

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 115 of 2012

LUDORVICUS P. MUHATI PLAINTIFF

VERSUS

DESINA KHABAYIDEFENDANT

RULING

The application by way of Notice of Motion dated 10.5.12 seeks orders that the body/remains of PIUS MAKHATSE KONZOLO which were buried on L.P. NO. ISUKHA.LUKOSE/667 be exhumed and preserved at Kakamega P.G.H.'s mortuary pending the hearing and determination of this case.

Secondly, that the O.C.S. Kakamega Police Station do provide security to ensure compliance with the orders.

The application is supported by the affidavit of LUDORVICUS P. MUHATI. According to the said affidavit, the respondent is a step-mother to the applicant. That the respondent was married to the applicant's father when the respondent already had three children, the deceased being one of them. That the father of the deceased is the late FRANCIS IHACHI SHILABIKA KONZOLO. That the deceased's roots are in EBUTSAMI and he only used to occasionally visit his mother and did not have a house at BWICHINA village, Lukose Sub-location. That the respondent illegally buried the body of the deceased at BWICHINA on land parcel NO. ISUKHA/LUKOSE/667.

In opposition to the application, the respondent swore an affidavit on 25.5.12. It is the respondent's position that she is the widow of the late CLEMENT LUSENO WERE, (hereinafter Were) who was the owner of three parcels of land among them L.P. NO. ISUKHA/LUKOSE/667. That the late WERE had three wives and before his death the late Were had settled each of his wives on her own parcel of land, but that the grant of letters of Administration to the estate of the late WERE have not yet been obtained.

The respondent's contention is that the body of PIUS KONZOLO is rightfully buried on the parcel of land belonging to his father, the late WERE. According to the respondent, there is no evidence exhibited to prove that the late PIUS KONZOLO was not a son to the late WERE. The respondent saw this case as a scheme by the applicant to disinherit her and her children. The respondent further averred that the late PIUS KONZOLO was buried at night according to Luhya customary practices relating to murdered persons.

MS Muleshe advocate appeared for the applicant while MS Andia appeared for the respondent.

It is not in dispute that the land in question belongs to the late WERE. It is also not in dispute that the estate of the late WERE is yet to be distributed to the beneficiaries.

It is therefore not clear at this stage who the beneficiaries are and who amongst the them will inherit L.P. NO. ISUKHA/LUKOSE/667 which is the subject matter of this suit.

Whether the late PIUS KONZOLO was the son of the late WERE or not is an issue that cannot be determined in the instant application.

Consequently, the application fails with costs to the respondent.

Delivered, dated ant signed at Kakamega this 11th day of October, 2012

B. THURANIRA JADEN

J U D G E