



1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Subordinate Court Case*

BURIAL DISPUTE

- from*
- Githungiri/Githiga/1121*
- 2011 pending*
- clarified by Hon*
- 2010*
- plaintiff*
- the related*
- to this*
- proceed with the*
- unreasonable delay*
- opposed*
- 3.1 *Application by appellant to restrain the respondents burying the deceased upon land LR No.*
- 3.2 *Mwera J gave interim orders on 6th September hearing of application.*
- 3.3 *Confusion as to when application be heard but duty judge*
- 3.4 *Inter parties hearing 27th September 2011*
- 3.5 *Matter related to HCCC 3859/79*
- 3.6 *Nambyue J delivered judgment on 24th September and ordered land be transferred to the original now deceased.*
- 3.7 *Original plaintiff passes away*
- 3.8 *Appellants file case in subordinate court.*
- 3.9 *Magistrate's court dismisses application in view of Case HCCC 430/11*
- 3.10 *appellant files appeal from magistrate's court case High Court on 6th September 2011*
- 3.11 *arguments by applicant that*
- i) *Orders in place but parties wish to burial. Orders must be obeyed.*
- ii) *Irreparable loss would suffer*
- iii) *Application filed without*
- In Reply:*
- i) *Application for stay of execution*

finalization of the

ii) Application was not till the application

iii) Application be denied

iv) Relying on ruling

George Gitau Gatuma – Vs – Augustino Mbai Gatuma – Vs –
CA 113/05

4. Held:

a) Related file HCCC 3859/79

Orders of Mwera J
5th November 2010 that:

i) There be a status quo prior to 24th September 2010 that:

ii) There were orders pending the court

of

iii) appeal case
Ougo Deputy Registrar issued

transfers of land instruments despite Mwera J's orders

13. Case law:

- a) Michael Musau Kitivo
– Vs –
Maurice Ndambuki Kitivo
CA 233/07
- b) Koinange Investment and Development Ltd
- vs -
Nairobi City Council & 3 others
Visram JA (25th May 2009)
- c) Augustine Mbai Gatuma
-Vs –
George Gitau Gatuma
HCC 113/2005
Ojwang J

14. Advocates :

- i) S. Kingara instructed by S. Kingara & Co Advocates for the Appellant
- ii) M.K. Chebii instructed by M/s M.K. Chebii & Co Advocates for the Respondent
- iii) O.P. Ngoge appearing in HCC 3859/79

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 430 OF 2011

SAMWEL NDIBA alias SENIOR 1ST APPELLANT

SAMWEL NDIBA alias JUNIOR 2ND APPELLANT

VERSUS

JOHN GACHOKA KIHARA..... 1ST RESPONDENT

JOSEPHAT GATHOGA KIRAHHA 2ND RESPONDENT

DAVID MBURU KIHARA 3RD RESPONDENT

(Being an appeal from the Ruling of the Hon. Mr B M Nzakyo – Resident Magistrate – Githunguri dated the 2nd September 2011 in Githunguri PMCC 70 of 2011)

RULING

I. BACKGROUND

1. On unknown dates, Esther Wangari Kihara passed away. The announcement of her demise was made on the radio station for

16th August 2011. The funeral service was to have occurred on

19th August 2011 wherein it was announced that she would be buried on land parcel Githunguri/Githiga/1121 by her sons the two respondents.

2. The appellant/applicant filed a suit before the magistrate’s court seeking orders to restrain the two respondents from burying the deceased person. The Hon. Magistrate who handled the matter being PMCC 70 of 2011 noted that there was another matter in existence touching on the same dispute. The trial magistrate declined to issue injunction orders herein.

3. Then this appellant appealed to this court.

4. There were orders in this appeal issued by Mwera J that there be stay of orders/burial of the deceased till the finalization of the application seeking that not only should the magistrate’s orders be stayed, but a temporary injunction do issue.

5. The orders of the court exparte read that the orders be issued till the finalization of the appeal. The Hon. Judge kindly clarified that this was not the case. That his orders read the temporary injunction remain in force till the interparty hearing.

6. Despite this order, the parties proceeded to prepare the burial of the deceased, therefore the orders

sought herein.

7. This whole case is related extensively to the case of :

Esther Wangari Kihara

– Vs –

Samuel Ndiba alias Sam and 2 Others

HCCC 3859/1979

It was a suit filed by the deceased in 1979 claiming ownership of land. It had been in the court corridors for many years when it was finally heard by Kubo J. It was not determined but all the evidence had been concluded by the Hon. Judge. It was then that the Hon. the Chief Justice gave directions that the said matter be finalized by Nambuye J. At the time the matter came before me, Nambuye J was not stationed at the High Court of Kenya, Nairobi. She would, in essence, have been the best person to deal with this matter.

8. Nonetheless, I heard the submission of both parties and would outline their arguments put before this court.

II APPLICATION DATED 5TH SEPTEMBER 2011

9. There is the existence of file HCCC 3859/79. The position of that land dispute file is that the original defendants in that case not being satisfied with the decision of Nambuye J have appealed to the court of appeal. In the process, the land was transferred to the deceased and title issued. There was a stay of execution granted by Mwera J issued on 5th November 2010 in which such stay was issued with effect from 24th September 2010.

10. The deputy registrar filed transfer forms with effect from

21st December 2010 being long after orders of Mwera J were issued.

11. The original defendant placed a caution on the register of land.

12. Unfortunately, the original plaintiff Esther Wangari Kihara passed away. It would have been logical for the parties to go back to the HCCC 3859/79 case and have a substitute for the deceased legal representative to deal with the matter.

13. They went to the subordinate courts to seek orders restraining the deceased sons from buying her upon the land that now bears her name.

14. The orders of Mwera J staying the orders of Nambuye J so that no transaction occurs on the land, now goes to the burial of the deceased as of 24th September 2010. The status was that the title of the land had not been transferred to her name.

15. Mwera J again issued orders in terms of prayer one and two on the

6th September 2011 certifying the application as urgent and issuing a temporary injunction restraining the respondent from proceeding with the burial of Ester Wangari Kihara deceased on LR No. Githunguri/Githiga/1121 pending the interparte application of the case.

16. These were orders in which the Resident magistrate declined to grant in PMCC 70/2011 on the 2nd September 2011.
17. There would be substantial loss if orders are not granted and there would be prejudice suffered.
18. They are ready and willing to furnish security for orders be granted pending appeal.
19. The appellant relied on the case law of:

Michael Musau Kitivo – Vs – Maurice Ndambuki Kitivo

CA 233/07 Court of Appeal

S.E.O. Bosire JA (25th July 2008)

There was a pending issue of land before another court. The trial magistrate declined to have the burial matter allowed due to the pending land dispute case. An injunction in the above case was held to be *“merited as the land was registered in the name of the deceased person. The respondent was and is possibility still in possession.”*

20. This is similar to his matter. The Hon. Magistrate ought to have issued injunctive orders. He failed to do so. Orders were issued by Mwera J which orders the appellant wishes this court to confirm.
21. In reply, the respondents relied on the authority of:

Augustino Mbai Gatuma – Vs – George Gitau Gatuma

HCCC 113/2005

Ojwang J (as he then was)

The defendant prayed for interim orders to restrain the burial of the body of the deceased, one Margaret Wanjiku Gitau upon any of the parcel of land in dispute in the Dagoretti area of Nairobi. The Hon. Judge held that whereas on 2nd March 2005, Ransely J had ruled *“the applicant had a prima facie case with a probability of success and in any event damages would not be an adequate remedy.”* Orders so restraining were granted, the Hon. Judge in the above matter stated that *“the prime merits of the matter, which were likely will remain unchanged over at the hearing of the main suit dictate that the plaintiff be allowed to proceed with the burial of his daughter as he intends.”*

22. The respondent asks, by implication, I adopt the same position in this matter. Besides there may be the exhumation of the body if the court finds otherwise The Hon. Judge had relied on the Public Health policy.

III OPINION

23. The issue of land is a sensitive matter. This particular parcel of land has been protracted since 1979. The stage it has reached is an appeal to the court of appeal against the orders of Nambuye J of 24th September 2010.

24. What then should the parties do herein? I believe that the best course is to confirm the orders of Mwera J of 6th September 2011 and rule that there be a temporary injunction to issue to stay the burial of the said deceased person till further orders of the court.

25. I hereby order that the applicant's provide security of Ksh. 800,000/= in the form of bond insurance or bank or cash deposited in the account of both advocates pending the determination of this appeal. That the applicant are to pay the mortuary fees day to day till the finalization of this appeal.

26. I further order that this appeal 430/11 be heard by Nambuye J together with HCCC 3859/79 to be placed before her for reference.

27. The costs of this application will be in the appeal.

DATED THIS 6TH DAY OF SEPTEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

iv) S. Kingara instructed by S. Kingara & Co Advocates for the Appellant

v) M.K. Chebii instructed by M/s M.K. Chebii & Co Advocates for the Respondent

vi) O.P. Ngoge appearing in HCC 3859/79