



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**ELC NO. 13 OF 2014**

**MARCO MUJUMBA BUSOLO ..... PLAINTIFF**

**VERSUS**

**RACHEL RUSIMBI OKUMU ..... DEFENDANT**

**RULING**

1. The applicant Marco Mujumba Busolo brought a notice of motion dated 29th January, 2014 seeking to restrain the respondent Rachel Rusimbi Okumu from burying the remains of the late Michael Okumu Achoka in the applicant's land comprised in Title No. Kakamega/Nzoia/51.
2. The applicant Michael Mujumba Busolo (Busolo) and Michael Okumu Achoka (deceased) are sons of one mother Mary Munayo Busolo (Mary) who is now deceased.
3. Mary had initially been married to one Patrick Achoka who is said to have died in 1959. Mary together with Patrick Achoka had four children namely Joseph Okello, Ibrahim Apopo, the deceased and Christine Atieno.
4. Marty later lived with another man called Wilson Busolo and together the two had two children namely Marco Mujumba Busolo the applicant herein and Susan Chala. There are two rival contentions regarding the status of Mary in relation to Patrick Achoka and Wilson Busolo. The deceased had contended in proceedings annexed to the applicant's application that Mary did not remarry after the demise of Patrick Achoka. On the other hand the applicant contends in the plaint that Mary separated from Patrick Achoka and married Wilson Busolo.
5. Mary died in 1987. In 1998 the applicant filed Kitale HCCC No. 50 of 1998 in which he sought to evict the deceased from the suit land. The case proceeded ex-parte and the applicant managed to evict the deceased. The ex-parte judgement was subsequently set aside and the deceased returned back to the suit land.
6. In 1999 the applicant filed Kitale Succession cause No. 156 of 1999 in respect of the estate of Mary. He obtained grant of letters of administration pursuant to which he had himself registered as proprietor of the suit land in 2000. On learning that the applicant had obtained letters of administration in respect of Mary's estate, the deceased filed summons for revocation of grant issued to the applicant. The objection was partly heard as the time the deceased died.
7. The applicant contends that the deceased's remains should not be interred on the suit land as he is the sole proprietor of the land. The deceased's wife who is the respondent in this application contends that her husband is entitled to be buried on the suit land as the deceased had interest in the suit land.
8. The respondent contends that the suit land was bought by Mary and that the deceased has lived on the land throughout his life and that she together with her deceased husband has set up their matrimonial home on it and has lived with the deceased on that land for over twenty years. She contends that she has no any other land on which she can bury the deceased.
9. I have considered both the applicant's application as well as the opposition to the same by the

respondent. The issue for determination is whether the applicant is entitled to the injunction which he is seeking. The principles for grant of an injunction are now well settled. In the case of *Giella -Vs- Cassman Brown* 1973 EA 358, the principles are set out as follows;- Firstly an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

10. A prima facie case was defined in the case of *Mrao -Vs- First American Bank of Kenya & 2 others* 2003 KLR 125 as follows;-

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”***

11. The applicant is seeking to restrain the burial of the deceased on the suit land. He has annexed a copy of title deed “MMB1” which shows that he is the sole registered owner of the suit land. From the proceedings in respect of the objection raised by the deceased in succession cause No. 156 of 1999 “MMB3”, it is clear that Wilson Busolo was buried on the suit land where Mary was also buried.

Patrick Achoka was buried at his ancestral home in Samia. This then raises the question as to why this happened this way. Was it a question of Mary remarrying or was it a question of inheritance. These are issues which will be determined in the pending succession cause. It is not for this court to determine these issues. There may be Luhya customs on succession in such cases. This will come out in the pending succession proceedings.

12. At this stage my concern is to determine whether an injunction should be issued as prayed. The respondent has annexed documents to show that the property had been sub divided into two between the applicant and the deceased. I will not make any findings on this as to do so, I will be going on to the issue of ownership. This is a subject to be determined in the pending succession cause according to the law of succession. Mr Kiarie for the applicant cited Nairobi Civil Appeal No. 233 of 2007 between Michael Musau Kitivo – Vs- Maurice Ndambuki Kitivo. In this case an issue arose as to where a mother of one of the parties who had died should be buried. The burial dispute had been filed in the lower court which granted an injunction restraining the defendant in that case from burying his deceased mother on the suit property. The plaintiff therein who was a step brother of the defendant had contended that his step mother could not be buried on the suit property as the same had been given to him as a gift. The trial magistrate granted an injunction in the suit which was a second prayer but declined to rule that the suit property belonged to the plaintiff on the ground that there was a pending succession cause in the High Court over the same property. The defendant was aggrieved by the decision of the magistrate. He appealed to the High Court which affirmed his decision but went on to delve into the issue of ownership. The defendant further appealed to the court of Appeal. The court of Appeal affirmed the decision of the High Court but faulted the High Court for delving into the issue of ownership holding that since there was a pending issue of ownership of the land in a succession cause, the judge should not have touched on the issue of ownership in her judgement.

13. As in the case cited hereinabove, there is a pending succession cause in the High Court and another civil suit pending. It will therefore be wrong for me to delve into the issue of ownership in the present application. As I have said before in this ruling, my concern is to determine whether the applicant is entitled to the injunction he seeks. On the material placed before me, I find that the applicant has demonstrated that he has a prima facie case with a probability of success. He has title to the land. He also has an arguable case that his mother Mary had re-married and that he was sired by a different father from the father of the deceased. The applicant's father was buried on the suit land unlike the deceased's father who was buried elsewhere.

14. I therefore find that the applicant is entitled to the injunction which he is seeking. I hereby

restrain the defendant/respondent, her agents or family members from burrying the remains of the deceased in the applicant's land comprised in Title No. Kakamega/Nzoia/51 pending the hearing and determination of this suit.

15. It is unfortunate that the deceased died before conclusion of the objection in Succession Cause No. 156 of 1999. The deceased had concluded his evidence in the cause on 22/6/2006. Seven years later, no other evidence had been adduced. If the respondent will not inter the remains of the deceased elsewhere, then the parties should take appropriate steps to ensure that the pending disputes are resolved, quickly particularly the succession cause matter.

16. In the circumstances of this case, I will not order costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 27th day of February, 2014.

**E. OBAGA,**

**JUDGE**

In the presence of Mr Kiarie for plaintiff and M/s Arunga for defendant. Court Clerk – Kassachoon.

**E. OBAGA,**

**JUDGE**

**27/2/2014**