



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 36 OF 2018**

**PATRICK MUTENYO WANJALA.....PLAINTIFF/APPLICANT**

**VERSUS**

**FATUMA NALIAKA KUTA**

**SALIM MUCHELULE OMULANGULA**

**ASMINI WABWIRE WANYAMA**

**RAMADHAN JOM KARIO**

**RAMADHAN MAHDLY WEKHUYI**

**GODFREY ONGUME CHICHOLA.....DEFENDANTS/RESPONDENTS**

**RULING**

The application is dated 20<sup>th</sup> January 2021 and is brought under Section 3, 3A & 63e of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent and that service of the same be dispensed with in the first instance.
2. That this honourable court be pleased to issue a temporary order of injunction restraining the defendant/respondents, their agents, assigns, representatives and any persons claiming through them from burying, interring the remains and/or body of the deceased Samson Akhonya on the applicant's L.R.S. N/Wanga/Khalaba 1800, 1801, 1802, 1803, 1804 and 1805 pending the hearing and determination of this application inter-parties.
3. That this honourable court be pleased to issue an order of injunction restraining the defendant/respondents, their agents, assigns, representative and any persons claiming through them from burying, interring the remains and/or body of the deceased Samson Akhonya on the applicant's L.R.S. N/Wanga/Khalaba 1800, 1801, 1802, 1803, 1804 and 1805 pending the hearing and determination of the application.
4. That the court be pleased to amend its ruling delivered on the 28<sup>th</sup> September, 2020 to include an eviction order against the respondents, their servants, agents, heirs and dependants from L.R.S. N/Wanga/Khalaba/1800, 1801, 1802, 1803, 1804 and 1805.
5. That the officer Commanding Harambee Police Station (O.C.S) be ordered to ensure lawful compliance with the orders herein.
6. That costs of this application be provided for.

It is premised upon the grounds that the plaintiff/applicant is the lawful owner and proprietor of L.R.S. N/Wanga/Khalaba 1800, 1801, 1802, 1803, 1804 and 1805 approximately 5.93 Hectares. That the plaintiff/applicant is in sole possession and occupation of the suit parcel of land. That the applicant having obtained the adverse possession of the said parcel of land vide the judgment delivered in this suit in favour of the applicant hence duly issued with the title deeds herein. That the deceased's family now purports to have purchased parcel of land from one Fatuma Naliaka Kuta, the 1<sup>st</sup> respondent herein on which the applicant challenged the said vendor who disposed to the deceased in which the court issued a decree vide the judgment dated 14<sup>th</sup> May, 2019 declaring the applicant as a lawful owner of the subject property in dispute. That the defendant/respondent together with the deceased's family now without any lawful right and authority intends to inter and or bury the deceased Samson Akhonya on the plaintiff/applicant's parcel of land. That the deceased passed away on 7<sup>th</sup> day of January, 2021, the preparation for his burial is ongoing and the same is scheduled on 23<sup>rd</sup> January, 2021. That the defendant/respondents together with the

family to the deceased have no proprietary rights or interests as far as land parcel No. L.R.S. N/Wanga/Khalaba 1800, 1801, 1802, 1803, 1804 and 1805 are concerned. That the defendant/respondents' actions are an infringement of the plaintiff/applicant's right property ownership as enshrined under Article 40 of the Constitution. That the defendants and the deceased's family should be restrained from their unlawful actions as this will be a recipe for chaos and breach of peace.

This court has considered the application and the submissions therein. The plaintiff/applicant seeks an order of injunction restraining the defendant/respondents, their agents, assigns, representative and any persons claiming through them from burying, interring the remains and/or body of the deceased Samson Akhonya on land parcels No. N/Wanga/Khalaba 1800, 1801, 1802, 1803, 1804 and 1805. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd** (2003) eKLR, the Court of Appeal held that:

*“...A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter...”*

In the case of **Suleiman vs Amboseli Resort Ltd (2004) KLR 589**, Ojwang Ag. J (as he then was) stated thus:

*“Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in Giella – v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at 780 – 781: - A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown, the court has to consider the following questions before granting injunctive relief:*

- i) Is there a prima facie case.....*
- ii) Does the applicant stand to suffer irreparable harm....*
- iii) On which side does the balance of convenience lie.....*

*Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant. ”*

On perusal of the documents on record no evidence has been adduced to show that the respondents intend to carry out the burial. Secondly, this matter was concluded and the applicant has been granted eviction orders against the respondents on the 28<sup>th</sup> September 2020. The applicant is advised to execute his judgement and desist from making endless application in court. I find this application is frivolous and lacks merit and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21<sup>ST</sup> APRIL 2021.**

**N.A. MATHEKA**

**JUDGE**