



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 255 of 2007

COL. JOSIAH LANDY MRASHUI

SAMUEL KALEMA MRASHUI (Suing as legal

Representatives of the Estate of LABAN MRASHUIPLAINTIFFS

VERSUS

CLEMENT MULEMWA RUGENDO

JOHNSON MWANDAWIRO

GODFREY KIZAKA

JOHN MWAWANA

MWAMBURI MWASENGA

DANSON MWAKANGALU

MARIAM WANJALA MWANYEZADEFENDANTS

R U L I N G

Josiah Landy Mrashui and Samuel Kalema Mrashui, the plaintiffs herein, took out a summons under order XXXIX rules 1 and 2 of the Civil Procedure Rules in which they sought for temporary orders of injunction to restrain Clement Mulemwa Rugendo, Johnson Mwandawiro, Godfrey Kizaka, John Mwavana, Mwamburi Mwakangalu, Danson Mwasenga and Mariam Wanjala Mwanjeza the defendants herein, from interring the remains of the late David Rugendo on LR No. Ronge/Nyika/522 pending the hearing and determination of the suit. The summons is supported by supporting and supplementary affidavits sworn by Samuel Kalema Mrashui. The defendants on their part opposed the application by filing a

preliminary objection, a replying and further affidavits sworn by Clement Mulemwa Rugendo and David Mwambogho Rugendo respectively.

The principles of granting orders of injunction are well settled. First, an applicant must show a prima facie case with a probability of success. Secondly, it must be shown that the applicant might otherwise suffer irreparable loss and thirdly, that if the court is in doubt, it would decide the application on the balance of convenience.

The plaintiffs have filed the suit in their capacity as the legal representative of the Estate of Laban Mrashui, deceased. This complaint started upon the demise of David Rugendo. It is not in dispute that David Rugendo died on the 24th day of October 2007 at Voi District Hospital. It is alleged that the defendants and other relatives and friends of the deceased have threatened to bury the body of David Rugendo deceased on L.R. No. Ronge/Nyika/522. It is stated that the deceased's body at the time of filing this application had been ferried from the mortuary to the suit premises and that a grave had even been dug in readiness for the burial. These facts were not largely disputed by the defendants. What is in dispute is the ownership of L.R. No. Ronge/Nyika/522. The plaintiffs have annexed a copy of the title deed and an official search to show that the aforesaid parcel of land is registered in the name of Laban Mrashui, deceased. For this reason the plaintiffs urged this court to find that they have a prima facie case with a probability of success. The defendants on the other hand have urged this court to find that the plaintiffs have not shown a prima facie case with a probability of success because the dispute is a boundary dispute which can only be sorted out by the Land Registrar. In the replying affidavit of Clement Mulemwa Rugendo, the deponent avers that a portion of the parcel of land known as Ronge/Nyika/522 which is Plot No. Ronge/Nyika/2435 is the property of the late David Rugendo. A copy of the title and the official search was annexed to the aforesaid affidavit which showed that David Rugendo, deceased is the registered owner of L.R. No. Ronge/Nyika/2435. When this issue emerged, it became necessary for the survey report of the Provincial and District Surveyors to be sought. The same were filed. According to the two reports, parcel No. Ronge/Nyika/522 measures 13.26 Hectares. Inside the aforesaid land, David Rugendo, deceased, Clement Rugendo and 6 others have put up their houses. However the land is registered in the name of Laban Mrashui, deceased. The reports also indicate that parcel No. Ronge/Nyika/2435 is located about 3 kilometers from parcel No. Ronge/Nyika/522. From those reports it means that the two parcels of land do not share a common boundary. After a careful consideration of the arguments and the averments placed before this court, I am convinced that the plaintiffs have shown that they have a prima facie case with a probability of success. The dispute can only be determined upon the hearing of the substantive suit. That is where the parties will be able to explain how they acquired the property. From the survey reports, it is clear that the allegation that the complaint is a boundary dispute appear to be remote.

The second element which must be met is that the applicants must show that they might suffer irreparable loss. There is no dispute that the defendants intend to inter the body of David Rugendo on the land in dispute. According to the defendants, parcel No. Ronge/Nyika/2435 was parceled out of Ronge/Nyika/522. The defendants' advocate did not address me on this issue. I have anxiously considered this issue and bearing in mind that the object of interlocutory injunction is to protect the party aggrieved against injury by violation of his rights for which could not be adequately compensated in damages. It is well settled that if damages would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted. In my estimation of this case, I do not think the injury likely to be visited upon the plaintiffs is the kind that can be calculated in monetary terms. For this reason I find that the plaintiffs are likely to suffer irreparable loss. Even if one was to say that damage can be assessed in monetary terms, there is no evidence that the defendants would be in a financial position to pay the same.

The third and final condition is that if the court is in doubt, the application should be decided on a balance of convenience. Who between the plaintiffs and the defendants would be more inconvenienced if the order is not granted? It is crystal clear in my mind that the balance of convenience tilts in favour of the plaintiffs. One can imagine the steps the plaintiffs will take to have the body exhumed if they succeed at the end of the day. The process will be cumbersome, expensive and traumatizing.

For the above reasons I grant the orders sought in prayers 3 and 5 of the summons dated 29th October 2007. Pursuant to the provisions of Order XXXIX rule 2A of the Civil Procedure Rules, I direct the plaintiff to ensure that the substantive suit is heard expeditiously.

Dated and delivered at Mombasa this 23rd day of June 2008.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Opolu for Defendant and Mr. Odongo for plaintiff.