



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 8 OF 2012

DENNIS MUNGARA NGANGA..... PLAINTIFF

- VERSUS -

NJOROGE CHAURE 1ST DEFENDANT

KAMAU CHAURE 2ND DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 11th January 2012. It is expressed to be brought under orders 40 and 51 of the Civil Procedure Rules 2010 and sections 1A, 1B, 3A and 63 of the Civil Procedure Act. The plaintiff prays for a mandatory injunction to compel the defendants to exhume the remains of one Njeri Chaure, deceased, from the plaintiffs land Lari/Kambaa/1002. In default, the plaintiff prays that he be at liberty to exhume the remains and preserve them in a mortuary. The plaintiff also prays for a prohibitive injunction to restrain the defendants from interfering with his quiet possession of the land. Lastly, he prays that the police at Lari station do enforce the ensuing order.

2. In a synopsis, the plaintiff avers that he bought the suit land in 2011 for consideration of Kshs 900,000 from one Edward Kinyanjui Ndungu. The latter has also sworn an affidavit with leave of court dated 10th February 2012. He confirms the sale to the plaintiff. A title deed has been issued to the plaintiff. The defendants are alleged to have dug a grave and buried the deceased on the plaintiff's land on or about 6th January 2012. The plaintiff says that the burial was secretive and meant to defeat his proprietary rights to the land. The defendants, it is alleged, have continued to enter and trespass upon the plaintiff's land destroying his crops and interfering with his possession. The plaintiff contends that unless the remains of the deceased are exhumed, they will decompose quickly. He thus prays for the reliefs of mandatory and prohibitive injunctions. He avers that in default, he would suffer irreparable harm not compensable in damages.

3. The defendants contest the motion. There is filed a replying affidavit by Kamau Chaure, the 2nd defendant, and on behalf of the 1st defendant. An authority to depone to that affidavit on behalf of his co-defendant has been filed. The gist of the defendants' case is that the suit land comprises ancestral land hived off from the former title Lari/Kambaa/309 which belonged to their late father Chaure Gathita jointly with his brother Mbiyu Gathita. It was held in trust by the latter. The defendants claim to have held possession for over 48 years. They also aver that their late father was buried there on 11th April 1995. The land is the one that was subdivided by Edward Kinyanjui into 8 portions. The plaintiff's portion is an excision thereof. The defendants aver that the ownership of the original title is the subject of succession cause number 328 of 1991 at the Resident Magistrate's court Kiambu. Accordingly, the defendants contend that the subdivision is irregular and that the defendants retain the right to possession and to bury

their mother on the land. They also submitted that it would be inimical to morality and public policy to order exhumation. The defendants claim they are in possession. They acknowledge burying the deceased on the land but deny doing so in secret.

4. I have heard the rival submissions. I take the following view. The plaintiff seeks both a prohibitive and a mandatory injunction. The principles upon which the court grants those reliefs is now well settled. When a litigant approaches the court for prohibitive injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80.

See also the *Public Trustee Vs Nicholas Kabucho Murimi* HCCC ELC 610 of 2011 [2012] e KLR, *George Munge Vs Sanjeev Sharma & 3 others* HCCC ELC 677 of 2011 [2012] e KLR.

5. A mandatory injunction on the other hand, ought not to be granted on an interlocutory application in the absence of special circumstances. It is to be granted only in clear cases either where the Court thinks that the matter ought to be decided at once; or where the injunction is directed at a simple and summary act which could be easily remedied; or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court has to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction. See the decisions in *Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited* Nairobi HCCC 398 of 2005 (unreported) and *Mucuha Vs Ripples Limited* [1990 – 1994] E.A. 388. That position has been stated clearly in *Halsbury's Laws of England* 4th Edition Volume 24 paragraph 848.

6. I would then mirror those legal principles against the facts in this case. I am satisfied that by a sale agreement dated 30th August 1995, Edward Kinyanjui Ndungu bought title number Lari/Kambaa/309 from one Joseph N. Mbiyu. That transaction was sanctioned by the land control board on 12th September 1995 as per the exhibit “EKN 9” to the further supporting affidavit. When the land was transferred, he subdivided it into 8 portions. By a further sale agreement dated 15th September 2011, Edward Kinyanjui sold the portion known as Lari/Kambaa/1002 (the suit land) to the plaintiff for Kshs 900,000. I have perused the title deed annexed marked **DMNI**. It is in the name of the plaintiff and was issued on 22nd September 2011.

7. The defendants claim a beneficial interest on the original title. They claim to be in possession for the last 48 years and to have buried their father Chaure Gathita there. So I need to interrogate those facts a little more. I have looked at the copy of the register of Lari/Kambaa/309. It was registered in the name of Mbiyu Gathita. It was not registered in the names of Chaure Gathita, the defendants’ father. The defendants state in their reply that Mbiyu Gathita was holding the title in trust for their father. That is not borne out by the register. And I note that the defendants in the replying affidavit have not provided any document to rebut the records of the register or to show the existence of the trust. I find *prima facie* that the land was not registered in the name of Chaure Gathita deceased. I then turn to the succession cause number 328 of 1991 at Kiambu Resident magistrate’s court. The defendants depone at paragraphs 6,7,8,9 and 24 that the succession matter is still pending and undetermined. I have seen a replying affidavit of Edward Kinyanjui in that cause marked “**KC 2**” as well interim orders exhibited as “**KC 4**” and “**KC 5**”. An order marked “**KC 3**” had stayed the orders of eviction issued by that court on 6th March 1995. The defendants have also annexed an order marked “**KC 6**” over an interlocutory application that was adjourned generally on 7th April 2011. In a sense then, the succession cause No 328 of 1991 would seem to be alive.

8. I note however that that rendition of events at the subordinate court is incomplete. In the further supporting affidavit sworn by Edward Kinyanjui, he depones at paragraphs 8,9,10 and 11 as follows;

8. **THAT** the Resident Magistrate's Court Kiambu gave another order on 22nd September 1995 for the eviction of CHAURE GATHITA and members of his family from the parcel of land known as Title No. **LARI/KAMBAA/309**. (I annex hereto to copy of the said order and I mark the same **Exhibit No. EKN 4**).

9. **THAT** I am also aware that on 29th November 1995, the Resident Magistrate's Court Kiambu gave an order in favour of the said JOSEPH J.N. MBIYU against CHAURE GATHITA in the following terms:-

a) That the Court Bailiff and the OCPD Kiambu do forcefully evict and demolish all the structures erected on Title No. **LARI/KAMBAA/309** using reasonable force.

b) That the costs of the application be in the cause.

(I annex hereto a copy of the said order and I mark the same **Exhibit No. EKN 5**).

10. **THAT** on 15th August 1996, the Resident Magistrate's Court Kiambu issued an order for the re-eviction of CHAURE GATHITA'S family from the parcel of land known as Title No. **LARI/KAMBAA/309**. (I annex hereto a copy of the said order and I mark same **Exhibit No. EKN 6**).

11. **THAT** I am aware that the defendant's brother JOSEPH CHAURE made an application to the High Court in Nairobi HCSC No.1879 of 1996 for revocation of the grant of administration made to JOSEPH J.N. MBIYU by the Resident Magistrate's Court Kiambu Succession Cause No. 328 of 1991 on 24th June 1996. The said application was heard and dismissed on 24th May 2000. (I annex hereto in a bundle copies of the pleadings, the proceedings, the ruling and the order issued by the High Court to confirm these facts and I mark the same **Exhibit No. EKN 7**).

9. From the evidence before me, it is clear that the subordinate court at Kiambu issued a subsequent order for eviction of the family of Chaure Gathita from the land. It issued a similar order on 15th August 1996. An application to the superior court in Nairobi High Court succession cause 1879 of 1996 to annul the grant was apparently dismissed on 24th May 2000. The defendants have not led any evidence to controvert those averments. In the further supporting affidavit at paragraphs 19 and 20, the deponent is emphatic that the defendants never challenged his original title and never buried their father on the land. The facts and truth will be disentangled by the trial court. From the pleadings before me, I find there is a paucity of evidence to support the claims by the defendants. I have entertained serious doubts that they are in possession or that their father owned the suit land or was buried there.

10. When I juxtapose that against the plaintiff's registered title, I reach the conclusion that the plaintiff has a superior claim of ownership. And I am also guided there by sections 27 and 28 of the Registered Land Act (now repealed) but which is material to the plaintiff's interest in the land.

11. Having reached that conclusion, it follows logically that the defendants' claim on possession and right to bury the deceased on the land are on a quicksand. The defendants have failed to establish a legal right at this stage. I thus find that they were not entitled to bury the deceased on the suit land. The next key question is whether the remains of the deceased should be disturbed.

12. To disinter the remains of the deceased should be an exception. See *Re Matheson (deceased)* [1958] 1 ALL ER 202. But a court of law in exercise of civil or criminal jurisdiction can order, for good cause, the remains to be disturbed. See *Hellen Cherono Kimurgor Vs Esther Jelagat Kosgei*, Nairobi, High Court succession cause 1129 of 2006 [2008] e KLR. And this court has held that subject to the Public Health Act, Cap 242, the relief is available. See *Apeli Vs Bukulu* [1985] KLR 777, *Salina Soote Rotich Vs Caroline Cheptoo and another* High Court, Eldoret Civil Appeal 48 of 2010 (unreported). The court is seized of original jurisdiction to make the order under the Constitution and the Judicature Act. The onus lies with the applicant to establish that it is absolutely necessary to disinter the remains. It is a macabre event that may offend cultural and religious sensitivities. The court must then weigh various interests depending on the unique circumstances of the case. In the instant case there are competing proprietary

rights of the parties with traditional and cultural rights of the family of the deceased.

13. Having a fresh grave of a stranger on land registered in the name of the plaintiff compromises his right to quiet possession. It is disturbing. The grave, as he depones, is a permanent feature. It attracts the defendants to his land for traditional reasons. He depones at paragraphs 18 and 20 that the defendants may use it to stake a claim on his land. And if an order to exhume the remains is not made now, they will decompose and become more difficult to remove. The defendants submitted that an order for exhumation would be against morality and public policy. My view is that subject to the Public Health Act and considering the deceased was only interred on 6th January 2012, there is nothing immoral or against public policy in exhuming the remains. It is disturbing and culturally offensive to disturb the dead. But I see no inconsistency with the constitution, statutes or concepts of justice and morality. The defendants are the authors of this misfortune. If the order is not granted now, then the rapid decomposition will make it more difficult in the future. I must also weigh the interests of the plaintiff as proprietor against those of the defendants. I find in the end that the plaintiff has established a strong *prima facie* case for prohibitive injunction. I also find that he has reached the threshold for grant of a mandatory injunction to compel the defendants to exhume the remains of the deceased from the suit land.

14. I thus order:

- a) **THAT** a mandatory injunction shall issue to compel the defendants jointly or severally, their servants or agents and at their costs and subject to the Public Health Act, to exhume and remove the remains of Njeri Chaure, deceased, buried on the plaintiff's land title number **Lari/Kambaa/1002** forthwith;
- b) **THAT** in default of the defendants complying with order (a) above, and in the alternative, the plaintiff will be at liberty, subject to the Public Health Act, to exhume and remove the remains of Njeri Chaure, deceased interred on the plaintiff's land title number **Lari/Kambaa/1002**.
- c) **THAT** an injunction shall issue restraining the defendants, their servants or agents or otherwise howsoever from entering, trespassing upon, remaining thereon or interfering with the plaintiffs title or possession of land title number **Lari/Kambaa/1002** until the hearing and determination of the suit.
- d) **THAT** the Court Bailiff shall supervise execution of the above orders.
- e) **THAT** the suit shall be heard and determined within 1 year in default of which the injunction granted at order (c) above will lapse.
- f) **THAT** costs of the motion are awarded to the plaintiff in any event.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 18th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Mwangi for Mr. Ombati for the Plaintiff.

No appearance for the Defendants.