

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 102 of 2006

WANJIKU GATHORONJO.....PLAINTIFF

VERSUS

ANN NJERI KARANJA.....DEFENDANT

RULING

This is an application made under the provisions of **Order XXXIX Rules 2, 2A, 3 & 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** where the plaintiff Wanjiku Gathoronjo is seeking mandatory injunction to compel the defendant Ann Njeri Karanja by herself or by her agents to exhume and or remove the remains of one Wambui Gathoronjo buried on the plaintiff's parcel of land known as Molo/Molo Block 1/180 (Kiambiriria) (*hereinafter referred to as the suit parcel of land*) pending the hearing and determination of the suit. The grounds in support of the application as stated on the face of the application are that the plaintiff is the registered owner of the suit parcel of land. The plaintiff stated that the defendant had unlawfully and without any justifiable cause entered into the suit parcel of land and buried the remains of her mother Wambui Gathoronjo (*hereinafter referred to the deceased*). The plaintiff contends that neither the defendant nor the deceased had any propriety rights or interest over the suit parcel of land. She stated that she would suffer irreparable damage which is not likely to be compensated by an award of damages. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The defendant filed a replying affidavit in opposition to the application. She swore that the suit parcel of land belonged to her late father and was unlawfully transferred to the plaintiff. She deponed that the deceased, being the co-wife of the plaintiff, had nowhere else to be buried other than on the suit parcel of land which used to belong to her late husband. She further deponed that the plaintiff was registered as the owner of the suit parcel of land in succession proceedings which were flawed because when the estate of her late father was distributed, the deceased did not benefit at all. She further deponed that the deceased had lived with her for several years prior to her death because of her old age and failing health. She urged this court to disallow the application as plaintiff had not established a case to warrant this court to issue her with the order of mandatory injunction.

At the hearing of the application, Mr Mwangi learned counsel for the plaintiff reiterated the contents of the application and supporting affidavit. He submitted that the plaintiff was the registered owner of the suit parcel of land and had been so registered since the year 1991. He submitted that on the 1st of April, 2006 at 6.30 p.m., the defendant entered the suit parcel of land without the consent of the plaintiff and buried therein the remains of the deceased. He submitted that the suit parcel of land did not form part of the estate of the late Gathoronjo Githuta. In any event, he argued that the said estate had already been distributed to its beneficiaries and the deceased had inherited a parcel of land at Mai Mahiu. He further submitted that neither the defendant nor the deceased had any right over the suit parcel of land. He argued that the deceased had not at any time during her lifetime resided on the suit parcel of land and therefore the defendant could not have had any right to bury her on the suit parcel of land. He submitted that the plaintiff had established special circumstances that would enable this court grant the order of mandatory injunction sought. Mr Mwangi referred this court to several decided cases in support of the plaintiff's application. I will refer to the said cases at the later part of this ruling. Mr Mwangi urged this

court to allow the application with costs.

Miss Ndungu, learned counsel for the defendant opposed the application. She submitted that the suit parcel of land comprised part of the estate of the late Gathoronjo Githuta. She submitted that the deceased was the wife of the said late Gathoronjo Githuta and used to reside on the suit parcel of land until when her health deteriorated thereby forcing the defendant to take care of her at her premises at Longonot. She submitted that the plaintiff had unlawfully been registered as owner of the suit parcel of land pursuant to succession proceedings which were faulty as the deceased was not included as the beneficiary of the estate of the said late Gathoronjo Githuta. She further argued that the plaintiff had not established a case to warrant this court to grant the orders of mandatory injunction sought. In her view, no special circumstances had been established to enable this court grant the said orders sought. She submitted that the issues in this case ought to be heard and determined in a full trial and not in an application. She urged this court to dismiss the plaintiff's application with costs.

I have carefully considered the rival arguments that were made by learned counsel for the plaintiff and learned counsel for the defendant. I have also read the pleadings that were filed by the parties to this application. The issue for determination by this court is whether the plaintiff has established a prima facie case as to entitle this court to grant her the orders of mandatory injunction sought. Both the plaintiff and the defendant appreciate the applicable law as regard the grant of mandatory injunction. As was held by the Court of Appeal in the case of **Kenya Breweries Limited & Another vs Washington Okeyo C.A Civil Appeal NO.332 of 2000 (Nairobi) (unreported) at page 3:**

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halbury's Laws of England 4th Edition Para.918 which reads;

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff....a mandatory injunction will be granted on an interlocutory application.”

Also in Locabail International Finance Ltd vs Agroexport and others [1986] 1 ALL ER 901 at page 901 it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the cases of Belle Maison Limited vs Yaya Towers Limited HCCC 2225 of 1992, per Bosire, J. (as he then was) and The Ripples Limited vs Kamau Mucuha HCCC NO.4522 OF 1992 per Mwera, J.”

In the instant application, certain facts are not in dispute. It is not disputed that the deceased and the plaintiff were married by the late Gathoronjo Githuta. It is further not disputed that the suit parcel of land comprised part of the estate of the late Gathoronjo Githuta. The plaintiff contends that she rightfully inherited the suit parcel of land from her late husband. She stated that she was subsequently registered as the owner of the suit parcel of land. It is her contention that the deceased inherited a parcel of land belonging to their late husband situate at Mai Mahiu and therefore the defendant had no right to bury the deceased on the suit parcel of land.

On the other hand, the defendant contends the deceased used to reside on the suit parcel of land until

when her health took a turn for the worse, when she made a decision to live with her at her matrimonial home at Longonot. It is her case that the deceased lived with her until her death. She contended that the deceased was rightfully buried on the suit parcel of land because she was entitled to be buried on the parcel of land owned by her late husband. The defendant further contended that the succession proceedings leading to the plaintiff being registered as the owner of the suit parcel of land as flawed because the plaintiff had excluded the deceased and herself from benefiting from the estate of Gathoronjo Githuta when it was distributed.

Having carefully evaluated the rival arguments in this application, it is clear that the crux of the matter is whether or not the suit parcel of land comprise part of the estate of the late Gathoronjo Githuta who was the husband to both the plaintiff and the deceased. I have perused Succession Cause number 160 of 1987 in respect of the estate of the late Gathoronjo Githuta. It is evident that the plaintiff inherited the suit parcel of land pursuant to succession proceedings which excluded the deceased. The deceased did not benefit at all when the estate of Gathoronjo Githuta was distributed. It is clear from the said succession proceedings that the deceased and her children were excluded from inheriting the properties that comprised the said deceased's estate because the deceased did not sire any male children. The burial dispute herein is therefore as a result of the defendant's bid to inherit part of the properties that comprised the estate of her late father. She has filed an application in the Succession Cause seeking to have the letters of administration issued therein revoked.

I do therefore hold that as long as the issue related to the succession of the estate of the late Gathoronjo Githuta is not resolved, the plaintiff would not be able to establish a prima facie case that the body of the deceased was unlawfully buried on the suit parcel of land. The deceased had to be buried on a parcel of land that comprised the estate of her late husband. Since the confirmation of grant does not indicate that the deceased inherited any parcel of land that comprised her late husband's estate, it was only natural that a decision was made to have the deceased buried on a parcel of land which was identifiable as having belonged to her late husband. In the circumstance of this case, and having evaluated the facts of this case, I am not prepared to hold that the facts of this case disclose special circumstances that would entitle this court to grant the plaintiff the orders of mandatory injunction sought. In the premises therefore, I do hold that the applicant has not established a prima facie case. Her application for mandatory injunction is therefore dismissed with costs.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE