



**Ondato & 2 others v Obimbira & 3 others (Environment & Land Case
217 of 2014) [2022] KEELC 3286 (KLR) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 217 OF 2014**

**AA OMOLLO, J
AUGUST 4, 2022**

BETWEEN

**CATHERINE ONDATO 1ST PLAINTIFF
HENRICO NALUO OUMA 2ND PLAINTIFF
MARY MURIZA ONDATO 3RD PLAINTIFF**

AND

**LEONARD W. OBIMBIRA 1ST DEFENDANT
RUBELA NERIMA OBIMBIRA 2ND DEFENDANT
ROSE AMUKASA OKWAKO 3RD DEFENDANT
LAND REGISTRAR BUSIA (K) 4TH DEFENDANT**

RULING

1. The Plaintiffs brought this present application premised on the provisions of article 40 (1) of *the Constitution*, section 26 (1) of the *Land Registration Act* No. 3 of 2012, section 3A *Civil Procedure Act*, and Order 40 rules 1 & 2 of the *Civil Procedure Rules* on the 20th day of June, 2022 for the following Orders:
 - a) Spent;
 - b) Spent;
 - c) The Honourable Court be pleased to issue permanent orders of injunction against the 1st and 3rd Defendants, their agents, family members, relatives, employees, general public and/or their servants from entering, digging any grave site, burying any remains and particularly the remains of the 2nd Defendant Rubela Nerima Obimbira (also known as Rebecca Nerima



Obimbira) and/or interfering whatsoever with the suit property known as land parcels Bunyala/Bulemia/2622, Bunyala/Bulemia/4291 and Bunyala/Bulemia/2624;

- d) The Officer Commanding Port Victoria Police Station to ensure compliance with this order;
 - e) The costs of the application be borne by the Defendants.
2. The application was supported by the affidavits sworn by Catherine Khabiria Ondato and Henrico Naluo Ouma dated 20th June, 2022 and the following grounds;
-) The Plaintiffs are the duly registered owners of land parcel Bunyala/Bulemia/2622, Bunyala/Bulemia/4291 and Bunyala/Bulemia/2624 respectively;
 - b) The Plaintiffs have no contract with the 1st, 2nd and 3rd Defendants nor have the Plaintiffs authorized the 1st, 2nd and 3rd Defendants to excise any part of, or work on land parcels Bunyala/Bulemia/2622 & 4291;
 - c) The 2nd Defendant has recently passed away and plans for her burial are currently underway with a tentative burial date set for July, 2, 2022;
 - d) The 1st and 2nd Plaintiffs are apprehensive that the 1st and 3rd Defendants who are currently in mourning the passing off the 2nd Defendant will inter the body of the 2nd Defendant on the suit property Bunyala/Bulemia/2622 & 4291;
 - e) The 1st Defendant has constructed a residential structure on the sit property and has previously ignored all court orders injuncting him from utilizing the suit land;
 - f) The main suit is coming up for mention on 19th July, 2022 by which time, should the burial take place on July, 2, 2022 as planned, the suit land shall be exposed to waste and delayed orders shall be rendered nugatory;
 - g) The Plaintiffs will suffer irreparably and cannot be compensated for the waste on their land which has a permanence and social fiat mutilates against the removal of anybody buried on the suit land belonging to the Plaintiffs;
 - h) The internment of the 2nd Defendant body on the suit land also portends a social and cultural issue of confirming ownership of the land to the 1st and 3rd Defendants which will be impossible to overturn;
 - i) The 1st Defendant had filed Busia ELC Misc. No. 9 of 2014 which was dismissed upon review, with the resultant cancellation of any title he obtained as a result of that suit;
 - j) It is just that the orders sought are granted.
3. The 3rd Plaintiff/Applicant deposed a separate affidavit dated 24th June, 2022 and filed on the 29th of June, 2022 in support of the motion. She deposed that on 26th June, 1990 LR No. Bunyala/Bulemia/833 was subdivided into five parcels being 2621, 2621, 2622, 2623 and 2624. That she is the registered owner of land parcel number Bunyala/Bulemia/2624 (the Suit Property). That she is aware that the 2nd Defendant passed on and that burial plans are underway to inter her remains on the suit property and that if injunctive orders are not granted, the subject matter of this suit shall be rendered nugatory to the prejudice of the 3rd plaintiff. She deposed further that the Defendants do not hold any title and neither are they registered owners of the suit property and thus there is no valid reason why the 2nd Defendant's remains should be buried thereon. That the Defendants allegations that they had obtained title for a land parcel known as LR No. Bunyala/Bulemia/4209 which was hived off



from parcels number 2622 and 2624 have not been substantiated by evidence of a title deed to the said property. She concluded by urging this Court to allow the application in order to preserve the subject matter of the suit and in particular parcel number 2624 pending trial.

4. As a response to the application, the Defendants filed a joint affidavit deposed by Leonard W. Obimbira, the 1st Defendant on the 27th of June, 2022. The Defendants confirmed that the 2nd Defendant was their mother and that she passed on and they were preparing to inter her remains on the 2nd of July, 2022 at her home at Mulukina village of Bulemia sub-location where she moved to in 1976 and put up her home. The 1st Defendant deposed that he also put up a home beside his mother on the suit parcel and that they have no other place of abode other than the suit land. He listed several family members who had been buried on the suit land over years. The Defendants contend that the situation on the ground has existed for a period exceeding 50 years and the same ought not to be disturbed. He deposed further that the dismissal of the Busia ELC Misc. No. 9 of 2014 was on a technicality and not on merits.
5. The application was canvassed by way of oral submissions. Through their advocates, the 1st and 2nd Plaintiffs submitted that there was no dispute that the 1st and 3rd Defendants intend to bury the 2nd Defendant on land which does not belong to them. Mr. Siganga disputed the title annexed to paragraph 7v of the Defendants' replying affidavit which he stated belonged to a totally different property. While seconding Mr. Siganga, Mr. Ndubi added that the fact that some of the Defendants' relatives have been buried on the land does not confer any rights to the parties. He urged this Court to grant the orders sought. The 3rd Applicant relied on the submissions by the 1st and 2nd Plaintiffs together with the depositions in her replying affidavit.
6. While submitting for the Defendants, Mr. Jumba advocate submitted that the dispute at hand finds its roots on a report by the Land Registrar attached to the replying affidavit as annex 3. That land parcel number 833 was subdivided into 6 portions but the resultant titles only had 5 numbers. He submitted that the 2nd Defendant had lived on that land since 1973 and there was never an issue. He submitted further that according to the 1st Defendant, their land was 2.43Ha and there is no complaint that the size occupied is less. Mr. Jumba further submitted that their withdrawal of the miscellaneous application was not a withdrawal of the defendants' rights. Counsel added that there was an order issued on the 27th of July, 2017 that barred their clients from interfering with L.R No. 2622 and 4291 pending hearing and determination of the suit, which order was still in force. He concluded by submitting that the deceased is occupying untitled land and not L.R. No. 2622 and 4291. He urged that the orders asked for be declined as there was no other place where the 2nd Defendant could be buried.
7. In his rebuttal, Mr. Siganga stated that section 26 of the [Land Registration Act](#) provided ways in which a title can be challenged and that the Plaintiffs' title has not been challenged from the documents filed by the Respondents and neither had they provided any documentation to prove that they were occupying untitled land. He urged this Court to grant the orders prayed for.
8. For the orders to be granted, the Plaintiffs/Applicants must demonstrate that: they have a prima facie case; if the injunction is not granted, they shall suffer irreparable loss and that they have the balance of convenience in their favour. The Applicants have pleaded that they are the proprietors of land parcels number Bunyala/Bulemia/2622, Bunyala/Bulemia/4291 and Bunyala/Bulemia/2624 and that the 1st and 2nd Respondents intend to bury the remains of the 2nd Respondent thereon. They claim that the Respondents are illegally on the land and as such should not be allowed to bury the 2nd Respondent thereon.



9. The Respondents on the other stated that their mother who is the 2nd Respondent started living on the suit parcel in 1976 and has been living thereon until her death in June, 2022 and annexed photos of the houses on the land and a letter from the Land Registrar Busia County, Mr. Tom Chepkwesi. In the said letter dated 18th October, 2013, the Land Registrar observed that the 2nd Respondent owned the land and had been farming thereon for more than 35 years, that she did not enter the land by force and nobody questioned their validity/right to the occupation of the land without interruption for a period of over 21 years. He noted that the land occupied by the 2nd Respondent borders that of Henrico Naluo Ouma in the southern side and Samuel Odari on the northern side. His conclusion was that he found it difficult to allocate a parcel number for the complainant (read 2nd defendant) and referred her to file or petition for the registration by adverse possession.
10. Pursuant to the submissions by Mr Jumba learned counsel for the Respondents that there exists an order of injunction on record which has not been set aside, I perused the record and found that an application seeking for orders of injunction dated 20th June 2017 was by consent allowed on the 27th July 2017. The temporary orders granted then restrained the Defendants/respondents jointly and severally from inter-alia trespassing on, construction of any dwelling house, occupation of a constructed house, sale of land or any other form of interference that is prejudicial to the plaintiffs' quiet possession and rights over L.R No. Bunyala/Bulemia/2622 & 4291 pending hearing and determination of the suit.
11. The fact of existence of the order restraining activities on the plaintiffs' titles by itself tilts the balance of convenience in favour of the Applicants. Secondly, the recommendation in the Registrar's letter that the complainant does file for petition to be registered by way of adverse possession confirm that the deceased held no title to the land where she was living on. In light of the fact that the Applicants are holding titles whether valid or otherwise gives them an edge over the deceased in terms or rights under the suit land thus they have established a prima facie case.
12. This court is alive to the requirement in law that once the applicant has proved any of the three principles, they are entitled to be granted the orders of injunction sought. However, given the obtaining circumstances, this court will go an extra mile to consider the issue of irreparable loss. The 3rd applicant deposed that human remains buried on a parcel of land has ramifications on the economic and cultural value of the land. The second applicant deposed that unless the orders are granted, it will be impossible to use his land without suffering a social backlash. The social and cultural loss may be difficult to quantify in monetary terms; however, the applicants have not pleaded that the body cannot be exhumed. Thus this court holds the burial of the 2nd defendant shall cause the Applicants loss but the loss is not irreparable as appropriate orders can be made to compensate for any such loss.
13. I have considered the cases cited by the 1st and 2nd applicants which I find distinguishable from these facts of this case. In the case of *Lawi Kigen Kiplagat vs Japheth Amenya Ratemo* (2021) eKLR the relationship between the two parties was sale/purchase for the land which was not completed. In that case, it was also argued that the deceased had other parcels of land where he could be buried. In the present case, it is pleaded that deceased has been on the land for a period of time and the Applicants have not stated there is an alternative land where the burial can be stated. In the second case of *Eliud Kangwana Adawo vs Philip Achieng John & Another* (2015) eKLR, the issue before the court was whether a body that had been buried contrary to the orders of the court should be exhumed before the determination of the case. The burial has not been done in the instant case but the observations made by Okongo J., for declining the exhumation of the body have been taken into account.
14. Consequently, this court finds that although the application is merited, balancing the scales of justice demand that the orders seeking to stop the burial be declined in part. The 1st and 2nd defendants



are allowed to inter the remains of the second defendant where she lived on giving the following undertaking to be filed in court before the burial takes place;

- i) The 1st and 3rd defendants undertake to exhume the body of the 2nd defendant in the event the Applicants win their case.
- ii) Besides interring the body, the 1st and 3rd Respondents, either themselves or through their agents shall not engage in any activities on the suit parcel including putting up any structures of any kind (save for tents) on the suit parcel pending hearing and determination of this suit.
- iii) The morgue charges if any are the responsibility of the 1st and 3rd Respondents.

15. In default of the undertaking being filed within three days of the delivery of this ruling, the orders of injunction prayed for is deemed as granted in terms of numbers 3 and 4 of the motion. This costs of the application shall abide the winner of this suit.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 4TH DAY OF AUGUST, 2022.

A. OMOLLO

JUDGE

