



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 114 OF 2019 (OS)**

**JOHN BOSCO KISOME**

**FRANCIS MAKAU MUTISYA**

**WILLIAM MULEMBA MUTISYA**

**GRACE NTHAMBA MASWII**

**MARTHA MBULA MUTISYA**

**ELIZABETH MUTINDI PAUL MUINDI**

**RAPHAEL KYENGE MUTISYA**

**JOSEPH MUTHINI MUTISYA**

**COLLECTOR MUENI MUTISYA.....PLAINTIFFS**

**VERSUS**

**GABRIEL MULEMBA.....DEFENDANT**

**RULING**

What is before court for determination is the Defendant's Notice of Motion application dated the 21<sup>st</sup> June, 2021 where he seeks the following orders:

**1. Spent**

**2. That pending the hearing and determination of this application interpartes, a temporary injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs/Respondents, their agents, family members, relatives, employees and/or their servants and the legal representatives of the estate of William Mulemba Mutisya if any from entering, digging any grave site, burying any remains and particularly the remains of the late WILLIAM MULEMBA MUTISYA and/or interfering whatsoever with the suit property known as Matuu/Ikaatini/676 in Machakos County.**

**3. That pending the hearing and determination of the suit, a temporary injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs/Respondents, their agents, family members, relatives, employees and/or their servants and the legal representatives of the estate of William Mulemba Mutisya if any from entering, digging any grave site, burying any remains and particularly the remains of the late WILLIAM MULEMBA MUTISYA and/or interfering whatsoever with the suit property known as Matuu/Ikaatini/676 in Machakos County.**

**4. That the OCS Ekalakala Police Station in Machakos County do ensure compliance with the orders above.**

**5. That the costs of this application be in the cause.**

The application is premised on the grounds that that the Defendant is the registered owner of the suit property and is in actual possession

thereon. The issue of determination of ownership of suit property is pending before court as the Plaintiffs' are claiming it through adverse possession. The Defendant and his family undertake farming and earn their livelihood from the suit property. That William Mulemba Mutisya died on 18<sup>th</sup> June, 2021 and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs are set to bury his remains on the suit property. The Plaintiffs have never buried any of their relatives on the suit property. Further, on 4<sup>th</sup> May 2005, the Plaintiffs' father Josphat Mutisya Mwanthi died and they attempted to bury his remains on suit property but the Defendant vide **Milimani CMCC No. 5126 of 2005 Gabriel Mulemba V Joseph Mutisya & 5 Others**, obtained orders restraining them from doing so and they buried their father elsewhere. He insists the Plaintiffs' own property elsewhere where they have established their homes and he does not own the suit property, in trust for them. He avers that the burial arrangements for the late William Mulemba Mutisya are at an advanced stage and the Plaintiffs unless restrained intend to bury the said remains thereon and this will lower its value as well as infringe on his rights.

The application is supported by the affidavit of GABRIEL MULEMBA where he reiterates the averments above.

The application is opposed by the Plaintiffs who filed a replying affidavit sworn by the 1<sup>st</sup> Plaintiff JOHN BOSCO KISOME MUTISYA where he deposes that though the Defendant is the registered proprietor of the suit property, they have been in occupation thereon for more than 12 years. He provides a history of the suit property and contends that the Defendant was adopted by their aunt Mary Mutinda Mulemba in 1964. Further, that their late mother who had a failed marriage joined forces with Mary Mutinda Mulemba together with the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs who all raised funds to purchase land parcel numbers Matuu/Ikaatini/676 and 716 respectively but however the said Mary Mutinda Mulemba took advantage of their late mother's absence and registered the two parcels of land in her name. He admits that the Defendant undertook succession proceedings and obtained a Grant. He insists that even though the adjudication committee made a decision in favour of one Mary Mutinda Mulemba, this does not invalidate their claim of adverse possession over the suit property. Further, that the deceased William Mulemba Mutisya has a right to be buried on the suit property since he lived therein from 1968. He avers that William Mulemba Mutisya buried his son Mutisya Mulemba on the suit property in 1985. He further admits that they never buried their father nor mother on the suit property.

The Defendant filed a further affidavit where he reiterated his averments above and disputed the issues raised in the replying affidavit. He explained that he adhered to the due process in acquiring title for suit property and Matuu/Ikaatini/ 716 since they were two beneficiaries together with his late brother Joseph Kyenge whose wife and children reside on Matuu/Ikaatini/716. He denied being adopted and insisted as the son of Mary Mutinda Mulemba, he had a right to inherit the suit property. He stated that his mother Mary Mutinda Mulemba singlehandedly bought land parcel numbers Matuu/Ikaatini/676 and 716 and denied there was any joint purchase. He was categorical that the Plaintiffs neither resided on suit property nor cultivated it as alleged. He reaffirmed that the adjudication committee confirmed the suit property belonged to his mother. He contended that there was indeed a court order restraining the Plaintiffs' from burying their father on suit property, which suit the Plaintiffs participated in, by filing a Defence and Counterclaim. He disputed that the Plaintiffs have buried any of their family members on suit property and insisted they have a burial site at Itunduimuni.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether a temporary injunction should issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs or their representatives from burying the remains of the late WILLIAM MULEMBA MUTISYA and/or interfering whatsoever with the suit property known as Matuu/Ikaatini/676.

The Defendant reiterated his averments as per the two affidavits and contended that he had established a prima facie case to warrant the orders sought. Further, that there is imminent threat of infringement of his right in respect to protection of the suit property, which property he has great interest in and damages will not be an adequate remedy. Further, that the balance of convenience tilted in his favour. To buttress his averments, he relied on the following decisions: **Mary Njeri Mbugua V Alice Muthoni (2018) eKLR**; **Lawi Kigeni Kiplagat V Japhet Amenya Ratemo (2021) eKLR**; **Kessiah Wanjiku Kuria V Joseph Ndirangu Mwangi (2016) eKLR**; **Zio Ngoma & 4 Others V Kea Ngoma (2014) eKLR**; **Anton Homesa Limited & Another V Davis Nathan Chelogoi (2018) eKLR** and **Barbara Jebet Moi V Emily Chesang (2017) eKLR**.

The Plaintiffs in their submissions insist the Defendant is not entitled to the orders sought. They contend that the suit revolves around claim for land through adverse possession which suit was filed before the deceased's demise. Further, the Defendant has not put any materials before court to show where the deceased had been residing prior to his demise. They insist the deceased having been in occupation of the suit property deserves to be buried thereon. To buttress their averments, they have relied on to the following decisions: **Giella V Cassman Brown (1973) EA 358** and **Ali Mwadua V Masla Mukadla (2019) eKLR**.

As to whether the Defendant has established a prima facie case with a probability of success at the trial, I will rely on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**. The Defendant claims the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs, intend to bury the remains of the late WILLIAM MULEMBA MUTISYA on the suit property known as Matuu/Ikaatini/676. He insists if they are allowed to bury the deceased on the suit property, it will lower its value. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs insist the deceased had resided on the suit property since 1968, and the fulcrum of this suit revolves around claim for land through adverse possession. In their replying affidavit, they also allege the Defendant fraudulently got registered as the owner of the suit property. The Defendant in controverting their averments, contend that the deceased never resided on the suit property and none of the Plaintiffs' relatives had been buried thereon.

It is not in dispute that the Defendant is the registered proprietor of the suit property and holds documents of title to that effect. Further, that the Plaintiffs seek to be declared owners of the suit property by virtue of adverse possession. I note in a previous Ruling dated 12<sup>th</sup> February, 2021, by Justice Angote in this matter, he had granted the Defendant orders of injunction and the Plaintiffs were restrained from interfering

with the suit property pending the outcome of the suit. Despite the existence of the said orders, the Plaintiffs admit they seek to inter the deceased remains on the suit property on claims he had resided thereon. Be that as it may, I note the Defendant's title to the suit property is yet to be cancelled and he remains its registered proprietor. Further, both parties admit that the Defendant undertook succession proceedings in respect to his mother's estate after which he acquired his title to the suit property. It has also clearly emerged that this matter had been handled by the Land Adjudication Committee that confirmed the Defendant's mother was proprietor of the suit property.

**Section 26 of the Land Registration Act** provides as follows:

***'(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'***

Section 24 (a) of the Land Registration Act stipulates that **'Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** Justice J.M. Mutungi stated that ***'the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law.'***

Further, in the case of **Barbara Jebet Moi V Emily Chesang (2017) eKLR**, where the Judge while dealing with an application with similar circumstances as the instant case, held as follows:

***'The plaintiff has accused the defendant of intending to bury the remains of the defendant's deceased grandchild on the suit property without the plaintiff's consent. The defendant concedes that she intends to bury the remains of her daughter on the property. The defendant seems to be laying some claim to the suit property or a portion of it in the nature of adverse possession. She has however not lodged any counterclaim to that effect. The defendant also alleges that she was promised that 10 acres of the suit property would be carved out and given to her. The fact of the matter is that currently, the plaintiff remains the registered proprietor. There being no dispute that the plaintiff is the registered proprietor of the suit property, the plaintiff must be accorded the full rights and privileges conferred by sections 24 and 25 of the Land Registration Act as well as Article 40 of the constitution. Those rights and privileges cannot be watered down by the alleged promise to give the defendant a portion of the property. I am therefore persuaded that the plaintiff has a prima facie case with a probability of success. I do not think that the plaintiff could in the circumstances of this case be adequately compensated by an award of damages.'***

In relying on the facts as presented while associating myself with the cited judicial authorities, I find that the Defendant by virtue of being the registered proprietor of the suit property has indeed established a prima facie case to warrant the orders sought.

As to whether the Defendant will suffer irreparable harm that cannot be compensated by way of damages. I note the Defendant claims the Plaintiff intend to inter the remains of the deceased on the suit property. The Plaintiffs on the other hand insist the deceased resided thereon and they are claiming the suit property by way of adverse possession.

In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that ***'... the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'***

In relying on the case above and based on the circumstances at hand, I find that the Defendant's alleged injuries are not speculative as he has demonstrated the harm he will suffer if the injunctive orders are denied and the Plaintiffs proceeded to bury the deceased remains on suit property.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance indeed tilts in favour of the Defendant whose rights have been infringed upon by the Plaintiffs.

It is against the foregoing that I find that the Notice of Motion application dated the 21<sup>st</sup> June, 2021 merited and will proceed to allow it in the following terms:

***a) Pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs/ Respondents, their agents, family members, relatives, employees and/or their servants and the legal representatives of the estate of William Mulemba Mutisya if any from entering, digging any grave site, burying the remains of the late WILLIAM MULEMBA MUTISYA and/or interfering whatsoever with the suit property known as Matuu/Ikaatini/ 676.***

*b) The OCS Ekalakala Police Station in Machakos County do ensure compliance with the orders above.*

*c) Costs of the application is awarded to the Defendant.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18<sup>TH</sup> DAY OF JANUARY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**