



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT KERUGOYA

ELC CASE NUMBER 24 OF 2016

DAVID KINYUADANIEL MAINA GATIMU (Suing as the Administrators of the Estate of the late NAHASHON GATIMU MBITI).....PLAINTIFFS

VERSES

NANCY NYOKABI KIMOTHO.....1ST DEFENDANT

EUNICE WAKARIMA KIMOTHO (Sued as the Administratrixes' of the Estate of the late

NELSON KIMOTHO MBITI (deceased).....2ND DEFENDANT

DAVID MUTUGI KIMOTHO.....3RD DEFENDANT

CHARITY NJERI KIMOTHO.....4TH DEFENDANT

JANE NJERI KIMOTHO.....5TH DEFENDANT

MARGARET WAMBUI KIMOTHO.....6TH DEFENDANT

RULING

The 3rd -6th Defendants/Applicants vide a Notice of Motion dated 30th December, 2021 seek the following orders;

1) SPENT

2) That the Honourable Court be pleased to order that pending the hearing and determination of this application, the plaintiff/respondent, his agents, family members, relatives, employees, general public and/or all the other persons through and under whom and/or for whose benefit he sues be restrained from interring the mortal remains of their Nephew and/or son ANTONY GATIMU MARGARET on the suit land MWERUA/GITAKU/111.

3) That this Honourable Court be pleased to order and direct the Area Chief and the Officer Commanding Station (O.C.S) Baricho Police Station to assist by providing Security during the enforcement of the interim order number 2 sought herein.

4) That pending the hearing and determination of this entire suit, the Honourable Court be pleased to issue orders of temporary injunction restraining the plaintiff/Respondent, his agents, family members, relatives, employees, general public and/or all the other persons through and under whom and/or for whose benefit he sues be restrained from interring the mortal remains of their nephew and/or son ANTONY GATIMU MARGARET on the suit land MWERUA/GITAKU/111.

5) That the costs of this application be provided.

The said application is based on five(5) grounds shown on the face of the said application supported by an Affidavit sworn by David Mutugi Kimotho the same date.

APPLICANTS SUMMARY OF FACTS

The reasons advanced by the Applicants for the grant of the orders sought in this Application are contained in the supporting Affidavit where the deponent deposed as follows;

- 1) That this suit was commenced on behalf of the Estate of NAHASHON GATIMU MBITI (deceased) who was blessed with seven children namely David Kinyua, Daniel Maina Gatimu, Charles Mwangi Gatimu, Margaret Muthoni Gatimu, Jane Njeri Gatimu, Faith Njoki Gatimu and Nelson Kimotho Gatimu.
- 2) That the above named Children of the late Nahashon Gatimu Mbiti are also beneficiaries of his estate.
- 3) That the subject of this case is a parcel of land known as MWERUA/GITAKU/111 registered in the name of David Mutugi Kimotho, the plaintiff herein
- 4) That among the persons currently residing on the suit land parcel number MWERUA/GITAKU/111 is Margaret Muthoni Gatimu together with her two children.
- 5) That on 27th December, 2021 a son to Margaret Muthoni Gatimu namely Antony Gatimu Margaret passed on as shown in a copy of letter annexed thereto and marked DMK-1.
- 6) He stated that despite engaging the plaintiff and his immediate family to know where they intend to inter the mortal remains of the said Antony Gatimu Margaret, they have not been forthcoming with any information on the same.
- 7) That he has observed that the respondents have pitched tents on the subject land parcel MWERUA/GITAKU/111, wherein they are holding the wake in respect of making the funeral arrangements for the said Antony Gatimu Margaret.
- 8) That it has now become apparent that the plaintiff/respondent, his agents, family members, relatives, employees, general public and/or all the other persons through and under whom and/or for whose benefit he sues wishes to inter the mortal remains of Antony Gatimu Margaret on the subject land parcel MWERUA/GITAKU/111.
- 9) That the said interment if allowed to go on will greatly afflict our interests in the suit land parcel MWERUA/GITAKU/111, the possession of which is the substratum of this case.
- 10) That if the interment is let to continue, there is real risk and danger that the plaintiff/Respondent, his agents, family members, relatives and/or all the other persons through and under whom and/or for whose benefit he sues, will use the same to try and defeat our legitimate interest in the subject land parcel MWERUA/GITAKU/111.
- 11) That the Plaintiff/Respondent, family members, relatives and/or all the other persons through and under whom and/or for whose benefit he sues are not in lack of a premises on which they can confer the final burial rites and subsequent interment of the late Antony Gatimu Margaret.

RESPONDENTS SUMMARY OF FACTS

The Respondent opposed the said application vide a replying Affidavit sworn on 12/01/2022 in which he deposed as follows;

- 1) THAT the application dated 30/12/2021 is frivolous, an abuse of the court's process and has failed to disclose very crucial material facts.
- 2) That the suit land MWERUA/GITAKU/111 was purchased from one Ngacha Kinyua by my paternal grandfather Mbiti Kibutu, but registered in the name of Nelson Kimotho Mbiti, now deceased, brother to my father Nahashon Gatimu Mbiti.
- 3) That my father Nahashon Gatimu Mbiti held the view that he should also reside on that land as of right, and settled on the land in 1964. He lived on the land until he died in 2001.
- 4) That we, the family of Nahashon Gatimu Mbiti, now deceased, connected water to the land. My father also took a loan to develop part of the suit land that he was occupying, planted coffee stems, dug a borehole and planted other assorted trees on the land.
- 5) That since my father was a prominent tailor, he built permanent houses on the land, where my siblings live to date.
- 6) That to the contrary, my father's brother Nelson Kimotho never settled on the suit land. Indeed he was a bicycle repairer and had no means to buy land. When he, Nelson Kimotho left the colonial village, he settled on his other brother's land, William Gichira, being number MWERUA/GITAJU/379. He was then allocated land parcel number MWERUA/MUKURE/506 and this is where he was buried after he died. His wife was also buried there.
- 7) That the now late Antony Gatimu Margaret was born and brought up on the suit land. Indeed he does not know of any other place he could call home.
- 8) That since we, the family of Nahashon Gatimu believe that we are entitled to part of the suit land, we buried our father on the suit land when he died in 2001. Our mother had died earlier in 1978 and we buried her on the suit land. When my brother Daniel Maina Gatimu died in April 2005, the Applicants herein moved to court, just like they have now done, to stop him being buried on the suit

land. The court disallowed their application, wherein I was named as the respondent, and we buried our brother on the suit land.

9) That the applicants are laying claim to the suit land, just like what we the children of Nahashon Gatimu are claiming. As of now, no one can claim to have more superior rights than the other party over the suit land. This court is yet to make a determination as to who should be the title holders and area to be taken by the said owners.

10) That the Applicants have not demonstrated what loss they will suffer and which cannot be compensated by an award of damages if the now late Antony Gatimu Margaret is buried on the suit land. There is no property in a dead body. If anything, none of the applicants live on the suit land except David Mutugi Kimotho who occupies part of the suit land.

LEGAL ANALYSIS AND DECISION

I have considered the Notice of Motion application, the affidavit evidence, both in support and in opposition thereto. I have also considered the annexures to the supporting affidavit and the submissions by counsels. The gist of the applicants' application is to stop the interment of the mortal remains of one Antony Gatimu Margaret (deceased) on the suit land parcel number MWERUA/GITAKU/111. Being an application for an equitable relief under **Order 40 of the Civil Procedure Rules**, the applicants are required to satisfy the triple requirements as set out in the celebrated case of **Giella versus Cassman Brown & Company Ltd (1973) EA 338**. First, the applicant must show that they have a prima facie case with high chances of success at the main hearing. From the materials placed before me, the Respondents are shown as the registered proprietors of the suit land while the Applicant is seeking a declaration to be registered as the owner under the **Limitation of Actions Act**, which right and/or interest in my humble view can only be determined after the case is fully heard and determined. The rights/interest of a claimant for land under the Limitation of Actions Act can only crystallize upon the full hearing and determination and not before. Until that is done, the rights of a registered proprietor as can be shown in a certificate of title shall be taken by all courts as prima facie evidence that the person so named is the absolute and indefeasible owner under **Section 26 of the Land Registration Act, No.3 of 2012**. On that ground, I find that the Applicants have not made out the first ground for the grant of the orders sought.

The second ground is that an Applicant must demonstrate that he will suffer irreparable injury for which damages will not be an adequate remedy. The Respondent in his replying affidavit stated that they buried their mother and father in the suit and when the brother to their father, one Daniel Maina died in the year 2005, the Applicants also moved to stop him being buried in the suit land but the court disallowed their application. By a supplementary Affidavit sworn on 21/01/2022, the Applicant confirmed the said burials took place adding that the same was done upon an agreement made before clan members. I am of the view that the mere act of interring the remains of a deceased person on a parcel of land does not confer title to that land on the estate of the deceased or her beneficiaries. I am therefore not persuaded that the Applicant would suffer irreparable injury if the orders sought herein are not granted. The upshot of the foregoing is that the application dated 30/12/2021 is not for granting and the same is hereby dismissed with costs to the respondents.

Ruling READ, DELIVERED and SIGNED in the open Court at Kerugoya this 11th day of February, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. David Kinyua – present
2. Davit Mutugi Kimotho – present
3. Kabuta, Court clerk - present.