



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

**CIVIL SUIT 113 OF 2005**

**AUGUSTINO MBAI GATUMA.....DEFENDANT/APPLICANT**

**VERSUS**

**GEORGE GITAU GATUMA.....PLAINTIFF/RESPONDENT**

**RULING**

The defendant's Chamber Summons application dated 21st April, 2005 was filed on 22nd April, 2005. It was brought under Order XXXIX, rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap. 21). The defendant's substantive prayers were as follows:

*(a) that, the Court do issue an interim injunction to restrain the respondent by himself, his agents, servants and/or employees and anyone else claiming through him, from burying the body and/or remains of the late Margaret Wanjiku Gitau on any of the following plots:*

- (i) DAGORETTI/RUTHIMITU/12 — measuring 2.0 hectares or thereabouts;*
- (ii) DAGORETTI/UTHIRU/281 — measuring 4.1 hectares or thereabouts;*
- (iii) DAGORETTI/MUTUINI/209 — measuring 0.21 hectares or thereabouts;*
- (iv) DAGORETTI/RUTHIMITU/183;*
- (v) DAGORETTI/UTHIRU/T39;*

*(b) that, the Officer Commanding Kabete Police Station be required to supervise compliance with the Court's orders;*

*(c) that, the respondent be ordered to pay the costs of this application.*

The grounds in support of the defendant's application are as follows. The defendant is the registered owner of land parcel No. DAGORETTI/UTHIRU 281 as well as all the other plots mentioned in the instant application. The plaintiff/respondent intends to bury his deceased daughter — **Margaret Wanjiku Gitau** — on the said parcel of land, L.R. No. DAGORETTI/UTHIRU/281. The plaintiff has no claim to the parcels of land particularised in the application; they are all fully owned by the defendant. The defendant stands to suffer substantial loss — as he will be “haunted by the [spirit] of the deceased if the applicant is allowed to bury his deceased daughter in DAGORETTI/UTHIRU/281 or any of the aforesaid parcels of land and further stands to lose the respect of his grown-up children and among his peers.” The applicant is willing to give an undertaking to pay damages to the respondent in the event he is found to

have been granted an injunction without cause.

The application is supported by the affidavit of Augustino Mbai Gatuma, the defendant, dated 21st April, 2005. He gives evidence that all the several plots the particulars of which are set out in the application, are his, and are registered in his name. He depones that there is pending HCCC No. 113 of 2005 in which those very plots are the subject of a dispute between himself and **George Gitau Gatuma** (the plaintiff). The deponent avers that the plaintiff's daughter, **Margaret Wanjiku Gitau** died on 17th April, 2005 and he intends to inter her body on L.R. No. DAGORETTI/UTHIRU/281 or one other of the several parcels of land identified and recorded in the instant application. The defendant avers that the plaintiff "has absolutely no claim [to] the land in which [he is] the first registered owner".

A replying affidavit was on 4th May 2005 sworn by Grace Wanjiru Gichuru, the widow of the late Geoffrey Gichuru Gatuma who was a brother to both the plaintiff and the defendant. She deposes that she is one of the beneficiaries of the trust held by the defendant in relation to all the five plots of land being claimed by the defendant/applicant.

The deponent avers that it is not true, as claimed by the defendant, that should the deceased daughter of the plaintiff be buried on parcel No. DAGORETTI/UTHIRU/281, the defendant will suffer harm and trauma — as she herself has had her deceased husband and late son buried on the very same parcel of land.

The deponent averred that there is space reserved on the suit land, utilised as a graveyard — and that the same had already been the site of as many as 22 tombs.

The plaintiff too has a replying affidavit sworn on 4th May, 2005. He avers that while it is true that the defendant is the registered owner of the several parcels of land described in this application, he is registered in trust for himself and his siblings. The deponent avers that it is true, he intends to bury his daughter, **Margaret Wanjiku**, on land parcel No. DAGORETTI/UTHIRU/281; but this is where his home stands, and this is where his mother, his deceased siblings and their relatives had been buried. Indeed, even his grand-children (i.e. the children of the deceased, **Margaret Wanjiku**, were also buried on the suit land. He avers that on the suit land, certain areas had been specifically set aside as family graveyard and at least a score of family members had been buried there.

The plaintiff swore a supplementary affidavit on 16th May, 2005 in which he exhibits a report from a land surveyor, showing the existence of a graveyard on L.R. No. DAGORETTI/UTHIRU/281.

On the occasion of hearing this matter, on 19th May, 2005 **Mr. Nyaga and Mrs. Wanjau** appeared respectively for the defendant/applicant and the plaintiff/respondent.

Learned counsel, **Mr. Nyaga**, noted, firstly, that the suit land was registered in the name of the defendant; secondly that the plaintiff wanted to inter his deceased daughter now lying in the mortuary, on the suit land; thirdly, that the plaintiff had filed a suit against the defendant seeking declaration of trust title-holding over the suit land; and fourthly, that the said suit was yet to be heard and determined. Counsel urged that the status quo be maintained pending the hearing and determination of the plaintiff's suit. In his words: "Until the matter is finalised, the respective rights of the parties should not be compromised." He urged that the burial of the plaintiff's daughter should be held in abeyance until the substantive suit on the trust question is heard and determined.

Learned counsel for the plaintiff/respondent, **Mrs. Wanjau**, submitted that the evidence available in the depositions, at this interlocutory stage, was sufficient to show that, indeed, a trust existed in the ownership of the suit land. Counsel urged, besides, that the burial of the deceased even if it took place, would cause no prejudice to the defendant/applicant, as, already, some 20 people have been buried on the suit land since the filing of suit in February, 2005. Counsel noted that the suit land has been used as family land, and both the plaintiff and the defendant, who are step-brothers, were born there. The remains of their parents and all the departed sons, are interred on the same land. Counsel noted that the surveyor's report attached to the plaintiff's supplementary affidavit showed family graveyards set aside, for burying

the descendants of both the plaintiff and the defendant.

**Mrs. Wanjau** contested the validity of the statement in the supporting affidavit sworn on 21st April 2005: that there existed a risk of a stranger — the deceased daughter of the plaintiff — being buried on the suit land; over 20 people were already buried there, and these are *not* sons of the defendant, but relatives of the defendant’s brothers. Counsel remarked: “So, what harm has the defendant suffered, or will he suffer? If the plaintiff’s suit fails, so many bodies would have to be exhumed!”

Learned counsel noted that the plaintiff had earlier filed a Chamber Summons application of 2nd March, 2005 in which he had prayed —

that, the defendant and/or his servants or employees or agents be restrained by way of injunction from interfering with the current occupation and possession the parcels of land known as

DAGORETTI/RUTHIMITU/121, DAGORETTI/UTHIRU/281,

DAGORETTI/MUTUINI/T209,

DAGORETTI/RUTHIMITU/T.183 and

DAGORETTI/UTHIRU/T39 until the suit is heard and determined.

*And Ransley, J* had ruled that “the applicant has a prima facie case with a probability of success and in any event damages would not be an adequate remedy.” The plaintiff obtained restraint orders against the defendant who had claimed that the plaintiff was only a tenant.

Counsel stated from the evidence that the plaintiff, who is aged 59, was born on the suit land like the defendant, and that the defendant was registered in trust and not, as he had claimed, in an individual capacity.

**Mrs. Wanjau** relied on the High Court’s decision in *Limuli v. Marko Sabayi* (1979) in which **Cotran, J** had held that “there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents.” Counsel submitted that section 28 of the Registered Land Act (Cap. 300) allows declaration of a trust even where a first registration is involved.

In further support of the respondent’s case, learned counsel cited passages in the Court of Appeal decision, *Phillicery Nduku Mumo v. Nzuki Makau*, Civil Appeal No. 56 of 2001. One of these passages thus reads:

“In our view, there is ample evidence to show that Makau owned the original parcel of land, that is plot No. 403. His entire family lived on it.

The appellant’s mother as the first wife of Makau took active part in the demarcation and registration of the suit land since Makau was dead. She was to hold the suit land in trust for the entire family of Makau. She acted fraudulently in trying to deny the house of Mueni...its natural inheritance. On our own consideration of the evidence on record we agree with the learned Judge that [a] customary law trust had been proved. It is trite that trust is a question of fact and has to be proved by evidence.”

In his response, learned counsel, **Mr. Nyaga** laid emphasis on s.27 of the Registered Land Act which, he submitted, conferred absolute ownership of land once registration had taken place. He submitted that the rights of the parties could not be determined until the hearing of the suit had taken place.

It is obvious, of course, that the full play of justice in this matter can only take place at the end of the

hearing of the main suit. However, it is an important principle provided for in the rules of civil procedure, that the strong early appearances in the setting of case, such as are marked out in interlocutory applications attended with depositions and legal submissions, may legitimately lead the Court to make certain orders favouring one party or the other. This is by no means an affront to the ends of justice as they may become apparent subsequently.

What is the fact-scenario in this particular instance, that should be held to justify the making of orders at this stage?

There is uncontroverted evidence that: (i) family members born on the disputed lands, have over the years increased in numbers and their interests have come into conflict over the main economic resource — the land itself; (ii) the lands the subject of competing interests are several, and somehow, they are all registered in the name of one man — *the defendant*; (iii) the defendant wants his title to be judged from the fact of *official registration* alone; he wants to rely on official title documents as conferring indefeasibility of title; (iv) by contrast, the plaintiff goes back to history and the social reality in the context of which those lands came to be registered in the name of the defendant; he says the suit lands have always been occupied by a large family, whose members have lived and died thereon, so that there are common areas such as graveyards, quite apart from the fact that they, the plaintiffs, have always had their abode on the same lands; and therefore the defendant's title is a title held in trust for the larger family; (v) at this moment the plaintiff's daughter is dead and her corpse is lying in the morgue; it has to be interred without any option. On this last point I will take judicial notice that the plaintiff is required, under the Public Health Act (Cap. 242), to effect the burial of the deceased. Learned counsel for the plaintiff, **Mrs. Wanjau**, has submitted persuasively that the interment of the plaintiff's daughter on the land which he has always occupied without challenge, cannot cause any prejudice to the defendant. I think there is less merit in the contention of the defendant that such a burial would be the burial of a stranger, and that it would haunt him later and cause him psychological harm.

I think the *prima facie* merits of this matter, which most likely will remain unchanged even at the hearing of the main suit, dictate that the plaintiff be allowed to proceed with the burial of his daughter as he intends.

I have no doubts that it is right and proper to vindicate the plaintiff's position as against that of the defendant. Consequently I hereby dismiss the defendant's application by Chamber Summons of 21st April, 2005, with costs to the plaintiff/respondent in any event.

**Orders accordingly.**

DATED and DELIVERED at Nairobi this 10th day of June, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Defendant/Applicant: Mr. Nyaga, instructed by M/s. Kinuthia Kahindi & Co. Advocates**

**For the Plaintiff/Respondent: Mrs. A. Wanjau, instructed by M/s. Kingoo-Wanjau & Co. Advocates;**