



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC NO. 356 OF 2010

MACHUA MBUGUAAPPLICANT

VERSUS

THE HON ATTORNEY GENERAL RESPONDENT

AND

DANIEL MULI KIMULI..... INTERESTED PARTY

RULING

Coram: Mwera J.
Mutinda for Applicant
No appearance for Respondent
Court clerk Njoroge

The motion herein dated 24.6.10 was brought under section 146 of the Public Health Act (Cap 242) and section 3A Civil Procedure Act, for an order

i) that the body of Machua wa Muchugia be exhumed from plot No. DAGORETTI/MUTU-INI 840 and be buried on plot No. DAGORETTI/MUTU-INI 725.

The reasons advanced were that the applicant was the grandson of the deceased Machua wa Muchugia who died in 1968 and was buried on Plot No. 840. It was the deceased property but after he died that plot was inherited by one of his sons. Later the interested party herein, Daniel Muli Kimuli, bought that plot. He does not belong to the clan of the deceased. The clan now wishes to exhume the deceased's body and rebury it on its land Plot LR 725. This was a unanimous clan decision which it discussed with the interested party. He has no objection – hence this application.

Machua Mbugua, the grandson of the deceased and the applicant herein, swore a supporting affidavit more or less restating what is in the grounds. The deceased died on 10.1.68 and was on 14.1.68 buried on Plot No. 840. This was his property. But following his death one son inherited it. It later changed hands and now it is the property of the interested party.

On 18.04.10 the Muchugia clan resolved that they wanted the deceased's remains exhumed and reburied on Plot No. LR 725. The interested party had no objection. Five (5) members of the Muchugia clan filed a consent for the order of exhumation. There were no copies of title for plots No. 840 or 725.

On or about 28.7.10 the interested party, Daniel Kimuli was served with this motion. He acknowledged service but did not file any papers in opposition.

When the cause was listed for hearing the Hon the AG was served. Miss Maina, a state counsel appeared and sought time to take instructions. On two occasions for mention Miss Maina did not appear before court and so it decided to determine the motion.

Section 146 cited herein says:

“146. Subject to the provisions of section 147, it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorised cemetery or in any other cemetery, burial ground or other place without a permit granted in a manner hereinafter provided.

(2) Such permit shall be granted to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.

(3) Such permit may be granted by the Minister in respect of any body or the remains of any body interred in any cemetery or burial ground or any other place.”

Then subsection 4, with a proviso thereto, goes on to state that the permitting authority may append conditions to the permit as it deems fit, which ought to be complied with. And that such permit shall not be necessary where a magistrate orders exhumation of a body when holding an inquiry in the cause of death of any person.

The applicant, kin of the deceased, has sworn an affidavit in that regard and stated that the deceased was buried on plot 840 which later became the property of the interested party. That party did not object to the wishes of the clan to exhume the remains of the deceased for reburial on the clan land – plot LR 725.

From the foregoing this application succeeds. The relevant Minister and/or also called the permitting authority, may issue the required permit as soon as possible to facilitate the desired exercise by the kin of the deceased herein.

Orders accordingly.

Delivered on 6.7.11

**J. W. MWERA
JUDGE**