



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 14 of 2005

JEREMIAH MUSYIMI NZUKI PLAINTIFF

VERSUS

MICHAEL MULE MUTUKU DEFENDANT

RULING -

1. The Application dated 11/5/2009 is premised on Order XXXIX Rules (1) (2) and 2A (2) and 3 of the Civil Procedure Rules and the Plaintiff/Applicant seeks orders to restrain Mwasie Mule, Samuel Nzomo Mule, Thomas Musau Mule, Ndunda Mule and the family of Michael Mule Mutuku, the Defendant from, interring/burying his body on Land Parcel No. Makueni/Mubau/658, the alleged property of Jeremiah Nzuki until further orders of this court.

2. From the grounds on the face of the Application and the Supporting Affidavit sworn by the Plaintiff on 11/5/2009, it is not in issue that the Defendant died on 1/5/2009 before this suit could be determined. In his Complaint dated 10/2/2005, the Plaintiff averred that the Defendant was a trespasser into his land and should be evicted. In his Statement of Defence dated 20/6/2005, the Defendant denied that claim and instead averred that he had purchased a part of the disputed land; has been in occupation since 1964 and the suit should be dismissed.

3. In an application for an injunction dated 1/4/2005, filed by the Plaintiff and seeking an order that the Defendant should be restrained from using or interfering with land parcel No. Makueni/Mubau/658, Lesiit J formed the opinion that the defendant's occupation of the land was admitted and that he had been on the land prior to 2005 when the suit was filed and that to grant the injunctive relief would amount to determining the suit and hence the Defendant's eviction. The learned judge then refused to grant the injunction but instead issued conservatory orders to preserve the land. She directed the orders against both parties and specifically ordered that none should deal with the land adversely so "as to cause waste or damage of a permanent nature and none of them should carry out activities such as cutting trees therein, or construct any structures therein whether temporary or permanent thereon that would affect the stratum and or value of the land until the suit is heard and determined or pending further orders of the court." She also allowed the Defendant to continue cultivating the land and grazing his livestock thereon but only on the portion that he was already occupying.

4. From the Replying Affidavit of Thomas Musau Mule sworn on 22/5/2009, two issues must be quickly resolved. The first is; since the persons named are not parties to the suit, can an order of injunction issue against them?
5. I have perused the Plaintiff in this matter, and the order of eviction is directed at the Defendant solely and there is no indication that his agents and/or servants are in any way intended to be affected by those orders even if ultimately they may well be. Further, I had occasion to address their *locus standi* in my Ruling of 4/6/2009 when I declined to “add” them to the suit as Defendants to the suit because I had difficulties with the procedure used. In any event, as I understand it no adverse orders can be issued against a non-party to the suit. In fact my advise to parties in that Ruling is that the cause of action against the named parties is different and may well require a separate suit.
6. The second issue is whether inspite of my findings above, the orders of Lesiit J do affect the named parties and whether by purporting to bury the deceased Defendant on the suit land, they are acting in contravention of those orders.
7. My view on that point is that the orders of the learned judge were limited to conserving the suit land until the suit was heard and determined or “until further orders of the court”. At that time the Defendant was alive and was given the leeway to continue occupation of the land. Had he lost the suit, then eviction orders would have issued. But she restrained both parties from wasting the land and their agents or assignees were included in that order. The situation obtaining now was unforeseeable and whether or not the deceased’s family were indeed bound by those orders cannot preclude this court from revisiting those issues and making other orders to address the present situation.
8. Having so said, has a case for an interlocutory injunction been made? Sadly not so in my humble view. Once the named parties are not proper parties from whom relief can be sought, then a *prima facie* case cannot be said to have been made.
9. Secondly, internment cannot be said to be a permanent damage that cannot be compensated in damages if at the end, it is found that the Defendant ought to be evicted. Lesiit J allowed him to continue cultivating the land and if he is buried there, he can still be exhumed, should the suit succeed. Whatever injury the Plaintiff will have suffered will therefore be certainly compensated in damages.
10. Lastly, and in view of the circumstances now obtaining, the balance will and must favour the named parties and in view of principle as enunciated in Giella vs Cassman Brown (1973) E.A. 358 no favour can be granted the Plaintiff and his Application must fail and is consequently dismissed.
11. Let each party bear their own costs.
12. Orders accordingly.

Dated and delivered at Machakos this 26th day of August 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Masika for Respondent

Mr Kisongoa for Applicant

ISAAC LENAOLA

JUDGE