



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 167 OF 2013**

DINAH CAREN ONDIEK AKINYI ..... PLAINTIFF

VERSUS

LEUKADIA AJWANG ONDORO ..... 1<sup>ST</sup> DEFENDANT

THADIUS OTIENO ONDORO ..... 2<sup>ND</sup> DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendants on 10<sup>th</sup> April 2013, seeking; an order of eviction against the defendants from all that parcel of land known as **LR No. Kabondo/Kowidi/428** (hereinafter referred to as “**the suit property**”). In her plaint dated 10<sup>th</sup> April 2013, the plaintiff averred that she is the administratrix of the estate of one, Tito Tobias Akinyi (hereinafter referred to as the “**deceased**”) who was at all material times registered as the proprietor of the suit property. The plaintiff averred further that sometimes in July 1998, the defendants entered into the suit property unlawfully and erected houses thereon, which houses the defendants had occupied up to the time the suit was filed. The plaintiff averred further that the defendants are also cultivating a portion of the suit property under their occupation. The plaintiff contended that as a result of the defendants’ wrongful and unlawful entry into the suit property, the estate of the deceased has been denied and/or deprived of the right to use and occupy a portion of the said property in occupation of the defendants. The plaintiff averred further that in the year 2008, the plaintiff lodged a complaint against the defendants with the police and the defendants who were charged and convicted of the offence of trespass on the suit property. The plaintiff averred further that despite demand and notice of intention to sue that was served upon the defendants, the defendants have refused to vacate and hand over possession of the suit property under their occupation to the plaintiff thereby rendering the filing of this suit necessary.
2. According to the court record, the 1<sup>st</sup> defendant is said to have been served with summons to enter appearance together with the plaintiff which summons she is said to have received on her own behalf and on behalf of the 2<sup>nd</sup> defendant. However, no appearance was entered on behalf of any of the defendants and no defence has been filed. There is an application on record for request for judgment in default of appearance and defence which was filed on 17<sup>th</sup> December, 2013. From the notes in the court file, the Deputy Registrar declined to enter interlocutory judgment in favour of the plaintiff on the ground that the purported service upon the defendants was not proper.
3. On 19<sup>th</sup> March 2014 the plaintiff filed an application by way of Notice of Motion dated 18<sup>th</sup> March 2014 seeking an order that pending the hearing and determination of this suit, the 2<sup>nd</sup> defendant by himself or through his agents, employees and/or representatives should be restrained by an interlocutory injunction from burying and/or disposing of the body of the 1<sup>st</sup> defendant on the suit property. The plaintiff’s application was brought on the grounds set out on the face

thereof and on the supporting affidavit of the plaintiff sworn on 18<sup>th</sup> March 2014. In her affidavit aforesaid the plaintiff has stated that the 1<sup>st</sup> defendant herein, died on 11<sup>th</sup> March 2014 and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were residing on the suit property where the 2<sup>nd</sup> defendant has made arrangement to bury the remains of the 1<sup>st</sup> defendant. The plaintiff has stated further that the burial of the 1<sup>st</sup> defendant on the suit property shall aggravate the acts of trespass which the plaintiff has complained of in this suit. It is on account of the foregoing that the plaintiff has sought an injunction to restrain the 2<sup>nd</sup> defendant from interring the remains of the 1<sup>st</sup> defendant on the suit property.

4. The application was served upon the 2<sup>nd</sup> defendant who appointed the firm of P. Ochieng Ochieng and Co. Advocates to act for him. The 2<sup>nd</sup> defendant filed a replying affidavit sworn on 2<sup>nd</sup> April 2014 in opposition to the application. In his affidavit in reply, the 2<sup>nd</sup> defendant admitted that the 1<sup>st</sup> defendant who is his mother died on 11<sup>th</sup> March 2014 after being taken ill. The 2<sup>nd</sup> defendant stated further that they have been living as a family on the suit property for over 22 years and that in the course of those years, his father, eldest brother, 2<sup>nd</sup> eldest brother and the wife of his eldest brother who died on 1992, 1997, 1994 and 1996 respectively have all been buried on the suit property without any objection from the plaintiff herein or the deceased.
5. The 2<sup>nd</sup> defendant annexed to his affidavit a copy of a letter from retired chief of the area one, Odindo J. Orongo confirming that the deceased 1<sup>st</sup> defendant and her family have been occupying the suit property over the years and that the said persons have been buried on the suit property. The 2<sup>nd</sup> defendant has stated further that the suit property is the only home that he knows and that it is where he currently lives and also the place where the deceased 1<sup>st</sup> defendant had his home. The 2<sup>nd</sup> defendant has contended that if the orders sought are granted, he will have nowhere to bury the body of the deceased 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant has urged the court to dismiss the plaintiff's application so that he may proceed to bury the remains of the 1<sup>st</sup> defendant. When the plaintiff's application came for hearing before me on 27<sup>th</sup> May 2014, Mr. Moracha Advocate appeared for the plaintiff while Mr. Nyasimi appeared for the defendants. In his submissions, Mr. Moracha relied on the grounds on the face of the application and on the supporting affidavit of the plaintiff/applicant. Mr. Moracha submitted that the plaintiff is the registered proprietor of the suit property and that the defendants had trespassed on the same. Mr. Moracha submitted further that as a trespasser the 2<sup>nd</sup> defendant has no right to inter the remains of the 1<sup>st</sup> defendant (deceased) on the suit property and as such the orders sought should be granted.
6. In his submission in reply, Mr. Nyasimi also relied on the 2<sup>nd</sup> defendant's affidavit filed in response to the application and submitted that there is a dispute over the ownership of the suit property and that the burial of the body of the 1<sup>st</sup> defendant on the suit property would not confer title of the suit property either on the deceased or the 2<sup>nd</sup> defendant. Mr. Nyasimi submitted that the deceased and the 2<sup>nd</sup> defendant have been staying on the suit property over the years and urged the court to allow the 2<sup>nd</sup> defendant to proceed with the burial of the body of the 1<sup>st</sup> defendant on the suit property pending the determination of the issue of the ownership of the suit property.
7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the 2<sup>nd</sup> defendant's affidavit filed in opposition to the application. Finally, I have considered the oral submissions by the advocates for both parties. The law on temporary injunctions is now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] E. A 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondents with a probability of success and that unless the orders sought are granted, he will suffer irreparable injury. In the event that the court is in doubt as to the foregoing, the court will determine the application on a balance of convenience. It is on the basis of the foregoing principles that I need to consider the application before me. What I need to determine first is whether the plaintiff has demonstrated that she has a prima facie case against the defendants with a probability of success. What the plaintiff has sought in the present application is to restrain the 2<sup>nd</sup> defendant from interring the remains of the 1<sup>st</sup> defendant on the suit property.
8. I am of the opinion that the plaintiff's application has been brought in vacuum in that it has no basis on the pleadings on record. As I stated at the beginning of this ruling, the plaintiff's suit as

