



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

**Civil Suit 756 of 2005**

**PAUL NJENGA**

**(Suing in his capacity as administrator and**

**legal representative of the Estate of the Late**

**PETER NJENGA RINGIRIA)..... PLAINTIFF**

**VERSUS**

**LEAH WANJIKU NJOROGE..... DEFENDANT**

**RULING**

This Ruling is delivered in respect to two applications filed by the warring parties herein against each other. The said applications were consolidated by virtue of an order of this Court made on 25th June 2005 and heard together before me on 18th and 21st July 2005. The Plaintiff, Paul Njau Njenga filed his application by way of a Chamber Summons dated 20th June 2005 and filed together with his plaint on the same date. He seeks, inter alia, injunctive orders against the Defendant, restraining her and her family from burying her deceased husband Daniel Njoroge Ringiria on the parcel of land known as DAGORETTI/RUTHIMITU/460 or in any other parcel of land forming part of the estate of his father, the late Peter Njenga Ringiria or from trespassing or in any other way interfering with the estate of the said Peter Njenga Ringiria. The Plaintiff is an administrator of the said estate by virtue of a Grant of Letters of Administration issued to him jointly with one Hannah Wanjiku Njenga on 14th July 2003. On 20th June 2005 the Plaintiff obtained an ex parte injunction in his favour pending the hearing of his application interpartes, which order the Defendant seeks to have set aside in her application filed on 22nd June 2005.

The defendant is the widow of the Plaintiff's father's brother Daniel Njoroge Ringiria who died on 14th June 2005 and whose body is still lying at the City Mortuary as a result of an interim restraining order on 20th June 2005. In her Chamber Summons dated 22nd June 2005 the Defendant seeks, in addition to the variation or setting aside of the said interim order, a mandatory order as follows:

**“THAT this honourable Court do grant an order that Daniel Njoroge Ringiria.....be buried on the land parcel known as Dagoretti/Ruthimitu/460.”**

The Defendant's Chamber Summons is expressed to have been brought under Section 3A, a non-existent provision cited as rule 9A, Order XXXIX rule 4 of the Civil Procedure Rules and all other enabling provisions of the law. I find that the mandatory orders sought by the Defendant cannot be granted on the application as filed and only the prayer for setting varying or setting aside the interim injunction can be considered under Order XXXIX Rule 4 which provides that

**“An order for injunction may be discharged or varied or set aside by the Court on**

**www.kenyalaw.org Paul Njenga v Leah Wanjiku Njoroge [2005] eKLR 3 application made thereto by any party dissatisfied with such order.”**

Parties agreed to argue both their applications on the strength of the grounds and/or affidavits filed in support of their respective applications and/or in response to the opponents application or replies, in such a manner as would assist the Court in determining the issue of whether body of Daniel Njoroge Ringiria should or should not be buried on the suit premises or put in another way, whether the Defendant should be restrained from burying the said Daniel Njoroge Ringiria on the subject land.

The Plaintiff’s application of 20th June 2005 is expressed to have been brought under the provisions of Order XXXIX Rules 1, 2 and 7 of the Civil Procedure Act (sic) but its wording suggests that the Plaintiff desires that a permanent injunction be issued on the application. The relevant prayer reads as follows:

**“(b) THAT An order of injunction be issued restraining the Defendant either by herself or through her children servants, Agents and/or employees or any other person deriving title from the Defendant or her late husband Daniel Njoroge Ringiria on the parcel of land known as Dagoretti/Ruthimitu/460 or in any other parcel of land forming part of the Estate of the late Peter Njenga Ringiria or from trespassing or in any way interfering with the estate of the late Peter Njenga Ringiria.”**

Suffice it to say that permanent injunctions cannot be issued under Order XXXIX which only applies to temporary injunctions and interlocutory orders. Assuming that the Plaintiff’s prayer above is erroneously worded and that the Plaintiff, having filed a plaint intended that a temporary order is granted pending the hearing and determination of the suit, I find that Rules 1 and 7 of the said Order do not apply to his case and that his claim perhaps falls under Rule 2 which applies where an applicant seeks a temporary injunction to restrain a Defendant/Respondent from committing a breach of contract or other injury of any kind. The threat to the Plaintiff herein would fall under the latter part of the rule.

At the time this suit was commenced the Defendant and her family and/or associates had already dug a grave in which they intended to bury her deceased husband. The Plaintiffs main fear and reason for objecting to the burial of his deceased uncle on the subject parcel of land is that the Defendant and her family would, by reason only of having buried the deceased on the said land return to claim ownership of the same. Indeed his fears are expressed in paragraphs 10, 11 and 12 of his Supporting Affidavit of 20th June 2005 wherein he depones as follows:

**“10. THAT in view of the above.....the family of the late Daniel Njoroge Ringiria has no ground or right to want to bury him on the parcel of land known as Dagoretti/Ruthimitu/460 (which) belonged to my father**

**11. THAT I am opposed and object to the idea of a stranger being buried on my late father’s parcel of land without my consent and I believe that this is an attempt to invade this property and later lay claim to it.**

**12. THAT I stand to suffer prejudice if the Defendant and her family are not barred from burying her late husband and on the aforementioned parcel of land.”**

In paragraph 14 the applicant depones as follows:

**14. THAT I have been informed by my advocates on record which advice I believe to be true that such an act is illegal and unconstitutional as it violates my right to property.”**

It is surprising that the Applicant refers to the deceased in the said affidavit as a stranger when in the Plaint he clearly states, that he was his father’s brother and his own uncle.

The same fear is expressed in the paragraphs 5, and 6 of the Plaintiff’s Replying Affidavit of 27th June 2005 thus:

**“5. THAT it....comes as a great surprise to hear for the first time after many years and only after the death of the late Daniel Njoroge Ringiria that he was a beneficiary of the Deceased’s Estate.**

**6. THAT it is quite clear that this application (Defendant’s application of 22nd June 2005) is an abuse of the process of this Honourable Court and I believe the same is calculated to enable the Defendant to get an order that would assist her in future to inherit an Estate to which she is not a beneficiary.”**

Although this Court fails to understand how, by reason only of burying her husband on the land the Defendant would establish a claim for ownership of the suit premises, the Plaintiff’s fear appears genuine seeing that the Defendant, in her application, as well as the supporting and/or Replying affidavits introduces the issue of beneficial interest on the part of the deceased Daniel Njoroge Ringiria in the estate of the late Peter Njenga Ringiria which she alleges arises out of a presumed trusteeship on the part of the deceased registered owner, Peter Njenga Ringiria. As a consequence of the said fear on the part of the Plaintiff and the assertion of a beneficial interest in the suit land on the part of the Defendant, Counsel in their respective submissions and arguments strongly contested the ownership of the suit premises and forgot the principles upon which applications of this nature will be granted or refused by the Court. In his opening statement, Counsel for the Plaintiff submitted that in order to decide the issue before me I must first establish ownership. I hold this to be a wrong proposition since a right of ownership cannot be established in an interlocutory application under Order XXXIX or even in the main suit as filed herein. I have chosen to be guided by the principles under which the Court operates in proceedings of this nature and will not consider any pleadings, arguments and submissions or authority relating to the proprietary interest of either party to the suit premises. To succeed in his application, the applicants must first of all establish a prima facie case with a probability of success which is the first legal principle to consider when granting a temporary injunction under Order XXXIX. The said principles were well established in the leading authority of *GIELLA –vs- CASSMAN BROWN LTD* [1973] E.A. 358. Having already found that the injunction sought by the Defendant cannot issue on her application as filed, I find that the only issue to consider in her case is whether the interim injunction issued herein ought to be varied or set aside. It does not appear to me that the Plaintiff, by merely proving that he is the administrator of his father’s estate and that, as seen from the various annexures to his affidavits the suit land is duly registered in his father’s name and forms part of the estate, he has established a prima facie case against the Defendant in so far as her desire to bury the deceased on the land is concerned. That the Defendant and her family already live on the land negates the allegation of trespass in the circumstances of this case. The second principle for my consideration is whether the Plaintiff has demonstrated that he stands to suffer irreparable loss incapable of compensation in damages in the injunction sought is not granted. The Plaintiff’s fear being that the Defendant may later on come to claim the land, I find that the same can only pose a real if the Plaintiff can show a real likelihood of such a claim being entertained by a Court and title being granted to the Defendant merely on the ground that the defendant’s husband is buried on the land. It being clear that a Court of law will not allow such a claim I am not satisfied that the Plaintiff has demonstrated any threat of irreparable loss or injury.

The third essential and which I must consider in the circumstances of this case is one of the balance of convenience, wherein the main question is whether an injunction is necessary to preserve the status quo until the trial of the suit, or whether the applicant is likely to suffer any prejudice if the injunction is not granted.

The suit herein involves a dead body which is currently held in a mortuary pending the hearing of the proceedings filed by the Plaintiff. I have already found that its burial as intended by the Defendant does not pose any legal threat to the ownership of the property. The question remains however whether the Defendant and her family have any right under law to bury the deceased on the suit premises. Unfortunately there is no law or policy in Kenya regarding the disposal of dead bodies save only as provided for under the Public Health Act (Cap 242 of the Laws of Kenya) which states in Section 144 (1) and (2) as follows:

**“144 (1) It shall be lawful for the minister to select and appoint and to notify in the gazette**

**sufficient and proper places to be the sites of and to be used as cemeteries; and it shall be obligatory where such cemeteries exist to bury the dead in such cemeteries in conformity with the provisions of any rules made by any local authority.**

**(2) any person who is in breach of any such rule shall be guilty of an offence and liable to a fine not exceeding One**

**Thousand Five Hundred Shillings.”**

I find that the above does not provide a solution to the present dispute since one cannot tell from the facts whether a designated cemetery does exist in the vicinity of the suit premises or whether any rules have been made concerning the disposal of bodies by the relevant local authority. I am therefore left with no alternative but to decide this dispute on the basis of the evidence adduced before me and the submissions by Counsel, considering also the burial practices of the warring parties which appear to be of significant relevance in the circumstances.

The Defendant has established through unchallenged affidavit evidence that the late Daniel Njoroge Ringiria has always lived on the suit land having been born, brought up and married there. He is said, again without challenge, not to have had any other home but the suit premises which, despite being registered in the name of his brother, is said to be the family's ancestral home. It being common among the Kikuyu community, to which both warring parties herein belong, to bury their dead in their homesteads, the defendant's desire to bury her late husband on the said piece of land can be understood, the issue of who owns the same notwithstanding. It is unfortunate that the provisions of the Public Health Act previously cited appear ineffective in resolving burial disputes in Kenya. It is equally unfortunate that in present times communal or family grave yards as existed in the past have become as rare as the fear of being dispossessed of land has intensified. This fear has of late caused people to imagine a connection between land rights and burial rites resulting in bitter wrangles being brought to the Courts. The Court wishes to point out that this case is just but one of several disputes arising out of lack of clear and effective laws and policies regarding burials. It is hoped that the authorities concerned will address the issue and in the near future put into effect the provisions of Section 144 of the Public Health Act to avoid a situation where family units as we know them today will either annihilate themselves as they fight over the issue or have their dwellings displaced by graves. As it is there is not enough privately owned land to live on leave alone to bury each and every family member.

The Court can only act and issue orders in accordance with the law as it exists and upon being satisfied that an applicant has established a legally recognizable right capable of protection within the ambit of existing legal principles. The Plaintiff has failed to do so in this case as previously stated in this Ruling. This being the case I see no grounds to restrain the Defendant from burying her deceased husband on the suit land provided that the burial site is such as will not interfere with any other family members' use of the suit property. Should the issue of land ownership be in future contested and decided against the Defendant and in favour of any party claiming under the registered title then at that point such party may apply to the Court for an exhumation order.

It not being disputed that the deceased Daniel Njoroge Ringiria lived in the property known as DAGORETTI/RUTHIMITU/460 all his life, the burial of his remains on the same cannot be said to constitute a trespass either on his part or that of his widow. One could say the deceased is only coming back home as he always did, albeit this time lifeless, inactive and in a casket.

In view of all the above considerations and my various findings I disallow the Plaintiff's Chamber Summons of 20th June 2005 and dismiss the same. Consequently the interim injunction granted herein on 20th June 2005 is set aside. Each party shall bear its own costs in both applications.

Dated and delivered in Nairobi this 29th day of July, 2005

**M.G. Mugo**

**Judge**

**In the presence of:**

***N/A : For the Plaintiff***

***Mrs. Kiarie : For the Defendant***