



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**MISCELLANEOUS CIVIL APPLICATION NO. 003 OF 2020**

**IN THE MATTER OF: GARSEN SENIOR PRINCIPAL MAGISTRATE'S COURT LAND CASE NO. FZY8 OF 2020 BISHOP  
JAMES NJIHIA THIONG'O as Attorney of ZEPHANIA MWANGI-VERSUS-BISHOP MAURICE PEPELA BUSURU**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR EXHUMATION OF THE BODY OF MARK SOITA BUSUNI**

**AND**

**IN THE MATTER OF SECTION 147 OF THE PUBLIC HEALTH ACT CAP.242 LAWS OF KENYA**

**BETWEEN**

**BISHOP JAMES NJIHIA THIONG'O as Attorney of ZEPHANIA MWANGI**

**VERSUS**

- 1. THE COUNTY GOVERNMENT OF TANA-RIVER**
- 2. MEDICAL OFFICER OF HEALTH-GARSEN**
- 3. MEDICAL OFFICER OF HEALTH-WITU**
- 4. OFFICE OF THE ATTORNEY GENERAL**
- 5. HARRIS WAMALWA**
- 6. MARK WAFULA.....RESPONDENTS**

**Coram: Hon. Justice R. Nyakundi**

**A.M. OMWANCHA advocate for the Applicants**

**Mr Jacob Punga Mkala for the 4<sup>th</sup> Respondents**

**JUDGMENT**

The applicant filed a Notice of motion under Certificate of Urgency dated 29.10.2020 and later amended and filed on 5.11.2020 seeking the following orders inter alia: -

**1) Spent.**

**2) That this Honorable Court be pleased to order and direct that the body of Mark Soita Busuni which was interned and buried on 26.09.2020 on Parcel of Land known as TANARIVER/WITU TANA/119 situated at WITU-Tana within Tana River County measuring approximate area 4.3 Hectares belonging to the Applicant herein be exhumed for reburial at his**

homeland in Western Kenya or at any other places per the Deceased family's choice.

3) That upon granting order (2) above, do direct the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to grant or issue the Applicant with a permit to exhume the body or remains of Mark Soita Busuni interred on the subject Parcel of Land.

4) That upon granting prayer (3) above, this Honorable Court be further pleased to order and direct the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to issue a burial permit for reburying the exhumed body or remains of Mark Soita Busuni by the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

5) That upon granting prayer (4) above, this Honorable Court be further pleased to condemn the 5<sup>th</sup> and 6<sup>th</sup> Respondents to cater for all the expenses for the exhumation and re-burial.

6) That this Honorable court be further pleased to make such other interlocutory orders as may appear to the Court to be just and convenient.

The application was grounded on the supporting affidavit of one Bishop James Njiha Thiong'o dated 29.10.2020. At that juncture this court ordered that the application be served upon the Respondents for interparties hearing.

After service the Respondents filed three (3) grounds of opposition dated 23.11.2020 and filed on the same day stating that the Hon. Attorney General had been erroneously enjoined in the suit, that medical service is a devolved function and as such the Hon. Attorney General cannot be sued or enter appearance on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are employees of the Tana River County, department of health and lastly that the application discloses no triable issues as against the Hon. Attorney General and as such should be dismissed.

### **Brief Facts**

The Parties herein have an ongoing land dispute matter at the Senior Principal Magistrate's court in Garsen, Land Case No. FZY8 of 2020. The Applicants sought a temporary injunction restraining the 5<sup>th</sup> and 6<sup>th</sup> Respondents from burying the body of Mark Soita Busuni on land parcel number **TANA RIVER/WITU TANA/119** measuring approximate area 4.3 Hectares, however they did indeed proceed and bury the deceased on the aforementioned suit land even after they had been served with the temporary orders dated 25.09.2020.

Despite being served with this current application, the 5<sup>th</sup> and 6<sup>th</sup> Respondents have not filed anything to respond to the motion. To support his application, the applicant has annexed an affidavit of service to show that he did serve the order of injunction.

### **Submissions**

Counsel for the Applicant, Mr. Alfred Omwancha, in his submissions dated 24.11.2020 and filed on the same day, submitted that this court had the discretion to order the removal of the remains from one place to another and it is for this reason that the present application was filed. He also submitted that

For these submissions counsel relied on the cases of; **re Estate of Jacob Mwalekwa Mwambewa (Deceased) [2018] eKLR** and **Hellen Cheroni Kimurgor V Esther Jelagat Kosgei (2008) eKLR**.

### **The Respondents' Submissions**

Respondents did not file any submissions or enter appearance.

### **Analysis and Determination**

Section 146 of the Public Health Act states as follows: -

#### **Permit to exhume**

(1) Subject to the provisions of section 147, it shall not be lawful to exhume anybody or the remains of anybody which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.

(2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.

(3) Such permit may be granted by the Minister in respect of anybody or the remains of anybody interred in any cemetery or burial ground or any other place.

(4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes anybody or the remains of anybody contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings:

**Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of anybody for the purpose of holding an inquiry into the cause of death of any person.**

#### **Issues for Determination**

Having analyzed this application, I find that I am only seized of one matter for determination and this is unfortunately the ultimate determinant of this application. I will consequently put my mind to the issue of jurisdiction.

I have considered the applicants' submissions in this matter as well as the authorities cited by Counsel. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated **In the Matter of Interim Independent Electoral Commission [2011] eKLR** as follows:

**[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):**

**"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."**

**[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.**

The broad jurisdiction of the Environment and Land Court is donated by Article 162 of the Constitution which establishes the three tiers of Kenya's Superior Courts. It provides thus:

- 1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)**
- 2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-**
  - a) employment and labour relations; and**
  - b) The environment and the use and occupation of, and title to, land.**
- 3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)**
- 4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.**

In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Environment and Land Court. **Section 13** of the Act outlines the jurisdiction of the court as follows:

#### **13 Jurisdiction of the Court**

- 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**
- 2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-**
  - a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.**
  - b) relating to compulsory acquisition of land;**
  - c) relating to land administration and management;**
  - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and**
  - e) any other dispute relating to environment and land.**
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69**

and 70 of the Constitution.

4) *In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court*

5) *Deleted by Act No. 12 of 2012*

6) *Deleted by Act No. 12 of 2012*

7) *In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-*

a) *interim or permanent preservation orders including injunctions;*

b) *prerogative orders;*

c) *award of damages;*

d) *compensation;*

e) *specific performance;*

f) *restitution; or*

g) *declaration; or*

h) *costs*

From Article 162(2) (b) of the Constitution of Kenya, 2010 and at Section 13 of the Environment and Land Court Act, 2011 it is abundantly clear that this court lacks the jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land as they can only be determined by the Environment and Land Court.

Subject matter jurisdiction is the power of the court to hear and determine a particular dispute in controversy. In my view the applicant has not made an affirmative pleading that the case is within the court's jurisdiction as the dispute is between the rightful owner of the parcel of Land and the respondent leave to assert the claim over the same Suit land.

This case was originally filed in the Magistrate's court in Garsen. From the word go or more literally this court on application of exhumation has been entangled with the contested issue on ownership and rightful registered proprietor of interest in LR TANARIVER/WITU TANA/119. Henceforth, the problem with the applicant's assertion of jurisdiction is apparent on the face of the notice of motion and supporting affidavit. In particular, the court would then be obliged to determine the sanctity of title and the form of beneficiary's interest perceived to be applicable to the family of the deceased which interred his remains on the said parcel of land. Whereas it may indeed be necessary to consider the exhumation of the body under the Public Health Act before the land case is over, the court is unwilling to go there alone without any orders from the Land Court.

### **Result**

This court after a tedious examination of the motion and documents submitted suspects that it may not have subject matter jurisdiction over this case based on the claim over Legal right and interest to the Land in dispute.

The motion is denied with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF JANUARY 2021.**

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**R. NYAKUNDI**

**JUDGE**