



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENTAL AND LAND CASE NO. 181 OF 2013

LENA NAMAROME WAFULA.....1ST PLAINTIFF/APPLICANT

VERSUS

ANGELAS WEPUKHULU.....1ST DEFENDANT/RESPONDENT

SIRENGO MUKELESIA2ND DEFENDANT/RESPONDENT

RULING

This Notice of Motion dated 3rd July 2013 and brought pursuant to the provisions of section 3, 3A & 63(e) of the Civil Procedure Act and Order 40 Rule 1 & 2 and order 51 rule 1 the Civil Procedure Rules seeks orders:

- That this application be certified as urgent and service of the same be dispensed with in the first instance.
- That pending hearing and determination of this application interpartes, this Honourable Court be pleased to issue a temporary order of injunction restraining the defendants, their servants, agents and or relatives from burying the remains of JOHN WEPUKHULU MUKELESIA-deceased on land parcel NO: BOKOLI/KITUNI/79.
- That this Honourable court be pleased to issue an order of injunction restraining the defendants from interring the remains of JOHN WEPUKHULU MUKELESIA-deceased in land parcel NO: BOKOLI/KITUNI/79 pending the hearing and determination of the main suit.
- That the O.C.S. Webuye Police station to enforce the compliance of the court order.
- That costs be provided for.

The prayers 1 & 2 of the application were granted exparte. The issue for determination is confirmation of the prayers earlier given in terms of prayer 3 and whether prayer 4 is necessary. The application is premised on the grounds on the face of it and the supporting and supplementary affidavits sworn by the applicant the respective dates.

The application is opposed by the Respondents who have sworn affidavits in reply. Both parties thereafter filed written submissions and each annexed case law in support of their submissions. I have read through the pleadings on record and submissions filed.

It is clear from the pleadings that the applicant had filed a suit against – JOHN WEPUKHULU MUKELESIA- deceased vide Bungoma CMCC NO. 692 of 2009 in which she sought to have the

deceased evicted from the suitland. That suit is still pending. Other than this suit, there was a previous suit regarding the same parcel of land L.R. BOKOLI/KITUNI.79. The deceased was made a beneficiary in Kimilili Resident Magistrate Court succession cause No. 5 of 1975 granting him 6 acres of land. This is brought out in the ruling annexed to the supporting affidavit.

Subsequently, an appeal was lodged against the ruling of the Magistrate court by Mukhanya s/o Wafula in Bungoma RMC No. 25 of 1978. The judgment in that appeal was delivered on 3rd November 1980. From the observations made in the judgment at page 1, the purchaser for value [John Wepukhulu – deceased] had stayed on the land for 8 years. The deceased used the order of 13th September 1978 and got the suit land subdivided into BOKOLI/KITUNI/780 and 781. He was subsequently registered as owner of land L.R. Bokoli/Kituni/781.

The respondent are holding onto validity of their title L.R. Bokolo/Kituni/781 and submit that L.R no. Bokoli/Kituni/79 ceased to exist. They have annexed copy of search and title for their land parcel Bokoli/Kituni/781. They have also annexed the District Land Registrar's report dated 23rd August 2011. The Land Registrar in his findings at paragraph 2 said,

“the parcel of land No. Bokoli/kituni/79 was indeed subdivided to create new parcels i.e Bokoli/Kituni/780 and 781. The boundaries of the two restricted parcels exist on the ground and are intact.”

It would appear then that the applicant and her family never disclosed and/or executed the judgment on appeal against the respondent or the the District Land Registrar with the order to correct the records. However what is more confusing is the existence of two parallel registrars for the same piece of land even after subdivision had been undertaken according to the Land Registrar. There are current searches showing both L.R. No. 79 and 781 are existing.

On the basis of the judgment of the court in Bungoma RMC Civil Appeal no. 25 of 1978, title L.R. No. Bokoli/Kituni/781 ought to have been canceled. Neither the applicant nor his son seemed to have served the order on the district Land Registrar. However it is not open to this court at this interim stage of the proceedings to make a finding on validity of any of the titles or otherwise. I set the background above for purposes of analyzing whether the applicant merits the orders she is seeking.

For injunctions to be granted, an applicant's case must fulfill the principles laid down in the renowned case of *Giella vs. Cassman Brown*. The applicant is seeking to stop the burial of John Wepukhulu – deceased on L.R. BOKOLI/KITUNI/79 because she is the registered owner of the suit parcel. But from the history of this case, the deceased has lived on this land earlier than from 1975. By her own averment in her plaint in CMCC No. 692 of 2009 where she sued the deceased at paragraph 5 states,

“...and he has also put up permanent structures to which the plaintiff has been demanding for his vacation in vain”.

She sought for the eviction of the defendant and all persons claiming through him (deceased). The applicant may have a prima facie case but the balance of convenience does not tilt in her favour. The balance of convenience tilts in favour of the respondent whose family has lived on this land for several years and put up houses. They got judgment that cancelled the deceased title in 1980 but sat on it.

The applicant has not demonstrated to this court that the loss she will suffer cannot be compensated in monetary terms. If the applicant's suit is successful, the body of John Wepukhulu-deceased can always be exhumed. It is now settled in law that there is no property in a dead body. Consequently i dismiss the application with no order as costs.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 29th day of August 2013.

A. OMOLLO

JUDGE.