



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 58 OF 2016

NYONGESA WANDERA MAURICE 1ST APPLICANT

AFRIKANUS ABRAHAM EGESA 2ND APPLICANT

VERSUS

ALFRED EDWIN DIDYMUS KHASEKE 1ST RESPONDENT

OUMA ONYANGO 2ND RESPONDENT

JUDITH BWIRE KHASEKE 3RD RESPONDENT

JOSEPH OKUKU NAMBOKA 4TH RESPONDENT

RULING

1. What is before me for determination is an application dated 4/10/2017 filed here on 9/10/2017. The application is a Notice of Motion expressed to be brought under Sections 3 and 3A of the Civil Procedure Act (cap 21). The Applicants – **NYONGESA WANDERA MAURICE** and **AFRIKANUS ABRAHAM EGESA** – are the Plaintiffs in this case while the Respondents – **ALFRED EDWIN DIDYMUS KHASEKE, OUMA ONYANGO, JUDITH BWIRE KHASEKE** and **JOSEPH OKUKU NAMBOKA** – are the Defendants. The dispute revolves around two parcels of land: Land Parcel No. BUKHAYO/MATAYOS/1880 and BUKHAYO/MATAYOS/1882. The immediate issue for consideration relates to the place of burial of one JACKSON OKOTH KHASEKE whom the Applicants desire to bury on parcel No. 1882 while the Respondents would rather that he is buried on parcel No. 1880. Underlying this immediate issue of burial is ownership of the two parcels of land.

2. The application has three prayers but prayer 1 is spent. The prayers for consideration therefore are two and they are as follows:

Prayer 2: That the body of the late JACKSON OKOTH KHASEKE which is lying at Busia County Referral Mortuary be released to 2nd Plaintiff/Applicant – **AFRIKANUS ABRAHAM EGESA** and **COLOMITINA NAMBOKA JUMA** for burial on L.P. No. BUKHAYO/MATAYOS/1882 forthwith.

Prayer 3: That costs be in the cause.

3. The premise of the application is that the 2nd Applicant – **AFRIKANUS ABRAHAM EGESA** and one **COLOMITINA NAMBUKA JUMA** are the registered owners of the land; that they are the closest relatives of the deceased; that the mortuary fees where the body of the deceased is lying continues to increase; and that it is the 2nd Applicant who has been taking care of the deceased during his lifetime.

4. The Applicants averred that the Respondents are putting them to unnecessary costs by continuing to cause detention of the body of the deceased at the mortuary of Busia County Referral Hospital. According to the Applicants, the Respondents will suffer no prejudice if the order sought is granted.

5. There are various responses by the Respondents. The responses came by way of grounds of opposition and replying affidavits. The 1st Respondent – **ALFRED EDWIN DIDYMUS KHASEKE** – filed a replying affidavit on 31/10/2017 and intimated that he had filed it not only on behalf of himself but also for 3rd Respondent – **JUDITH BWIRE KHASEKE** – and 4th Respondent – **JOSEPH OKUKU NAMBUKA**. In the response, the 2nd Applicant is said to have fraudulently filed a succession cause and obtained a grant. He then used the grant to acquire ownership of land parcel No. 1880, which he then sold to 1st Applicant. In the same way, he became owner of land parcel No. 1882, which

he claims to hold in trust for the deceased and the deceased's sister – 3rd Respondent herein.

6. The true position, Respondents averred, is that land parcel No. BUKHAYO/MATAYOS/1880 measuring 0.66Ha was the one given to FRANCIS BWIRE KHASEKE who was the father of JACKSON OKOTH KHASEKE, the deceased whose body is awaiting burial. This is the land which, had the Plaintiffs been well meaning, should have been allocated to JACKSON OKOTH KHASEKE. Infact, Jackson's father, Francis, is said to be buried on this land. The 1st Respondent alleged that parcel No. 1882 measuring 0.11Ha belonged to JOHN OPIYO OWINO. This Respondent then bought it. The late Jackson is said to have discovered the Applicants' fraud and had applied to revoke the grant that facilitated the fraud. He unfortunately died before his application could be heard.

7. The 3rd Respondent – JUDITH BWIRE KHASEKE – filed her own replying affidavit despite being part of 1st Respondent's replying affidavit. Her affidavit contains some history and antecedents surrounding the disputed parcels of land. To her, parcel No. 1882 was sold to 1st Respondent. She is a sister to the deceased, she deponed, and their land is parcel No. 1880, which is where the deceased should be buried. This Respondent averred that the 2nd Applicant was misled into buying parcel No. 1880 and the one he is now alleging to hold in trust for her and her brother is already occupied by its owner.

8. As pointed out earlier, there were also grounds of opposition. In the grounds filed, the Applicants are accused of failing to disclose some material facts. The 2nd Respondent and one Colomitina were accused of fraud in their dealings concerning ownership of the land. The Respondents aver that the Applicants should await the outcome of the process initiated to revoke the grant issued to them. It was also stated that the Applicants have filed other cases which are still unresolved. The position of the Respondents is that the Applicants should be patient.

9. The application was canvassed by way of written submissions. The Applicants' submissions were filed on 5/3/2018. The submissions largely restate what is contained in the application and the responses made and the court was ultimately urged to allow the burial of the deceased on parcel No. 1882 as that would ease the financial burden on the family. The decided case **PATRICK ODERA ALILA & Another Vs ROSE NYAGWESO & Another: HCC No. 61/2012, MILIMANI, NAIROBI** was cited to support the position that it is undesirable to hold a body in mortuary for long while litigants fight over the place of burial.

10. The Respondents' submissions were filed on 2/3/2018. The submissions totally missed the point. They focused on another application namely: Notice of Motion dated 2/8/2017 which is about a different issue.

11. I have considered the application, the various responses made, and the submissions. I have had a look at the pleadings too. I will not dwell so much on what each side has stated. It is clear that the application has serious shortcomings arising from circumstances and facts that were not canvassed by either side. And these circumstances and/or facts makes the filing of this application look malafides and/or ill-advised.

12. It is necessary to explain: There was an earlier application dated 23/6/2016 seeking to restrain the Respondents from burying the remains of the deceased on land parcel No. BUKHAYO/MATAYOS/1880 pending hearing and determination of the suit herein. The court allowed the application in a ruling dated 14/12/2016. The order sought was granted and what that in essence meant was that the burial of the deceased had to await the outcome of the suit. That order is still in force. But while that order was still in force, and without first seeking to vary, discharge or set it aside, the Applicants filed the present application seeking to bury the same body elsewhere. The suit is not yet determined. Isn't the order sought trying to interfere or even neuter the restraining order already in force? Aren't the Applicants trying to jump the gun? I think they are. And they should not be allowed to do so.

13. In the amended plaint filed here on 9/10/2017, one of the prayers – prayer (b) to be specific – seeks to have the Applicants, as Plaintiffs, allowed in inter the body of the deceased on land parcel No. 1882. As sought in the amended plaint, the prayer is in the nature of a final order meant to be considered and/or granted after a full trial. A look at the application at hand shows that it is this same prayer that has been lifted and now asked for in the application. A question arises: Why should an order that requires to be granted after a full trial be brought forward to be granted in an interlocutory application? What has changed? Methinks the Applicants are trying to be too clever by half.

14. The Respondents are disputing the current registered ownership of parcels Nos 1880 and 1882. They are of the firm view that the deceased's land is parcel No. 1880 and they believe that that should be the place of his burial. Of course, the Applicants hold a different view. But I think it is plain that the suit needs to be heard and determined first before anybody can claim a right to bury the deceased on any of the two parcels of land. The application at hand, if allowed, will pre-empt all this.

15. I think the Applicants are also trying to ride on their success in the application dated 14/12/2016. But the ruling in that application was not about where the deceased should be buried. It was about preventing his burial on parcel No. 1880 before a conclusive determination as to his place of burial is made. That place can be parcel No. 1882 or even parcel No. 1880. The Applicants should be patient. As Plaintiffs in the suit herein, they should put their efforts in trying to expedite the hearing and determination of the suit.

16. The upshot, in light of all this, is that the merits of the application at hand have not been demonstrated by the Applicants. The application is hereby dismissed with costs.

Dated, signed and delivered at Busia this 30th day of January, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant: Absent

2nd Applicant: Present

1st Respondent: Present

2nd Respondent: Present

3rd Respondent: Present

4th Respondent: Absent

Counsel for Applicants: Present

Counsel for Respondents: Absent

Court Assistant: Nelson Odame