



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 177 OF 2005

IN THE MATTER OF THE ESTATE OF THE LATE CHEPKONGA TONJE (DECEASED)

RTD GENERAL DAUDI TONJE.....ADMINISTRATOR/APPLICANT

-VERSUS-

JOHN TONJE.....ADMINISTRATOR/1ST RESPONDENT

CAROLINE K. HENDRICHS.....2ND RESPONDENT

ANGELA J. TANUI.....3RD RESPONDENT

DORCAS J. KIUNGA.....4TH RESPONDENT

DANIEL K. TONJE.....5TH RESPONDENT

SIPORA BOIWO.....6TH RESPONDENT

MATHEW K. TONJE.....7TH RESPONDENT

JUDGMENT

1. By way of a summons premised under **Rule 49, 59 (s)** and **73** of the **Probate and Administration Rules**, Retired General Daudi Chepkonga Tonje (hereinafter, the applicant) seeks orders;

1. Spent

2. Spent

3. THAT pending the hearing and determination of the intended appeal or otherwise the Civil Application No. 33 of 2017 seeking the striking out of the Notice of Appeal filed herein by John Bartinga Tonje, or otherwise on permanent basis, the respondent hereto, namely Mrs. Carolyn Hendrichs, Mrs Angela Tanui, Mrs Dorcas Kiunga, Daniel K. Tonge, Sipora Boiwo, John Bartinga Tonje and Mathew K. Tonje themselves, servant, agent and/or representatives or proxies be restrained from burying the remains of the late Shadrack K. Tonje on the parcel of land known as Baringo/Ravine 102/182 (Muchongoi Farm).

4. THAT the status quo obtained in the Estate of the Late Chepkonga Tonje as at be maintained.

5. THAT costs be borne by the respondents.

2. The application is premised on 5 grounds namely;

1. **THAT** applicant herein who is one of the administrators to the subject estate was by the judgment of the court dated the 25th April 2012 awarded the parcel of land known as Baringo/Ravine 102/182 (Muchongoi).

3. **THAT** the first respondent to the instant application and the prime mover of the acts complained of filed Notice of Appeal immediately after the said judgment but has for six (6) years and way past the timeline permitted by law not taken any substantive appellate proceedings.

4. **THAT** one of the beneficiaries of the subject estate from the 2nd house, one Shadrack K. Tonje died on the 1st February 2019 and the respondents to this application, the beneficiaries from the 2nd house herein are planning to bury his remains on the subject parcel of land awarded by the Honourable Court to the applicant without his consent and against his wishes and that of this siblings from the first house.

5. **THAT** the decision to bury the deceased on the said parcel is illegal and is otherwise actuated by spite, malice and is calculate to desecrate the said parcel, lower its value and subvert the court's determination or judgment in any event it amounts to the violation of the applicant's extant proprietary rights decreed by the Honourable Court.

6. **THAT** unless the Honourable Court intervenes the planned burial will proceed and may be irreversible and will or might create adverse and nefarious claims thereafter on behalf of the deceased or his family.

3. It is supported by the affidavit of the applicant sworn on the 8/2/2019.

4. The applicant's case as gleaned from the application and the supporting grounds and affidavit evidence is that the applicant, who was one of the administrators of the estate of Chepkonga Tonje, was vide judgment of court awarded parcel of land known as Baringo/Ravine 102/182 (Muchongoi).

5. It is urged that the 1st respondent to the instant application filed a notice of appeal immediately after the said judgment. The said appeal has not been prosecuted 6 years down the line.

6. It is the applicant's case that the respondents are planning to burry one Shadrack Tonje who died on 1/2/2019 on the subject land.

7. This is said to be actuated by spite, malice and calculated to desecrate the land, lower its value and subvert the court's judgment and it is a violation of the applicants rights decreed by the court in its judgment.

8. It is urged that unless there is timely intervention the planned burial would take place and is irreversible.

9. The applicant avers that the stay of execution granted by the court (**Ouko J**) was allowed on terms that the status quo was to be maintained.

10. It is the applicant's case that the court issued a certificate of delay to the respondents way back in October, 2017 meaning that the time of lodging of an appeal lapsed 60 days from the date of the certificate and thus the intended appeal is now moot and the stay of execution should be vacated.

11. The application is opposed. John Bartinga Tonje has sworn a replying affidavit with authority of the co-respondents.

12. He avers that in its ruling dated 12/3/2013 the court recognized that some of the beneficiaries live on the subject land and until it is finally distributed upon confirmation of grant it constitutes part of the estate.

13. It is urged that the orders of 12/3/2013 did not injunct and/or prevent the respondents herein from use and/or access of the suit property as the same would only paralysed the lives of the respondents and their families who live on the land.

14. The matter was canvassed by way of oral submissions.

15. I have had occasion to consider the application, the supporting grounds and affidavit, on the one hand, and the replying affidavit on the other hand. I have had due regard to learned submissions by counsels.

16. Of determination is whether the applicant has met the threshold for the grant of an injunction espoused in **GIELLA vs CASSMAN BROWN**.

17. These requirements are;

1. The applicant must establish a prima facie case.

2. The applicant must demonstrate irreparable harm if a temporary injunction is not granted and if in doubt.

3. The applicant must show that the balance of convenience tilts in his favour.

18. On the issue of a prima facie case, it is noteworthy that counsels from both divides did not address this court extensively on this. It is clear, however, from the applicant's affidavit at paragraph 8 and paragraph 9 that the respondents lodged a notice of appeal 6 years ago. The court issued a certificate of delay way back in October 2017. This fact is not contested. The only rejoinder from counsel for the respondents from the bar is that a record of appeal has been filed though admittedly not served. An undertaking by counsel for the respondent from the

bar to avail the court a copy of the record was not honoured. At the time of writing this ruling, no such record has been seen by court.

19. From the foregoing therefore the application by the applicant to have the appeal struck out stands a very high probability of success.

20. As regards irreparable damage to the applicant, I note the subject matter herein is land. The burial of a body on this land certainly changes the character of the land. It impacts the value of the land negatively. It emotionally haunts the applicants and would continue to do so if the applicants were to be eventually successful. This when put in the context of African and specifically Kenyan attitude to dead bodies, their burial sites and peculiar beliefs in spirits takes a more significant bearing in showing there would be suffered irreparable damage.

21. The act of burial is irreversible. Any arguments that exhumation can occur should need arise is not tenable more so for reasons stated at paragraph 20 above.

22. The envisaged burial is also a potential cause of further conflicts among the parties. What happens should, for example, the applicants eventually triumph and the respondents would wish to tend the burial site of their kin?

23. I am satisfied that the applicant stands to suffer irreparable damage.

24. As regards the balance of convenience, it is common ground that land Baringo/Ravine 102/182 (Muchongoi Farm) was awarded to the applicant by a judgment of court in the succession cause herein.

25. There is an order of stay of execution that stayed the execution of the said judgment. It was ordered that the status quo be maintained.

26. The status quo cannot be interpreted in any other way other than to mean the situation on the ground was to remain as it was at the time of judgment.

27. Notably a stay of execution does not confer additional rights. Its meaning cannot be stretched to include all manner of future actions or omissions that the party enjoying the stay may wish to engage in.

28. In this court's ruling dated 12/3/2013 *Ouko J* (as he then was) stated *inter alia*;

“Substantial justice required that he be given a chance to pursue the appeal while the property is preserved to avoid wastage and disposal.”

29. The paragraph clearly shows that the judge was alive to the need to preserve the property to avoid wastage and disposal.

30. That preservation cannot, if the scales of justice were equal, operate in favour of the respondents but get skewed to prejudice the applicant when the applicant also seeks preservation of the same subject matter.

31. However painful or inconvenient to the respondent, the balance of convenience tilts in favour of maintaining the land in its present character to ensure that should the applicants succeed in the appeal they are not prejudiced.

32. He who comes to equity must come with clean hands. From the facts before the court, the respondents are not in court with clean hands. There is an inexplicable delay in the prosecution of their appeal. Even after a certificate of delay was issued in October, 2017, it is submitted that no record of appeal has been served on the respondents to the appeal.

33. Counsel for the respondents undertook at the bar to provide the court such a record of appeal if at all its filed. At the time of writing this ruling, the court has not had the advantage of seeing the record of appeal.

34. The respondents continue enjoying the fruits of a stay of execution. They seem keen to exploit the stay to an extent that it would appear that the stay orders overturned the judgment of the court. They do not appear to be in any hurry to prosecute the appeal all along harbouring the notion that the stay order allows them an absolute right to use the land in whichever way they desire. The notion that the stay order allows the respondents the absolute right to use the land in whichever way they desire is a misapprehension of the legal principles applicable.

35. I am satisfied that the applicant has demonstrated merit in his application. The threshold for an injunction has been achieved.

36. With the result that I allow the application dated 8/2/2019 and make the following orders;

1. THAT pending the hearing and determination of the intended appeal or otherwise the Civil Application No. 33 of 2017 seeking the striking out of the Notice of Appeal filed herein by John Bartinga Tonje, the respondent hereto, namely Mrs. Carolyn Hendrichs, Mrs Angela Tanui, Mrs Dorcas Kiunga, Daniel K. Tonge, Sipora Boiwo, John Bartinga Tonje and Mathew K. Tonje by themselves, their servant, agent and/or representatives or proxies be and are hereby restrained from burying the remains of the late Shadrack K. Tonje on the parcel of land known as Baringo/Ravine 102/182 (Muchongoi Farm).

2. THAT the status quo obtaining in the Estate of the Late Chepkonga Tonje as at date of application herein be maintained.

3. Costs to abide the outcome of the appeal.

Dated and Signed at Nakuru this 28th day of February, 2019.

A. K. NDUNG'U

JUDGE