



No. 68/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 60 OF 2010

MBWELE MUOKI..... 1ST PLAINTIFF

DENNIS MUOKI 2nd PLAINTIFF

VERSUS

JUSTUS MUTIE KIOKO..... ..DEFENDANT

RULING

1. The application dated 14th June 2013 by way of Notice of Motion is brought pursuant to Order 51 rule 1 of the Civil Procedure Rules and Sections 1B and 3A of the Civil Procedure Act.
2. It seeks this court's order directing the officer commanding Makueni Division (OCPD) to provide security during the burial of the late Dennis Muoki (the second plaintiff) on land parcel no. MAKUENI/UNOA/58.
3. The application is premised on grounds that the plaintiffs are the registered owners of land parcel No. MAKUENI/UNOA/58 (*hereinafter the suit property*). The defendant unlawfully settled on a portion of that land following a pretext that he had purchased it from a person who had no claim of right on the said land.

The issue was determined in Succession Cause no. 76 of 2004. The defendant however refused to move out of the suit land, prompting the plaintiffs to file the present suit seeking eviction orders.

4. Prior to the suit being determined the 2nd plaintiff passed on. The defendant sought injunction orders from the court in this suit to bar the 1st plaintiff from interring the mortal remains of the 2nd plaintiff on the suit property. The application was dismissed. Despite the court Order, the defendants organized unruly armed gangs who deterred the 1st plaintiff from burying the 2nd plaintiff's mortal remains on the suit property. The body was returned to the mortuary.
5. The OCPD Makueni has however refused to provide necessary security without a Court Order.
6. The application is supported by an affidavit deponed by the 1st plaintiff where she states that the suit property measures 11.3 Hectares. The defendant has settled on a portion of the suit property. Her attempt to bury the deceased on their land was thwarted by goons who threatened to shoot them. She was forced to take the body back to the mortuary. Prior to the act of being barred to bury the deceased the defendant had threatened to shoot them with arrows in case they went to inter the body at the suit property
7. In a reply thereto the defendant stated that in his defence to the suit seeking his eviction from the suit property he counterclaimed for a sum of Ksh.7,500,000/= being the value of the suit property or in the alternative a refund of Ksh.29,000/= being the purchase price of the suit property and

- interest at a commercial rate.
8. He stated that the court having ordered in the Succession Cause that he had recourse in pursuing the persons who sold to him land he was entitled to remain on the suit premises until the suit was determined. He denied having hired goons to bar mourners from burying the remains of the deceased.
 9. Further, he stated that burial of the deceased on the land would result into him being tortured by spirits which will be tantamount to being evicted, an act that will make him suffer irreparable damage as he will not recover the value of his investment in the suit property which stood at Ksh.7,200,000/= per the valuation report by P. Wambua dated 25th March 2009. He averred that it was only fair and just for the Notice of Motion to be dismissed.
 10. I have taken into consideration rival submissions of counsels for the applicant and the respondent.
 11. Parties herein are in agreement that this suit emanated from Succession Cause No. 76/2004. Annexure "MMB" to the supporting affidavit is the Ruling of the court. **Lenaola J.** stated as follows:

"Since neither Kioko, Dennis Muoki nor Muli Kioko had no lawful interest in the deceased's estate any attempt at disposing any part of it, two (2) years after his death (he died on 14.10.2982), is unlawful as it amounts to intermeddling with it. In the event, Justus Mutie Kioko has no lawful interest in this estate and he can pursue a refund of his money from those that illegally received it."

12. Justus Mutie Kioko being the Respondent herein has no legal claim over the suit property. He sought injunctive orders to restrain the 1st applicant from burying the mortal remains of the 2nd plaintiff on the property suit. **Makhandia J.** (as he then was) dismissed the application. He found that the applicant herein who was a joint absolute registered owner of the suit property could inter thereon the mortal remains of the deceased.
13. No appeal has been preferred against both Rulings. The proprietary rights in respect of the subject property are therefore not in question. A right to seek compensation from those who illegally obtained money from him (Respondent) as stated by **Lenaola J.** cannot be used as an excuse to deter the owner of the suit property from burying her son.
14. In his replying affidavit at paragraph 13, the Respondent states thus:

"The burial of the 2nd plaintiff at the suit premises will inflict psychological torture on me as I risk being visited by spirits."

This is evidence that he is opposed to the burial of the mortal remains of the deceased. The applicant must therefore be believed when she says that mourners who were going to bury the body were turned away by a violent gang of armed goons who threatened to shoot them with arrows forcing them to return the body to the mortuary.

15. In the circumstances, I find the applicant having demonstrated that she needs security in order to inter the body of the deceased on their land.
16. Accordingly, I hereby order the officer commanding Makueni police Division (OCPD Makueni) to provide security during the burial of the late Dennis Muoki on land parcel No. MAKUENI/UNOA/58.
17. Costs in the cause.
18. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of AUGUST, 2013.

L.N. MUTENDE

JUDGE

