



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 88 of 2009

NOAH NJUGUNA GATHENGE.....PLAINTIFF

VERSUS

TERESIAH WANINI KIBUE.....1ST DEFENDANT

ALEXANDER KIMANI KIBUE.....2ND DEFENDANT

R U L I N G

1. What is before me is the Chamber Summons dated 26/02/2005 brought under Order XXXIX of the Civil Procedure Rules seeking ORDERS:-

1. *THAT this matter be certified urgent and the same to be heard ex parte at the first instance.*
2. *THAT this Honourable Court do hereby restrain the defendants herein either by themselves, agents and/or servants from burying/laying to rest one LIVINGSTONE KIBUE METHI (deceased) who has passed on/away on the Plaintiff's parcel of land known as KIGANJO/HANDEGE/T.59 pending the hearing of this application interpartes.*
3. *THAT this Honourable Court do hereby restrain the defendants herein either by themselves, agents and/or servants from burying/laying to rest one LIVINGSTONE KIBUE METHI (deceased) who has passed on/away on the plaintiff's parcel of land known as KIGANJO/HANDEGE/T.59 pending the hearing of this suit.*
4. *In the alternative and without prejudiced (sic) to the foregoing the defendants herein be compelled to exhume the remains of one Livingstone Kibue Methi from the plaintiffs' parcel of land known as Kiganjo/Handege/T.59.*
5. *THAT the costs of this application be provided for.*

2. The application is supported by the grounds on its face, namely –

(a) *THAT the applicant herein, Noah Njuguna Gathenge is the registered legal owner of Land Reference No. KIGANJO/HANDEGE/T.59.*

(b) THAT the defendants herein in conjunction with other members of the late Livingstone Kibue Methi have trespassed onto the plaintiff's parcel of land, dug/prepared a grave and are in the process of burying or laying to rest the deceased herein.

(c) THAT the plaintiff/applicant has not given the defendants herein or any other person any authority or permission to bury the deceased on his parcel of land.

(d) THAT the plaintiff/applicant stands to suffer irreparably unless the orders sought are not granted.

3. There is also an affidavit in support of the application sworn by Noah Njuguna Gathenge on 26/02/2009. The deponent says that he is the registered owner of parcel of land known as L.R. No. KIGANJO/HANDEGE/T.59 and that one Livingstone Kibue Methi, who was a neighbour died sometime in the month of February 2009. The deponent says that on or about the 26/02/2009, the Defendants herein together with other relatives of the deceased dug a grave [and subsequently buried] the remains of Livingstone Kibue Methi on the deponent's land without the authority and/or consent of the deponent. He prays that the orders sought be granted to him in the interest of justice. Annexed to the deponent's affidavit is a copy of the Title Deed (Annexure 'NNGI' certifying that Noah Njuguna Gathenge holder of ID/5179998/68 is the absolute proprietor of the land comprised in the said title, subject to the entries in the register and such overriding interests as set out in section 30 of the Registered Land Act. The entries made on the said Title Deed show that the Plaintiff/Applicant was registered as absolute proprietor on 4/10/1990. The encumbrances section of the Title Deed has Nil entries.

4. The Applicant also filed a plaint contemporaneously with the application. The Applicant avers that the Defendants and others trespassed on the suit land on or about 26/02/2009 and dug a grave thereon for the purpose of burying the remains of one Livingstone Kibue Methi and that the Defendants' actions were done without the consent and/or authority of the Applicant/Plaintiff. The Applicant/Plaintiff prays for judgment against the Defendants jointly and severally for

(a) A permanent injunction restraining the Defendant his servants and/or agents, from burying the remains of Livingstone Kibue Methi on the Plaintiff's parcel of land known as LR KIGANJO/HANDEGE/T.59.

(b) Exhumation of Livingstone Kibue Methi by the Defendants from L.R. No. KIGANJO/HANDEGE/79 (sic)

(c) Costs of the suit and interest.

5. At the exparte hearing on 27/02/2009, the Applicant's application was certified urgent and interim orders of injunction were granted in terms of prayer 2 of the application. The Applicant was ordered to serve the application together with the Order within 3 (three) days of 27/02/2009. The application was fixed for inter-partes hearing on 12/03/2009.

6. The parties came to court on 12/03/2009, but the application could not proceed for reason that the Respondent's affidavit was erroneous. Since the Respondents were acting in person, they were granted leave to file fresh Replying Affidavits in preparation for interpartes hearing on 28/04/2009. Again the application could not proceed to full hearing on 24/04/2009 since the Respondent's Replying Affidavits were not accompanied with the annexures mentioned in their affidavits. The matter was adjourned to the 1/07/2009 and in the meantime parties were granted leave to file and serve Further and/or Supplementary Affidavits.

7. By her Further Affidavit sworn on 7/06/2009, the 1st Defendant/Respondent Teresiah Wanini Kibue says that the deceased Livingstone Kibue Methi was her husband and that he died on 18/02/2009 at Gatundu Hospital. She says that the deceased was the owner of land Ref. No. Kiganjo/Handegge/T.59 measuring 0.25 acres and that he had occupied the same since 1965 after he had purchased the same from the Plaintiff's father, one Evans Gathenge Njuguna. The deponent produced a copy of an Agreement for Sale dated 9/01/1965 between Tutorial High School and the Plaintiff's father. The deponent alleges that

instead of effecting the transfer of the suit land after purchase by Tutorial High School, Evans Gathenge Njuguna absconded until his death on 10/02/1981. The deponent alleges fraud on the part of Evans Gathenge Njuguna in processing the transfer of the suit land which is now admittedly registered in the name of the Plaintiff.

8. The 1st Defendant/Respondent says that the orders sought ought not to be granted on grounds, that the land on which the deceased Livingstone Kibue Methi was buried was the deceased's land. It appears that the parties were in court sometime in 1991 in HCCC No. 476 of 1991 (OS) in which the Plaintiff was Livingstone Kibue Methi (now deceased) while the Defendant was Noah Njuguna alias Noah Njuguna Gathenge. On the 30/01/1991, the Plaintiff in the said suit obtained a temporary injunction restraining the Defendant therein from disposing and/or interfering with and/or alienating the suit land. The injunction was valid until 13/02/1991 when the application was to be heard inter partes.

9. There is also annexed to the affidavit of the 1st Defendant a copy of an order of the court dated 8/03/1993 forwarding HCCC No. 476 of 1991 to the D.O. Gatundu for arbitration. No evidence of what transpired after the reference has been provided by the Defendants; but I believe that that is not an issue before the court now. The 1st Defendant pleads that this suit is res judicata, but as I have said, there is no evidence confirming that HCCC No. 476 of 1991 was heard and determined.

10. The 2nd Defendant, Alexander Kimani Kibue also swore affidavits in opposition to the application and in particular the Further Affidavit sworn on 3/06/2009. He alleges therein that by the time the deceased Livingstone Kibue Methi died, he had already pointed out to his family the spot on the suit property where he would be laid to rest. The 2nd Defendant supports the 1st Defendant in urging this court to dismiss the Plaintiff's application.

11. This is an application for injunctive orders. The principles governing the granting of such orders are well set out in the case of *Giella –vs- Cassman Brown & Co. Ltd.* [1973] EA 358, and that is that the Plaintiff/Applicant must show (a) that he has a prima facie case with a probability of success; (b) that unless the orders sought are granted, he stands to suffer irreparable loss and (c) in the case of doubt on (a) and (b) above, the court should decide the case on a balance of convenience. The Plaintiff herein pleads that he is the registered owner in absolute proprietorship of the suit land on which Livingstone Kibue Methi was unlawfully buried. The suit land is registered under the Registered Land Act, Cap 300 Laws of Kenya (the RLA).

12. Sections 27 and 28 of the RLA provides –

“27. Subject to this Act –

(a) the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register to such liabilities, rights and interests as affect the

same and are declared by Section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

13. On the basis of the above provisions and in light of the evidence placed before me by both parties, I think that the Plaintiff has shown that he has a prima facie case with a probability of success. The Plaintiff is thus entitled to benefit from the unfettered discretion of this court to grant the orders sought. I also think that payment of damages in this case would not adequately compensate the Plaintiff/Applicant. The Defendants/Respondents have not even shown why they should sue when the alleged sale of the suit property was between the Plaintiff's father herein and Tutorial High School.

14. In the result, I would allow the Plaintiff's/Applicant's application. Since it is admitted that the deceased Livingstone Kibui Methi is already buried on the suit property, an order in terms of prayer 4 of the application is the most appropriate. Accordingly the Defendants be and are hereby compelled to exhume the remains of one Livingstone Kibue Methe from the Plaintiff's parcel of land known as Kiganjo/Handege/T.59 pending the hearing and determination of this suit. The costs of this application shall be borne by the Defendants.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of September 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

M/s E N Omotii (Absent) for the Plaintiff/Applicant

Mr Matheka (Present) for the Defendants/Respondents

Weche – court clerk