



REPUBLIC OF KENYA



KENYA LAW
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**Delta Connections Limited v Deche (Environment & Land Case
16 of 2019) [2022] KEELC 3591 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2019**

**MAO ODENY, J
JULY 19, 2022**

BETWEEN

DELTA CONNECTIONS LIMITED PLAINTIFF

AND

ALFRED MWARINGA DECHE DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 5th July 2022 by the Plaintiff/Applicant seeking the following orders: -
 - a. Spent
 - b. That a temporary order of injunction be issued restraining the defendant whether by himself, his servants, agents, employee or family members from interring the remains of Mwaka Deche Chinyaka on the Plaintiff's property known as Plot No. 67 Group 1 Takaungu pending the hearing and determination of this application inter partes.
 - c. That a temporary order of injunction be issued restraining the defendant whether by himself, his servants, agents, employee or family members from interring the remains of Mwaka Deche Chinyaka on the plaintiff's property known as Plot No. 67 Group 1 Takaungu pending the hearing and determination of this application inter partes.
 - d. That the costs of this application be provided for.
2. This application was brought under Certificate of Urgency whereby the court granted interim orders of injunction pending the hearing of the application inter partes.



Plaintiff/applicant's Submissions

3. The Applicant relied on the grounds on the face of the record and the supporting affidavit of Moses Ndun'gu Waweru who deponed that the Plaintiff is the registered owner of the suit land known as Plot No 67 Group 1 Takaungu and annexed a copy of the title and certificate of postal search.
4. He further deponed that the Plaintiff filed this suit against the Defendant who is in illegal occupation of the suit land seeking orders of vacant possession. It was the Applicant's averment that the Defendant's mother Mwaka Deche Chinyaka recently died and that they intend to bury her on the suit land without the consent of the Plaintiff hence this application to stop the intended interment.
5. Mr. Mwakireti counsel for the Applicant submitted that although the Defendant claims ownership of the suit property he has not shown any documents at all and stated that the Plaintiff has established a prima facie case with a probability of success by producing a title to the suit property.
6. Counsel also submitted that the Defendant's ownership claim is based on a portion of the suit property stating that the Plaintiff's right to the suit property has been extinguished. That the court gave interim injunction restraining the Defendant from interring the remains of his mother and that the Plaintiff shall be seeking for the Defendant's eviction in the main suit.
7. Mr. Mwakireti submitted that the interment of the Defendant's mother on the suit property will cause irreparable damage to the Plaintiff and that the balance of convenience tilts in favour of the Plaintiff who is the legal owner of the suit land.
8. Counsel cited the case of *Naibor Ajijik Group Ranch v Agriculture Development Corporation(ADC) & 3 others* [2016] eKLR to respond to the Defendant's claim that he has previously buried his relatives on the suit land where the court held that it is irrelevant that the Applicants may not have raised any objections to the burial of other persons on the suit land which is not a waiver to object to a future burials hence they are within their rights as title holders to raise objections on how the land should be used.
9. Counsel also relied on the case of *Macedonia Resort Club Ltd v Silvans Awili* [2016] eKLR where the court issued an injunction restraining the Defendant from interring the remains of his kin on the suit property and urged the court to allow the application as prayed.

Defendant's Submissions

10. The Defendant relied on the replying affidavit of Alfred Mwaringa Deche together with the annexures and deponed that the Plaintiff's suit for vacant possession is res judicata as there was a previous suit between his late father and the Plaintiff's predecessors in title which suits were decided in his father's favour.
11. The Defendant further stated that the Plaintiff's title to the suit property has been extinguished due to the operation of the law as time had already lapsed as at the time the Plaintiff filed the suit on 9th April 2019.
12. Counsel submitted that the Plaintiff filed a similar application for injunction dated 8th April 2019 which was heard and determined on 10th July 2020 where the court noted that the Defendant not only had been on the suit land for many years but had engaged the predecessor in title in a series of litigation.
13. Mr. Atian'g relied on the case of *Ali Mwaduna v Masha Mukadha* [2019] eKLR where the court denied the Applicant an order of injunction on the grounds that the Defendant had been in occupation of the suit land for a long period of time.



14. Counsel also relied on the case of *Dinah Caren Ondiek Akinyi v Leukadia Ajwang Ondoro & Thadius Otiemo Ondoro* [2014] eKLR where the court held that a party cannot bring an application for injunction in a vacuum which is not anchored in the original pleadings. Mr. Atiang submitted that there was no amendment of the Plaint to include the prayer.
15. It was counsel's further submission that the issue of ownership is contested because it was challenged in Bahari Land Disputes Tribunal and was decreed in SRMCC No. 32 of 1996 and where a title is challenged it is not express that it is the Plaintiff who owns the title. Further that the Plaintiff is not likely to suffer any irreparable harm as the Plaintiff has indicated the value of the property as Kshs 3million which is ascertained and can be compensated by way of damages.
16. Mr. Atiang submitted that if the court finds that the Plaintiff is the rightful owner of the suit land then the body can be exhumed and that interring a body does not confer title to any party. Counsel also submitted that the Defendant has exhibited evidence of previous burials of members of the family on the suit land.
17. Counsel relied on the case of *Lena Namarome Wafula Vs Angelas Wepukulu & Another* [2013] eKLR where the Applicant had title to the suit land but Anne Omollo J gave an option of exhumation. Mr. Atiang distinguished the authorities cited by counsel for the Plaintiff and stated that in the first authority, the Defendant was neither claiming ownership nor residing on the suit land. Further that the second authority was about absolute and indefeasible ownership which is not the case in the current matter and urged the court to dismiss the application and allow the Defendant to bury his mother.

Analysis and Determination

18. This is an application for injunction restraining the Defendant from interring his mother's remains one Mwaka Deche Chinyaka on the suit land Plot No. 67 Group 1 Takaungu pending the hearing and determination of this suit.
19. The principles for grant of injunctions are well settled as per the *Giella vs Cassman Brown & Co Ltd* [1973] E.A 358, where a party must satisfy the court that he/she has a prima facie case with a probability of success, if the temporary injunction is declined, he/she will suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court is to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience tilts in favour of the Applicant or the Respondent.
20. The Plaintiff is the registered owner of the suit land having annexed the title and an official search confirming the same. The Defendant also claims a portion of the suit land on the basis that he has been in occupation for over 40 years and that this suit is res judicata as there were previous suits being Kilifi SRMCC No 32 of 1996 Mombasa Civil Appeal No 203 of 2000 Mombasa HCC No 45 of 2007.
21. This suit land has a checkered history where the Defendant's father engaged the predecessor in title in numerous litigations and the issues have not yet fully been determined, that is why the current case is still in court. This matter is also still pending the hearing and determination on the issue of ownership and whether the Defendant is in illegal occupation.
22. Counsel admitted that the Defendant is in occupation of a portion less than an acre of the suit land which he lays claim to. Counsel further attached a list of other 79 occupants who have been permitted by the Plaintiff to cultivate the land. This shows that the Defendant is in occupation and what the court will decide upon hearing the case in whether such occupation is lawful or legal.



23. On the issue as to whether the Plaintiff will suffer irreparable harm, in the case of Dinah Caren Ondiek Akinyi – V – Leukadia Ajwang Ondoro & Another (supra) I am in agreement with Justice Okongo where he allowed the burial of the remains of the deceased on the disputed land on the ground that mere act of interring the remains of a deceased person on a parcel of land does not confer title to that land on the estate of the deceased or on her beneficiaries. I am therefore not persuaded that the Plaintiff would suffer irreparable harm if the orders sought herein are not granted.
24. The issue of ownership is yet to be decided and the Plaintiff’s plaint indicated the value of the land at Kshs 3 Million which is ascertainable and therefore the Plaintiff can be compensated by way of damages.
25. In the case of *Ernest Kiprop Arap Kogo v John Kibet & 2 others* [2019] eKLR the court held that:
- “The balance of convenience tilts towards allowing the deceased body to be buried on the suit land due to the fact that they are in possession and that the body will stay in the mortuary for a long period of time at their expense if the orders are given. In any event, if the respondent succeeds in the suit, the body can be exhumed and buried elsewhere. Application is dismissed with no order as to costs.”
26. On the issue as to whose side the balance of convenience tilts, having found that it is not disputed that the Defendant resides of a portion of the suit land, the same would be in favour of not granting an injunction at this stage. The issue of having previously buried his relatives on the suit land is not a ground for burying future deceased persons on the suit land. This does not confer a right to title of the suit land. In the event that the Plaintiff succeeds then the Defendant can be ordered to exhume the body interred on the suit land.
27. I therefore find that the application lacks merit and is therefore disallowed with costs in the cause and the interim orders vacated.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

