



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 286 OF 2002

KAMBORA MAMAU.....PLAINTIFF

VERSUS

ESTHER NYAMBURA KIRIMA.....DEFENDANT

RULING

The chamber summons before me dated 18th February 2002 is filed in Civil Case No 286 of 2002 filed by a plaintiff in the Civil Cases Division of this court. While in that Division of this court. While in that Division, the chamber summons was, on 21st February 2002, listed for hearing before my learned brother Githinji, J when he directed that the case be transferred to the Family Division as the dispute in this case was the dispute in the Family Division's Succession Cause No 190 of 1995 concerning the estate of Kirima Kambora (deceased).

The plaintiff in Civil Case No 286 of 2002 is Kambora Kamau, a son of Kamau Njoroge (now also deceased).

The relevant case file having been brought to the Family Division and put together with the Family Division's Succession Cause No 190 of 1995 (also referred to as P&A No 190 of 1995), the Chamber summons dated 18th February 2002 in Civil Case No 286 was listed for hearing before me when a preliminary objection was raised by the respondent/defendant, Esther Nyambura Kirima's advocate on the grounds that: "The application dated 18th February 2002 and the entire suite are both defective in law and devoid of merit and is an abuse of the court process".

The respondent/defendant, prays that the application and the plaintiff should be dismissed.

Having heard the parties on the preliminary objection, I start considering the issues by giving a brief summary of the background to the applicant's/ plaintiff's case in HC Civil Case No 286 of 2002.

The plaintiff in HC Civil Case No 286 of 2002, Kambora Kamau, is a son of Kamau Njoroge (now deceased) who was the sole administrator of the estate of his pre-deceased brother called Kirima Kambora. Kamau Njoroge obtained the grant of letters of administration intestate to the estate of his pre-deceased brother in this court's Succession Cause No 190 of 1995 and, as the administrator, shared out the only asset in the said estate of Kirima Kambora, land parcel No Loc 1/chomo/58 between himself and the only widow of Kirima Kambora called Esther Nyambura Kirima. Kamau Njoroge gave himself three acres leaving five acres to the widow in that eight acre parcel of land.

The widow was not satisfied with that distribution of her deceased husband's estate done when the grant

of letters of administration was confirmed and the relevant certificate of confirmation of grant issued on 5th March 1998.

On 11th January 2001 the widow filed her summons dated 6th November 2000 for revocation of grant issued to Kamau Njoroge to administer the estate of Kirima Kambora. The summons for revocation of grant was filed on the basis that Kamau Njoroge petitioned for the grant of letters of administration to the estate of Kirima Kambora and had the petition processed to the end without the knowledge and consent of the widow and children of Kirima Kambora and that the petitioner, Kamau Njoroge, had no right to inherit anything in the estate of his deceased brother Kirima Kambora.

As that summons for revocation filed by the widow of Kirima Kambora was being processed in this court, Kamau Njoroge filed on 25th January 2001 his Notice of Motion dated 23th January 2001 praying that this court “be pleased to sign all the necessary transfer documents to effect transfer by transmission of the deceased’s estate on behalf of Esther Nyambura Kirima.”

In support of that Notice of Motion Kamau Njoroge filed an affidavit dated 22nd January 2001 stating that he is relying on the grant of letters of administration intestate issued to him on 28th May 1997 to administer the estate of Kirima Kambora which was confirmed on 5th March 1998. Kamau Njoroge continued to state that on confirmation of that grant, the court ordered that the deceased’s estate comprising of parcel of land No LOC.1/ CHOMO/58 be shared between Kamau Njoroge and Esther Nyambura Kirima getting three acres and five acres respectively. He said he had severally approached the said Esther Nyambura Kirima to sign all the necessary transfer documents but she has refused, and that he believes that the said Esther Nyambura Kirima is not willing and she shall never sign the said documents.

I must point out that although Mr Ogutu, counsel for Kamau Njoroge, on the basis that he had filed the application but it was not being found in the case file, caused copies of the Notice of Motion dated 23rd January 2001 be put in the case file for Succession Cause No 190 of 1995 at the time I was handling his client’s HC Civil Case No 286 of 2002, the court record in Succession Case No 190 of 1995 does not refer to the filing of any such Notice of Motion and I even do not see evidence of the relevant court fees having been paid.

In any case assuming that that Notice of Motion was properly filed the position is that while that Notice of Motion was still pending and Esther Nyambura Kirima’s summons for revocation of grant was also pending, the poor Kamau Njoroge, unfortunately also passed away. On 11th February 2002, therefore, when Mr Ogutu, counsel for Kamau Njoroge, and Mr PK Njoroge, counsel for Esther Nyambura Kirima, appeared before me for the hearing of the summons for revocation in Succession Cause No 190 of 1995, the matter was by consent stood over generally on the ground that the administrator who was the respondent in the summons for revocation, and that was Kamau Njoroge, had died the previous day.

That is how far proceedings in Succession Cause No 190 of 1995 have progressed.

Following that death of Kamau Njoroge, his son Kambora Kamau, may be, with other relatives or with friends, decided that the body of Kamau Njoroge be buried in the portion of three acres Kamau Njoroge had shared out to himself from parcel of land Loc 1/Chomo/58 in the estate of his pre-deceased brother Kirima Kambora. Esther Nyambura Kirima, may be, with other relatives or with friends resisted that move. As a result Kambora Kamau went to this court’s Civil Cases Division and filed HC Civil Case No 286 of 2002 on 18th February 2002 praying, in the original plaint, for judgment against the defendant for:

“(a) a permanent injunction restraining the defendants, her agents, servants or by whosoever and howsoever from interfering and/or disrupting the funeral ceremony of Kamau Njoroge deceased to be held on the 3 acres portion of L.R. No LOC.1/CHOMO/58.

(b) Any other/further relief that the honourable court may deem just and fit to grant in this circumstances.

(c) Costs of the suit”.

That plaint dated 18th February 2002 was filed together with this chamber summons before me also dated 18th February 2002 where the two important prayers are prayers number 2 and number 3 stating as follows:

“2. That the defendant by herself, her agents, servants or whosoever and by howsoever be and is hereby restrained from interfering and/or disrupting the funeral ceremony of Kamau Njoroge (deceased) to be held on the 3 acres of land belonging to the deceased on LR No Loc 1/Chome/58 on any date whatsoever.

3. That the order be enforced by the assistance of the local area chief and the officer commanding station of the nearest police station.”

While prayer number 1 was for the chamber summons to be certified urgent and was granted by Githinji J, when the matter was in the civil cases division, prayer number 4 is for costs of this chamber summons.

After the original plaint and this chamber summons had been served to the respondent/defendant who as a result filed her notice of preliminary objection dated 21st February 2002 on that same date, the plaintiff, on 22nd February 2002, filed his amended plaint dated 22nd February 2002 amending prayer (a) to state that the plaintiff prays for judgment against the defendants for:

“(a) A permanent injunction restraining the defendant, her agents, servants or by whosoever and howsoever from interfering with the plaintiff’s quiet possession of the 3 acres of L.R. No Loc 1/Chomo/58 being part of the estate of Kamau Njoroge deceased.

aa) Damages

It means that while in the original plaint dated 18th February 2002, prayer (a) simply wanted a permanent injunction to restrain the defendant from interfering and/or disrupting the funeral ceremony of Kamau Njoroge to be held on the 3 acres portion of LR No Loc 1/Chomo/58 without claiming possession or showing the owner, in the amended plaint dated 22nd February 2002, the plaintiff now wants the permanent injunction granted on the basis that he has possession of the suit parcel of land which possession he should quietly enjoy, and that the portion of three acres is part of the estate of Kamau Njoroge (deceased).

Further, while the granting of the chamber summons dated 18th February 2002 would have, at the interlocutory stage, finally decided the main case in the original plaint in favour of the plaintiff, the granting of that chamber summons would still leave the main case in the amended plaint pending, but that will be for the prayer on damages only as prayer (a) will have been virtually decided in favour of the plaintiff since prayer (2) in the chamber summons has a clause that the 3 acres in question belong to the deceased Kamau Njoroge and his burial in that portion of 3 acres as a result of the court’s order in that chamber summons in terms of prayer 2 will have overwhelmingly strengthened the plaintiff’s claim even if the clause of ownership by the deceased Kamau Njoroge were not inserted in prayer 2 of the chamber summons.

Thus, the plaintiff has strategically set out his campaign for the three acre portion of land in parcel of land No LR No Loc1/Chomo/58 and has not shied at including the prayer for damages without specifying whether he wants general damages or special damages.

However, Mr PK Njoroge, counsel for the respondent/defendant, insists that his notice of preliminary objection still stands and Mr Ochieng Ogutu, counsel for the applicant/plaintiff, responds that he is prepared to counter the objection.

Mr Njoroge who filed his client’s replying affidavit and written defence dated 27th February 2002 and 28th February 2002, told the court during his submissions on the preliminary objection that the application dated 18th February 2002 and the entire suite are both defective in law and devoid of merit and an abuse of the court process and that, therefore, the application and the plaint should be dismissed

with costs.

He said that it is because the applicant/plaintiff does not have the *locus standi* to prosecute this suit. The plaintiff does not show that he has obtained a grant of letters of administration to the estate of his deceased father Kamau Njoroge and has not even shown that he has a limited grant enabling him to institute these proceedings. The deceased Kamau Njoroge may have left other people entitled to administer his estate and section 82 of the Law of Succession Act must be born in mind.

This is not a burial saga like in the case of *V.W Wamboi Otiemo v Joash Ochieng Ougo and Omolo Siranga* (1982-88) 1 KAR 1049 and has nothing to do with burial. In the amended plaint the plaintiff is now setting out his claim as if the three acres in question belong to him personally and the prayers there now do not have anything to do with burial and the injunction asked for in the chamber summons is only intended to strengthen the claim of the plaintiff to the suit portion of land.

Mr Njoroge went on to submit that there is no relationship between the prayers in the amended plaint which claimed property ownership and prayers in the chamber summons which were for burial. The chamber summons is therefore defective and that no purpose will be served by granting such an injunction.

On the other hand Mr Ochieng Ogutu opposed the preliminary objection stating that the objection is grossly misconceived because in the amended plaint, the plaintiff avers that he is a son of the deceased Kamau Njoroge and this suit is based on that relationship. The plaintiff is not therefore bringing HC Civil Suit No 286 of 2002 on behalf of the estate of Kamau Njoroge and does not therefore need to have a grant of letters of administration as one does not need a grant of letters of administration to the estate of one's father for one to qualify to bury his father.

Mr Ogutu went on to submit that the estate of Kamau Njoroge does not have the right to bury Kamau Njoroge as that right is placed upon the plaintiff. Therefore the right of burial being demanded by the plaintiff is a right placed upon him by virtue of being son of Kamau Njoroge (deceased).

That is natural right. God given right and there is no need under the law of Kenya, in those circumstances to apply for a grant of letters of administration. Mr Ogutu emphasised that there is no law stipulating that you cannot bury somebody without having obtained a grant of letters of administration.

On the question of locus standi, Mr Ogutu said he was relying on the case of *VE Wamboi Otiemo v Joash Ochieng Ougo and Omolo Siranga* which he did not have before me but he pointed out that in that case the clan which came to court to claim the right to bury did not have to come with a grant of letters of administration and nobody bothered the clan with that requirement. Mr Ogutu pointed out that the clan had not even obtained a limited grant. He posed a question:

“If a clan could have the right to bury in that case, why not the plaintiff as the son of the deceased Kamau Njoroge?”

On the point that the chamber summons seeks parallel prayers, Mr Ogutu did not agree with Mr Njoroge and argued that the prayers are totally different.

On the question of the claim for damages, Mr Ogutu's position was that it was pre-mature to question the basis of such a claim at the moment when the court is considering the chamber summons only as the prayers in the plaint will remain to be considered during the hearing of the main suit. There is no law preventing prayers for different injunctions in different places.

Mr Ogutu added that section 82 of the Law of Succession Act is not relevant in this matter as the plaintiff does not seek to enforce any of the powers in that section. He only seeks to bury his father on a portion of land he avers belongs to his father by virtue of a certificate of confirmation of grant.

According to Mr Ogutu, at the moment there is no dispute as to who owns the three acres and who owns

the five acres in the estate of Kirima Kambora on the basis of the grant issued in respect of that estate and has not been revoked. Mr Ogutu concluded by stating that the plaintiff was not claiming the three acres because the plaintiff's only claim was the right to bury his father in that three acres and the issue of the *locus standi* does not arise. Mr Ogutu asked the court to dismiss this preliminary objection as it has no basis in law.

As it can be seen, each party is uncompromisingly standing alone on its side. It is now my duty to try and resolve their disagreement on this preliminary point of objection. I will start by saying that from the pleadings before me in HC Civil Case No 286 of 2002, natural right or God given right of the plaintiff as a son to bury his father is not questioned by anybody and the defendants is not doing it in any way. Moreover, the defendant has not said, and nobody has said, that for one to bury somebody, one has to have a grant of letters of administration. That is why in the case of *VE Wamboi Otieno v Joash Ochieng Ougo and Omolo Siranga (ibid)*, it was not a requirement for the deceased's clan; Umira Kager from Nyalgunga Sub-location, Siaya District, Nyanza Province; to have a grant of letters of administration.

That case of *Wamboi Otieno* is however distinguishable from the instant case in that although both cases involve a dispute between relatives and in both burial of a deceased relative is involved, the *Wamboi Otieno* case was a purely burial dispute case while the instant case before me is a land claim or land ownership claim case disguised as a burial dispute case. In the instant case therefore a grant of letters of administration may be required while in a purely burial dispute case like the *Wamboi Otieno* case, no such a grant is required especially where the burial is governed by customary law, as was the position in *Wamboi Otieno* case.

The plaintiff knows that that is the position. That is why he is handling this case the way he has brought it and I said earlier that the plaintiff has strategically set out his campaign for the three acre portion of land in parcel of land Loc 1/Chomo/58 so that if the prayers in the chamber summons dated 18th February 2002 are granted, the plaintiff's case in the amended plaint dated 22nd February 2002 will remain for proof of damages only. This is because the granting of a permanent injunction in terms of prayer (a) of the amended plaint will be a mere formality burial of the body of Kamau Njoroge in the disputed three acre portion having been effected under an injunction granted in terms of prayer (2) of the chamber summons which neither says that the injunction will be temporary nor sets the time limit for that injunction in that prayer which includes a clause that "... the 3 acres of land" belongs "to the deceased" Kamau Njoroge. If the plaintiff will be armed with such an order, a judge hearing the main suit as set out in the amended plaint and handling the matter with consistency will find no difficulty in granting a permanent injunction in terms of prayer (a) in the amended plaint if the plaintiff will still feel that he needs that additional order which, to my mind, may be redundant.

In this matter, therefore, the plaintiff is trying to put the cart before the horse. Trying to get ownership of the dispute three acres of land decided in his favour under the guise of granting his God given right to bury his deceased father who has died leaving the same dispute over the same three acres of land pending between him and the defendant, in this court's Succession Cause No 190 of 1995.

Properly, therefore, and in accordance with the provisions of section 82 of the Law of Succession Act which is mandatory and relevant for the plaintiff to observe, the plaintiff should start by going into Succession Cause No. 190 of 1995 as a personal representative of this deceased father Kamau Njoroge as there is no other way lawfully open to the plaintiff.

It is the Law of Succession Act to govern inheritance of the three acre portion and the plaintiff will, therefore, get nowhere by trying to run away from the provisions of the Law of Succession Act.

Section 82 gives no room for persons other than the deceased's personal representative. It gives powers to personal representatives and section 83 of the Act spells out the duties of personal representatives.

According to the interpretation in section 3(1) of the Law of Succession Act, the term "personal representative" means the executor or administrator of a deceased person.

Section 82 of the Law of Succession Act therefore states as follows:

“Personal representative shall, subject only to any limitation imposed by their grant, have the following powers:

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for this estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: provided that:
(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof,

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation: provided that, except so far as otherwise expressly provided by any will:
(i) no application shall be made so as to affect adversely any specific legacy;
(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case Consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required”.

The plaintiff’s deceased father Kamau Njoroge having left this court’s Succession Cause No 190 of 1995 surviving him, the relevant part of section 82 is paragraph (a)

“to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate,”

According to proceedings in Succession Cause No 190 of 1995, not only was Kamau Njoroge an administrator but was also a beneficiary of the estate of his pre-deceased brother Kirima Kambora. That is the position in which Kamau Njoroge was when he died. He was the administrator of the entire estate and a beneficiary from three acres in that estate which comprised of only one parcel of land Loc 1/Chomo/58. He had not succeeded in completing the administration by sub-dividing that parcel of land and transferring five acres to Esther Nyambura Kirima and the remaining three acres to himself and by having the transfers registered under the provisions of the Registered Land Act. It is the registration of the two transfers under the provisions of the Registered Land Act that would have conferred the legal title in the five acres to Esther Nyambura Kirima and the legal title in three acres to Kamau Njoroge thereby bringing the process of administering the estate to the final end at which land title deeds could subsequently be issued to registered proprietors under the Registered Land Act. Although the parties have not specifically said it, I am mentioning the Registered Land Act because the registration particulars given in pleadings in this matter suggest that parcel of land Loc 1/Chomo/ 58 is registered under the Registered Land Act.

Kamau Njoroge did not succeed in reaching the final end partly because he appears to have been slow

after he obtained the certificate of confirmation of grant and partly because Esther Nyambura Kirima was opposed to the issuance of that grant to Kamau Njoroge and opposed the distribution of her husband's estate in the way Kamau Njoroge had done it. She filed her summons for revocation of the grant issued to Kamau Njoroge. Everything remained at the stage of the issuance of a certificate of confirmation of grant as the administrator could not move further in the administration of Kirima Kambora's estate.

As I said in this court's Succession Cause No 1086 of 1995, *in the matter of the estate of Ndungu Kariuki* (unreported); a certificate of confirmation of grant confers upon a beneficiary under it a beneficial interest. I stated:

“As a certificate of confirmation of grant, also referred to as a certificate of confirmation, confers upon a beneficiary under it a beneficial interest in the estate of the deceased person, where such a beneficiary subsequently dies before the executor or administrator of the estate for which the certificate of confirmation was issued transfers the resultant legal interest or title to the aforesaid beneficiary, it is not proper and lawful to proceed under rectification of that certificate of confirmation to replace the deceased beneficiary with a person other than a confirmed executor or administrator of the estate of the deceased beneficiary.”

I should add that that is the legal effect of sections 79, 82 and 83 of the Law of Succession Act, section 79 provides that property of a deceased person vests in his personal representative. Section 82 sets out powers of a personal representative while section 83 sets out duties of a personal representative. As stated earlier, a personal representative means the executor or administrator of the estate of a deceased person.

To get to be a confirmed executor or administrator of the estate of a deceased beneficiary, the proper procedure would be for the person aspiring to replace the deceased beneficiary to start the ball rolling in separate proceedings being a petition for the grant of probate or letters of administration in the estate of the deceased beneficiary. The aspirant will start those proceedings either as a petitioner as well as a beneficiary or as a purely beneficiary influencing others interested to have the petition filed.

After confirmation of that grant, it is the executor or administrator of the estate of the deceased beneficiary also referred to as the second deceased, whether or not that executor or administrator is also a beneficiary, who should approach and ask the executor or administrator of the estate of the first deceased person, also referred to as the pre-deceased, to apply for rectification of the certificate of confirmation of grant in the estate of the pre-deceased person so that the executor or administrator of the estate of the deceased beneficiary (the second deceased) replaces the deceased beneficiary (the second deceased).

It is after such rectification has taken place that the executor or administrator of the estate of the deceased person (the pre-deceased) will, as trustee, properly and lawfully transfer the resultant legal interest or title to the executor or administrator of the estate of the deceased beneficiary (the second deceased) to enable the latter executor or administrator, also as trustee, transfer the same legal interest or title to the entitled or aspiring beneficiary who started the ball rolling in the estate of the deceased beneficiary (the second deceased).

From my above analysis of the legal position and the required procedure, therefore, for the applicant/plaintiff to properly start litigation against the respondent/defendant in this matter, he should first instigate court succession proceedings for the estate of his deceased father Kamau Njoroge – so that the administrator of Kamau Njoroge's estate is known. That administrator may turn out to be the applicant/plaintiff before me in this chamber summons or he may turn out to be somebody else. But whoever may be the administrator of the estate, that is the person who will have the *locus standi* to go into this court's Succession Cause No 190 of 1995 to litigate, on behalf of the estate of Kamau Njoroge, against Esther Nyambura Kirima.

If Esther Nyambura Kirima were not opposed to what Kamau Njoroge had done and had not therefore filed her summons dated 6th November 2000 for revocation of grant in Succession Cause No 190 of 1995, the administrator of the estate of Kamau Njoroge would have simply applied, in that succession cause, to replace the deceased Kamau Njoroge, not only as the administrator of the whole estate of Kirima

Kambora, but also as the administrator beneficiary of the portion of three acres which Kamau Njoroge had shared to himself from that estate of Kirima Kambora.

After that replacement, the administrator of the estate of Kamau Njoroge would have also become the administrator of the estate of Kirima Kambora and would have, therefore, proceeded to complete the administration of the estate of Kirima Kambora by effecting the sub-division of parcel of land No Loc 1/Chomo/58 into three acres and five acres and transfer and register the portion of three acres in his name as administrator of the estate of Kamau Njoroge and transfer and register the portion of five acres in the name of Esther Nyambura Kirima as a widow beneficiary in the estate of Kirima Kambora.

Thereafter, that person, if not the applicant/plaintiff now before me, and as the administrator of the estate of Kamau Njoroge, would have gone further, back in the succession cause relating to the estate of Kamau Njoroge, to transfer the three acres from the estate of Kirima Kambora to the applicant/plaintiff and would have had it registered in the applicant's name in case the applicant/plaintiff would have been assigned successorship to those three acres during the distribution of assets in the estate of Kamau Njoroge.

That is some distance to reach the end and since Esther Nyambura Kirima has filed a summons for revocation of the grant issued to Kamau Njoroge in Succession Cause No 190 of 1995, that happy end for Kambora Kamau may never come true.

I have said that it is the administrator of the estate of Kamau Njoroge who would have the *locus standi* to be substituted in the place of Kamau Njoroge in this court's Succession Cause No 190 of 1995 in order to properly litigate with Esther Nyambura Kirima in this matter. In her summons for revocation she is saying that Kamau Njoroge was neither entitled to the grant of letters of administration nor to benefit in any way as a beneficiary from the estate of Kirima Kambora. With due respect to the views of Mr Ogutu who said that there is no dispute as to who owns three acres in the estate of Kirima Kambora, that dispute is still pending and nobody knows which side will win and to what extent. If the widow fully succeeds, the estate of Kamau Njoroge will have wholly lost Kamau Njoroge's claim in the estate of his pre-deceased brother Kirima Kambora and therefore a claim to have the right to bury Kamau Njoroge's body in the disputed three acres would have been futile. If the widow does not fully succeed, or even if she loses a full three acres to the estate of Kamau Njoroge, nobody at this stage knows whether the position of the claimed three acres or any portion of the three acres that the estate of Kamau Njoroge may succeed to get will be located at the same place where the three acres Kamau Njoroge claimed when he was still alive were. It be realised that the judge who will at that time, decide that dispute will not be bound to follow the location Kamau Njoroge had chosen. The burying of Kamau Njoroge's body in that areas or in any other area of parcel of land No Loc 1/Chomo/58 at the moment is also futile.

Yet as things stand now, proper litigation leading to a definite solution at a definite end which can be called the completion of the administration of the estate of Kirima Kambora, is yet to start following the death of Kamau Njoroge. In other words, the body of Kamau Njoroge can only be lawfully buried in three acres being a portion of parcel of land No Loc 1/Chomo/ 58 after the administrator of the estate of Kamau Njoroge has succeeded in this court's Succession Cause No 190 of 1995 and there is no appeal, or if there is an appeal, the administrator is successful in the Court of Appeal. That end is, as at today, also a long way to go.

For how long, therefore, can the body of Kamau Njoroge wait to be buried in a portion of land from parcel of land Loc 1/Chomo/58? Indeed at the time I reserved this ruling after I heard submissions, I overheard murmurs, from members of the audience who apparently, wanted an instant ruling, wondering as to who was to meet the continuously accumulating costs of keeping the body of Kamau Njoroge in the mortuary. If that alone is a worry today, how much more will the worry be if the burial of that body has to wait until the final determination of the pending litigation between Esther Nyambura Kirima and the yet to be known administrator of the estate of Kamau Njoroge over the three acres in dispute in the estate of Kirima Kambora?

No doubt the murmurers as well as the parties in this application before me think that it is this court

delaying the burial of the body of Kamau Njoroge.

Far from it. The people who are delaying the burial of that body are the people who decided that the plaintiff files HC Civil Case No 286 of 2002 and this chamber summons dated 15th February 2002. As I pointed out earlier, it is a land ownership claim disguised as a burial saga. It is a claim to title to land disguised as a claim to a burial right in this matter where Esther Nyambura Kiria is not denying or disputing Kambora Kamau's God given right to bury his father. Esther Nyambura Kirima is only reminding Kambora Kamau that in exercising his God given right to bury his father Kambora Kamau must respect his neighbour's God given right to the protection of the neighbour's property. In other words Kambora Kamau must realise that his God given right to bury his father is not unlimited. It is limited by his neighbour's God given rights so that Kambora Kamau cannot go and bury his father in other peoples parcels of land including portions of land over which Kambora Kamau's and his father's interest is in dispute as against the interest of the neighbour; and section 70 of the present Constitution of Kenya clearly says that where as every person in Kenya is entitled to the fundamental rights and freedoms of individual, that is to say, the right to:

“(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation. Those rights and freedoms are subject to the limitation “that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of other or the public interest.”

It follows from the foregoing that a party who claims a disputed title to land should not file that claim in court disguised as a claim for his right to bury a deceased relative. Where that happens, delay in burying the deceased relative is likely to occur as the person making the claim or his deceased relative should not be given title to that land on the basis of that person's right to bury the deceased; the right to own and protect the land in question being something different and distinct from the right to bury the deceased relative. To avoid these kind of litigations, and they are unnecessary and an abuse of the process of the court, such a deceased person should be buried in a parcel of land where there is no dispute over ownership affecting the interest of the estate of the deceased or the interests of his relatives to the extent of making the deceased's entitlement to be buried in that parcel of land questionable. After a quiet burial in an undisputed and quiet parcel of land, surviving relatives of the deceased can always take up and pursue the surviving claim to the title over the disputed land and succeed in their claim without evidence of the presence of the grave of their deceased relative who could have been buried there under protest and strong opposition from the opposite side thereby weakening that evidence.

Briefly to conclude this ruling therefore, I find that the chamber summons is framed in such a way as to substantially and finally decided the main suit in the plaint before relevant evidence is adduced, tested, canvassed and evaluated at the trial of the main suit thereby defeating the purpose for order XXXIX of the Civil Procedure Rules meant to be used only for interlocutory orders while the main suit is still pending. Secondly, the applicant/plaintiff has no locus standi to bring HC Civil Suit No 286 of 2002. Thirdly, even if the applicant/plaintiff had the locus standi, the procedure he has adopted of filing HC Civil Suit No 286 of 2002 instead of going to Succession Cause No 190 of 1995 to be substituted for his deceased father, is wrong and HC Civil Suit No 286 is, therefore, improper and incompetent.

That being the position, I agree with Mr PK Njoroge's preliminary objection that:

“The application dated 18th February 2002 and the entire suite are both defective in law and devoid of merit and an abuse of the Court process.”

That objection be and is hereby upheld and the chamber summons dated 18th February 2002 together with the entire suit as set out in the amended plaint dated 22nd February 2002 in HC Civil Suit No 286 of 2002 be and are hereby dismissed with costs of each to the respondent/defendant.

Dated and delivered at Nairobi this 13th day of March, 2002

J.M KHAMONI

JUDGE