



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 72 OF 2008

MUTISO MUMO KALAI PLAINTIFF

VERSUS

- 1. NDONYE MUSUU**
- 2. SAMMY NDUNDA**
- 3. MUMBUA MWILU**
- 4. MUSUU MUASYA**

5. KIMUYU MUSUU DEFENDANTS

R U L I N G

Before me is an application dated 15th September 2011 filed by the Plaintiff. The application was filed under Order 40 Rules 1, 2, 3 and 4 and Order 51 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21). It seeks 6 prayers, three of which have been spent as follows:-

- 1. (Spent).**
- 2. (Spent).**
- 3. (Spent).**
- 4. THAT an injunction do issue against the defendants jointly and severally their agents and/or servants restraining them from removing the body of the late Ndunda Muoki from Machakos District Hospital Mortuary for burial on the suit land LR No. Muvuti/Kaani/1678 pending the hearing and determination of this suit.**
- 5. THAT the OCS, Machakos Police Station assist in enforcement of the orders.**
- 6. THAT costs of this application be costs in the cause.**

The application has grounds on the face of the Notice of Motion. The grounds are that the defendants are

precluded by custom and law from burying the deceased on the subject land.

The application was filed with a supporting affidavit. In the affidavit, it was deponed that the subject land belonged to the plaintiff. A copy of a title deed issued in 2007 was annexed to the affidavit. It was deponed also that the dispute had been in court since 2008, and that mandatory injunction orders had been issued against the defendants for them to be evicted from the suit land. That however, the defendants had not complied with the court orders and now wanted to bury their late relative on the land which belonged to the plaintiff. That though a consent order was recorded on 10/2/2009 that the *status quo* be maintained, the defendants had continued to wantonly cause destruction to the suit property. It was deponed that the deceased should be buried in parcel LR. Muvuti/Kaani/1677.

The application is opposed. A replying affidavit sworn by Sammy Nzioka Ndunda, one of the defendants, on 27th September 2011 was filed. It was deponed that the defendants were in possession of the title No. LR Muvuti/Kaani/928 registered in the name of the late Muasya Muoki Wavai, who died in 1997. They annexed a copy of the said title. That they were not aware of title LR Muvuti/Kaani/1678, which was in the name of the plaintiff. That if it existed then the same must have been obtained through fraud. That they could not bury Ndunda Muoki on parcel No. LR Muvuti/Kaani/1677, as the same did not exist. That their attempt to bury the deceased on plot LR Muvuti/Kaani/928, which the plaintiff claims to own part through LR Muvuti/Kaani/1678, was not an act of high impunity. That the *status quo* of the suit land had been maintained since 10/02/2009 when a consent to that effect was recorded.

The parties through their respective counsel filed written submissions. The plaintiff's submissions were filed by Cheloti & Company advocates. It was admitted in the submissions that the land was initially owned by one, MUASYA MUOKI WAVAI deceased and it was LR Muvuti/Kaani/928. However, the plaintiff submitted that there was a sale to him of part of the land, and the land was then subdivided into two plots LR No. Muvuti/Kaani/1677 and LR No. Muvuti/Kaani/1678. It was contended that the latter plot was his land, and was the subject of this suit. According to him, the defendants should bury the deceased on plot LR Muvuti/Kaani/1677, as LR Muvuti/Kaani/928 did not exist anymore.

It was contended that the plaintiff had satisfied the requirements under the case of **Giella –vs- Cassman Brown Ltd (1973) EA 358** for grant of an interlocutory injunction.

The defendants filed their submissions through their advocates Manthi Masika & Company. It was their contention that the plaintiff had not established a *prima facie* case with probability of success. They contended that plot LR Muvuti/Kaani/1678 was fraudulently and illegally created from the original piece of land. They claimed that the defendants had in fact field HCCC No. 274 of 1996, in which, the plaintiff herein was not granted an injunction as requested by him. They contended that the court rejected his request for injunction on 9th April 1997.

They contended that thereafter, the plaintiff went to the Land Disputes Tribunal whose decision was null and void because it was made when Muasya Muoki Wavai was long dead.

It was also contended that the defendants had lived on the subject land for many years with the late Muasya, who was buried on the said land. Therefore, they had an overriding interest in terms of section 30 of the Registered Land Act (Cap 300).

Thirdly, they contended that a monetary compensation will be adequate to the plaintiff. Reliance was placed on the case of **Jeremia Musyimi Nzuki –vs- Michael Mule Mutuku – Machakos HCCC No. 14 of 2005**. They urged that the court should order that the burial on Ndunda Muoki be done on plot LR Muvuti/Kaani/928 of which Muvuti/Kaani/1678 is a part. They contended that the plaintiff had not satisfied the parameters set in the case of **Giella –vs- Cassman Brown Ltd (supra)**.

On the hearing date, only Mrs Keya, for the plaintiff was in court. She stated that she would rely on submissions filed. Nobody appeared for the defendants.

I have considered the application, documents filed and submissions on both sides. This application for

interlocutory injunction will succeed. It is clear from the facts and evidence placed before me that there was a bigger plot Muvuti/Kaani/928. There is now a smaller plot created from the bigger plot. It is plot Muvuti/Kaani/1678 in the name of the plaintiff. The defendants are the descendants of the original owner of the bigger plot, which is now in two portions. They claim that the plot LR Muvuti/Kaani/1678 was created fraudulently. However, the issue of fraud will have ultimately to be determined substantively after evidence is tendered. It cannot be determined at this interlocutory stage.

At the moment, it is clear to me that there is an area of the original plot LR Muvuti/Kaani/928, on which the defendants can choose to bury their late Ndunda Muoki. Whether it is designated as LR Muvuti/Kaani/1677 or not, the fact is that there is an area of land from the original plot on which there is no dispute. Due to the facts of the present case, the case of **Jeremiah Musyimi Nzuki –vs- Michael Mule Mutuku** is not applicable as there is an alternative area of land where the deceased can be buried.

I find that the plaintiff has established a *prima facie* case. A *prima facie* case is a case that may or may not succeed. He has also demonstrated that damages will not be adequate compensation, if the orders sought are not granted, as the defendants have an alternative area to bury their late deceased. The issue of the genuineness of the title to plot LR Muvuti/Kaani/1678 has to be pursued for substantive determination by the court. In my view, the plaintiff has satisfied the two main requirements for grant of an interlocutory injunction as stated in **Giella –vs- Cassman Brown Ltd (supra)**. He will therefore be granted the interlocutory injunction.

Consequently, I allow the application and grant prayer 4. I find no basis however, for granting prayer 5, as there is no prayer in the application that would require police action. My previous orders on mortuary costs are hereby vacated. Costs in the cause.

Dated and delivered this **20th** day of **June** 2012.

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George Dulu
Judge
In the presence of:

Counsel for the Plaintiff/Applicant – Mr Kamanda holding brief for Mrs Kaya.

Counsel for Defendant/Respondent Ms. Thiongo.

Nyalo – Court clerk.