



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

Misc. Appli. 630 of 2001

ISAAC COLLINS KAMAU.....PETITIONER

Versus

DAMARIS WARINGA GITAU.....RESPONDENT

RULING

On 6th August 2008, the Defendant Damaris Waringa Gitau, filed this Notice of Motion under Court Vacation Rules seeking orders that the court do restrain the Plaintiff by way of injunction, from burying the remains of his mother in law, Emily Wanjiru Karogi on the parcel of land known as Lari/Magina/1018 until the hearing and determination of the application and that an order of injunction issue restraining the Plaintiff from burying the mother in law on the disputed land. The Applicant also asks for costs. The court certified the application urgent and set the application for hearing on 25th August 2008. In reply the Plaintiff Advocate Odiwour urged a Notice of Preliminary Objection filed by the Plaintiff on 14th august 2008. The objections were threefold;

Firstly that the application is incurably defective as the court's jurisdiction has not been properly invoked because Order 39 Rule 1 requires the application to be brought by way of Chamber Summons yet this application is brought by way of Notice of Motion.

The 2nd point taken by the Plaintiff is that the grounds upon which the Notice of Motion is brought are speculative as there is nothing to show that the Plaintiff intends to bury the deceased on the disputed land. Counsel said that there is nothing like a burial programme nor is the place of burial specified.

The 3rd point taken is that an application under the vacation rules should be by way of Chamber Summons yet the Applicant filed a Notice of Motion and the Notice of Motion was improperly admitted.

Lastly Counsel urged that order 39 Rule 3 requires that orders obtained ex parte be served within 3 days. That the order had not been served on them even at the time of hearing of this preliminary objection and that therefore the application should be struck off.

In opposing the preliminary objection Mrs. Kinuthia urged that in the Notice of Motion several prayers are sought under Order 39 Rules 1 & 2 and that where several prayers are sought, an application can be brought as a Notice of Motion.

As regards service, Counsel replied that the application was served and the facts of the death are not

disputed and that the deceased's husband was buried on the disputed land and therefore it is likely that the deceased will be buried on the same land.

Counsel also objected to the preliminary objection for the reason that if the Plaintiff wants the orders vacated she should have come by way of Chamber summons.

A preliminary objection can only be raised on a pure point of law or on facts that are not disputed. Order 39 Rule 9 requires that an application under Rule 1 & 2 be by summons in chambers. This application is brought pursuant to Rule 1 Rule 3. Rule 3 which has been cited only requires that it be heard *ex parte* while S.3A merely invokes the court's inherent jurisdiction. The applicant did not seek any other orders apart from that under Rule 1. This application should therefore have been by way of Chamber Summons. The Notice of Motion as filed is incurably defective. Had the Applicant sought other orders under other provisions of law, then it would have been proper if he filed a Notice of Motion.

As to whether the application is speculative because there is no evidence of where the burial will be, that is not a point of law that cannot be taken on preliminary point. As clearly put by the Plaintiffs Counsel, it requires evidence to prove and that ground of objection must fail.

It is true that an application seeking leave to be heard during vacation has to be brought by way of Chamber Summons pursuant to S.10 of the Judicature Act as read with Rule 3 of the High Court Practice Rules under the Judicature Act. The Applicant combined the application for leave and that under Order 39 yet an application under the vacation Rules is supposed to be a separate application. Though the issue of leave to file the application during vacation is spent because the application has already been heard, the Notice of Motion as filed is defective. The two should not have been combined in the first instance and the application under order 39 (1) should have been by Chamber Summons too. Due to these grave procedural defects, this court will uphold the Applicant's preliminary objection and strike out the Notice of Motion dated 6th August 2008 with the Defendant/Applicant bearing the costs.

Dated and delivered this 27th day of August 2008.

R.P.V. WENDOH

JUDGE

In the Presence of:

Mr. Odiwour for Respondent

Daniel: Court Clerk