nd Defendant submitted the application has been made in bad faith and is misplaced. He took issues with the affidavit of service which he submits does not show the place of swearing or the date it was sworn hence it is defective. He added that the affidavit did not annex copies of the order served on him.

12. The 2nd Defendant/Respondent argue the affidavit of service is full of falsehoods and wondered why James Masila Makwadi did not swear any affidavit. He takes issue that since the parties are blood relatives, the Applicant may be out to settle scores. He also pointed out that the order did not contain penal notice and the words used was interfering and not interring. He contends the burden of proving disobedience has not been discharged. He relies in the holding in the case of in the matter of the Estate of Kipkoech Kirui deceased (2016) eKLR.

13. Having reviewed the pleadings and submissions, this court's duty is to determine whether the Application meets the threshold on the standard of proof required in contempt proceedings as laid out in the case of Katsuri Ltd. supra and Mutitika vs. Baharani Farm Ltd.

14. I have perused the order issued by this court from the CTS and prayer 2 read thus;

“That in the interim, order No. 2 of the application restraining the 2nd defendant and his family members from interring the remains of the 1st Defendant on the suit parcel L.R Kyangwithya/Misewani/1639 pending the hearing of this application inter parties.”

15. The use of the word interfering in the order extracted must have been a typographical error. The error does not take away the meaning intended when someone reads the order and prayer 2 of the motion that was granted also used the word “interring”.



16. The main contest here is whether it is proved that the 2nd defendant was served on 5th April, 2024 as alleged or that he had knowledge of the order. This is what the process server stated on service.

That on 5th April, 2024 I travelled to Kitui and hired services of bodaboda operator who is well known to the defendants at Kw Ukunda, Museve, Kitui Central, Kitui County. Upon arrival and after a brief introduction and my purpose of visit at around 10:25, I served Malombe Mutemi Makundi the 2nd Defendant in presence of James Masila Makundi the 3rd Defendant and other family members in presence of the Bodaboda Operator one Loyd Mate who accepted service by retaining copies of the application and order. That at the time service the defendants who resides were not known to me but was directed and pointed out to me by the said Loyd Mate and Sylvester Munyalo Makundi the Plaintiff and I hereby return copies of the same being dully served.

17. In denying this service, the 2nd Defendant states that there is no place called “Kwa Ukundu” in Kitui but he does not say anything about the place named “Museve” being in Kitui Central which the process server also mentioned in the description of the Respondent’s village. He also wondered why James Masila Makundi did not swear affidavit to corroborate the service. It is him who is denying service and so he had a choice to get the said James Masila swear facts to contradict the process server’s assertion.
18. Besides serving the 2nd Defendant, the process server deposed to serving the 2nd Defendant’s advocate on record with the order and application. Counsel has not denied service was affected to his office. The process server added that the plaintiff and the bodaboda operator pointed out the 2nd Defendant during the service. The 2nd Defendant deposed that the parties are blood relatives hence the plaintiff could not have pointed out a wrong party. Further as at 9th April, 2024, his advocate became aware of the impugned order.
19. In the case of Shimmers versus Shimmers, the court of Appeal held thus:

As per rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgment or order requiring a person not to do an act, that is, a prohibitory order. The dispensation of service under rule 81.8

1. is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.”

20. It is pleaded that on 9th April 2024, and the record does confirm that the 2nd Defendant’s counsel appeared in court on his behalf. Hence the orders earlier issued on 3.4. 2024 were extended in the presence of the Respondent’s counsel. As stated in the case of Shimmers Plaza hereinabove, and the case of Mwaniki Silas Ngari Vs John S. Akama and another, ELRC Case 1380/2013 for the proposition that personal service is not necessary where the orders were made in the presence of counsel for the parties.



The Respondent was deemed to have become aware of that representation and which was earlier than 12th April 2024 when the impugned burial took place.

21. The Plaintiff has demonstrated that the Respondent was both personally served and if there was any doubt of service, he is deemed to have knowledge by the appearance of counsel on the 9th April 2024 when the same orders were extended. Thus, the issue of knowledge of the order is properly proved.
22. On the question of proof of disobedience, the impugned order restrained the 2nd defendant and his siblings from interring the remains of the 1st Defendant the suit property L.R Kyangwithya/Misewani/1639 pending hearing of the application inter parties. The deceased 1st defendant was buried on 12th April, 2024 and it is the 2nd Defendant's argument that he is not in contempt. He cited the case of Mutitika vs. Baharini Farm Ltd in arguing that there was no proof made of the contempt.
23. On his part, the plaintiff has annexed a letter from the area chief which letter confirmed the 1st Defendant was interred on the suit land. In paragraph 10 of the Replying Affidavit the 2nd Defendant deposes thus;

“That the 1st Defendant herein was not buried on a property owned by the plaintiff as alleged. The Chief's letter states that he was buried at his home in Mwanyani Village in Kyangwithya/Misewani Plot No. 1639. There is nothing in the said letter to suggest that the 1st Defendant was buried on Kyangwithya/Misewani/1639. Again, the Chief's letter does not say that plot No. 1639, where the 1st defendant was buried belongs to the plaintiff.”

24. The Respondent does not deny the author of the letter is a chief from their location. I am alive to the burden of proof being on the shoulders of the Plaintiff throughout and having stated that the deceased Defendant's home is on the suit land as that is the jest of his claim which sought orders requiring the Defendants to vacate suit property. That the deceased was buried in this home as per the chief's letter, then the burden now shifted on the Respondent/2nd Defendant to present any evidence to contradict the contents of this letter and the pleadings on record.
25. The order restrained the burial from taking place on L.R. No Kyangwithya/Misewani/1639. It did not require the plaintiff to prove that he was the owner of the land. Ownership is an issue the 2nd defendant would have taken in response to the application dated 2nd April, 2024. I am satisfied that the plaintiff has shown evidence that burial took place on the suit land contrary to the order.
26. The 2nd Defendant also took issue with the affidavit of service not indicating the place where it was sworn. On the face of the affidavit, the Commissioner's stamp show it was commissioned in Kitui and that it was drawn in Kitui. This is a technical objection that is curable by dint of article 159 (2) (b) of *the Constitution*. If the technical issue would be upheld, this court would assume there was no replying affidavit filed in response to the application going by the date the said affidavit is indicated to have been sworn on 7th March, 2024 before the filing of the application it was responding to.
27. In conclusion, I hold that there is merit in the motion dated 18th April, 2024 and allow it on the following terms:
 1. The 2nd Defendant/Respondent is found guilty of disobeying this court's order issued on 3rd April 2024 and subsequently extended on 9th April 2024 by interring the remains of the 1st Defendant on the suit property L.R. No Kyangwithya/Misewani/1639.
 2. The 2nd Defendant/Respondent is hereby ordered to within 30 days from the date of this ruling exhume the remains of the deceased 1st Defendant from the suit property and bury it elsewhere.



3. The contemnor shall appear in Court on the 23rd January 2025 for show cause and sentencing.
4. Costs of the application to the Plaintiff

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

A. OMOLLO

JUDGE

