



**REPUBLIC OF KENYA**

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

**ELCC No. 38 OF 2012**

**LAWI KIGEN KIPLAGAT .....PLAINTIFF**

**VERSUS**

**JAPHETH AMENYA RATEMO (Legal representative of the estate of  
THOMAS RATEMO OIRA) .....DEFENDANT**

**RULING**

1. This ruling is in respect of two applications: the plaintiff's Notice of Motion dated 26<sup>th</sup> March 2021 and the defendant's Notice of Motion dated 15<sup>th</sup> April 2021.

2. Notice of Motion dated 26<sup>th</sup> March 2021 seeks the following orders:

1. *[Spent]*

2. *[Spent]*

3. *THAT the honourable court be pleased to order and direct the area chief and the O.C.S Elementaita Police Station to assist and provide security during the enforcement of the orders sought herein.*

4. *THAT pending the hearing and determination of this suit this Honourable Court be pleased to issue orders of temporary injunction restraining the defendant/respondent, his agents, family members, relatives, employees, general public and/or his servants from entering, digging any grave site, burying any remains and particularly the remains of **THOMAS RATEMO OIRA** and/or interfering whatsoever with the suit property known as land parcel No. **PLOT NO. 34, MITI MINGI SETTLEMENT SCHEME NO. 722** situated at Miti Mingi Nakuru County.*

5. *THAT costs of this application be provided for.*

3. The application is supported by an affidavit sworn by the plaintiff. He deposed that around the 26<sup>th</sup> March 2021, he learnt that the then defendant Thomas Ratemo Oira had passed away and that his relatives were preparing to bury him on the suit property. That he tried to engage the deceased's family to have the deceased buried in a place other than the suit property but they insisted on proceeding with the burial plans. He added that if burying the deceased on the suit property will lead to its degradation, exponential loss in its market value and irreparable damage.

4. Notice of Motion dated 26<sup>th</sup> March 2021 was placed ex parte before the vacation duty judge sitting at Eldoret on 30<sup>th</sup> March 2021 who granted an order stopping the burial pending inter parte hearing of the application. The defendant reacted to the application by filing Notice of Motion dated 15<sup>th</sup> April 2021, seeking the following orders:

1. *[Spent]*

2. *THAT Japheth Amenya Ratemo, the duly appointed Legal Representative of the Estate of the Defendant be and is hereby substituted as the Defendant in this suit in place of the Thomas Oira who is now deceased.*

3. *THAT this honourable court be pleased to set aside, and/or discharge the orders of the court issued on 30<sup>th</sup> March 2021.*

4. *THAT this honourable court be pleased to order that the burial plans and/or interment of the remains of the late THOMAS*

5. THAT the OCS, Elementaita Police Station be ordered to ensure compliance of orders issued herein.

5. Prayer 2 of the Notice of Motion dated 15<sup>th</sup> April 2021 was allowed by consent when both applications came up for inter parte hearing on 21<sup>st</sup> April 2021.

6. Notice of Motion dated 15<sup>th</sup> April 2021 is supported by an affidavit sworn by Japheth Amenya Ratemo the legal representative and son of the deceased defendant. He deposed that the deceased defendant passed away on the 24<sup>th</sup> March 2021 and that the orders issued on 30<sup>th</sup> March 2021 were obtained through non-disclosure that on 19<sup>th</sup> December 2012 the court had ordered that the deceased was to remain in possession of the suit property, that the deceased has been in occupation for the past thirteen years and had massively developed it by building a residential home on it, constructing a perimeter fence and connecting water and electricity and further that the deceased had in his possession a title deed in respect of the property. That no prejudice will be occasioned to the plaintiff if the deceased is buried on the suit property since the estate of the deceased is an estate of means which is capable of compensating the plaintiff by way of damages in the event that the plaintiff's suit succeeds. He added that the suit property measures approximately 100 acres out of which the deceased had utilized about 5 acres to set up his residence.

7. The plaintiff responded to the application dated 15<sup>th</sup> April 2021 through a replying affidavit wherein he deposed that despite the orders of 26<sup>th</sup> October 2012, the deceased went ahead to cause registration of the suit property in his name on 25<sup>th</sup> February 2013. That interring the remains of the defendant on the suit property would complicate the issues and devalue the property.

8. The defendant responded to the application dated 26<sup>th</sup> March 2021 through a replying affidavit in which he deposed that the deceased had developed the suit property to the tune of KShs 10,000,000 thereby entrenching his interest therein and that the 5-acre portion that the deceased had utilized can be valued and the plaintiff easily compensated.

9. The battle of affidavits raged on. The plaintiff filed a supplementary affidavit whose contents I have noted.

10. The applications were canvassed through oral submissions. Counsel for the applicant argued that as per the agreement dated 25<sup>th</sup> June 2008, the consideration of the suit property was never paid in full and that in 2016, the deceased tried to pay KShs 5,600,000/= after this suit had been instituted but the money was returned to him. He added that despite the non-payment, the deceased went further and transferred the suit property to his name in contravention of the court order issued on 19<sup>th</sup> December 2012 that restrained him from doing so. He concluded his submissions by arguing that under African culture, a burial on land has spiritual connotations and that burying the deceased on the land would lower its value and compromise the substratum of the case. That the defendant has other options in regard to places for burial.

11. In response, counsel for the defendant submitted that the issue of whether consideration was paid is pending trial as the suit is partly heard. He argued further that the deceased took possession of the suit property and developed the same and was allowed by the court to remain in possession. That the suit property is 100 acres out of which the deceased's residential home occupies 5 acres and that in the event that the plaintiff's case is successful, the deceased's estate could monetarily compensate the plaintiff for the five acres. That where damages are an adequate compensation, an injunction should not issue. He concluded his submissions by arguing that the defendant should be buried without delay owing to the pandemic and that even though the deceased had an alternative 5 acres of land elsewhere, the said land is not in his name and that it is bushy and clearing it will take time.

12. I have considered the applications, the affidavits and the submissions. As I see it, Notice of Motion dated 15<sup>th</sup> April 2021 is essentially a response to Notice of Motion dated 26<sup>th</sup> March 2021 since if the injunction sought in the latter application is not granted, the deceased's family will be at liberty to inter his remains on the suit property as is indeed their wish or elsewhere at their discretion. A determination of Notice of Motion dated 26<sup>th</sup> March 2021 will resolve both applications.

13. The principles applicable to an application for interlocutory injunction are settled and I need not go into any lengthy treatise. An applicant seeking an order must satisfy the test in **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

14. As regards what constitutes a *prima facie* case, the Court of Appeal termed the phrase in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** thus:

***... a case in 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 or rebuttal from the latter... [it] 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 success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.***

15. The dispute between the parties herein arises from a sale agreement dated 24<sup>th</sup> June 2008, between the plaintiff and the deceased, pursuant to which the plaintiff sold to the deceased the parcel of land known as Plot No. 34 Miti Mingi Settlement Scheme No. 722. Among others, the plaintiff claims that the deceased breached the agreement and prays in his plaint dated 26<sup>th</sup> October 2008 inter alia for a declaration that the agreement expired by effluxion of time and an order compelling the deceased to vacate the property.

16. The suit is partly heard before Hon. Justice Mutungi and is scheduled for defence hearing on 8<sup>th</sup> December 2021. The Judge is currently on leave thus the necessity for me to deal with the two applications owing to the urgency.

17. From the material placed before the court and the submissions made on behalf of parties, it is apparent that the deceased's presence on the suit property was pursuant to the aforesaid agreement. There are contestations as to whether or not the purchase price was paid, whether the deceased obtained good title as well as the extent and import of development of the suit property by the deceased. Those are matters that remain to be resolved by the trial court. Needless to state, if the plaintiff's case is upheld at trial, the end result may be that the deceased's estate's claim to the suit property will have come to an end. In such an eventuality, assuming that the deceased would have been alive at the time of final conclusion of the matter, he would have to vacate the property.

18. The defendant has argued that the deceased's stay in the suit property was pursuant to the order made by the court on 19<sup>th</sup> December 2012. Obviously, possession pending conclusion of the suit is not the same thing as burial on the property. Possession can easily be reversed. A burial on the other hand is not as quickly and elegantly reversible. As correctly argued by counsel for the plaintiff, the fact that human remains are buried on a parcel of land has ramifications on the value of the said parcel, be it economic or cultural value.

19. Counsel for the plaintiff argued that the deceased's estate has other options as regards alternative burial sites. The defendant conceded that indeed the deceased had an alternative 5 acres of land but added that the said parcel is bushy and that clearing it will take time. Suffice it to note that the deceased passed away on 24<sup>th</sup> March 2021 and that over 45 days have lapsed as parties haggled over the issues in the two applications.

20. Still on the issue of alternatives, the defendant swore on affidavit and his counsel reiterated in submissions that the deceased's estate is an estate of means. It thus seems to me that the suit property is not the only place where the deceased's remains can be interred. Perhaps the estate prefers to bury the deceased on the suit property. Nevertheless, the estate is quite aware of the litigation herein which has been pending since the year 2012 and which goes to the very root of title to the property. The estate's preference must be framed against that background.

21. In view of the foregoing discourse, I am persuaded that the plaintiff has established a *prima facie* case. There is need to preserve the suit property pending determination of the suit.

22. There is no dispute that the suit property measures about 100 acres out of which the deceased's residential home occupies about 5 acres. Counsel for the defendant has argued that in the event the plaintiff's claim succeeds after the deceased's burial on the suit property the deceased's estate will monetarily compensate plaintiff for the value of the 5 acres. That in the circumstances damages are an adequate compensation herein hence an injunction should not issue. It must be remembered that the litigation herein concerns the entire 100 acres. Adequacy of damages must be viewed against the entire claim. To accede to the defendant's suggestion that burial proceeds on the 5 acres would amount to partially determining the case that is pending trial, to the extent of the said 5 acres. I am not persuaded that damages are an adequate remedy as regards the whole claim that is pending before the court.

23. I am persuaded that the plaintiff has made a case for the injunction sought in his Notice of Motion dated 26<sup>th</sup> March 2021 and that prayers 3 and 4 of the defendant's Notice of Motion dated 15<sup>th</sup> April 2021 are for dismissal.

24. Prayer 3 of Notice of Motion dated 26<sup>th</sup> March 2021 seeks an order to the effect that the area chief and the O.C.S Elementaita Police Station to assist and provide security during the enforcement of the orders made. There are ample provisions within the Civil Procedure Rules for the enforcement of an injunction. I see no need to order that the police and the local administration be involved. Needless to state, the police and the local administration have a legal mandate to intervene whenever there is threat to law and order.

25. In the result, I make the following orders:

**(i) Pending the hearing and determination of this suit an injunction is hereby issued restraining the defendant/respondent, his agents, family members, relatives, employees and/or his servants from entering, digging any grave site, burying any remains and particularly the remains of Thomas Ratemo Oira and/or interfering whatsoever with the suit property known as land parcel No. PLOT NO. 34, MITI MINGI SETTLEMENT SCHEME NO. 722 situated at Miti Mingi Nakuru County.**

**(ii) Prayers 3 and 4 of the defendant's Notice of Motion dated 15<sup>th</sup> April 2021 are dismissed.**

**(iii) The plaintiff shall have costs of both applications.**

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF MAY 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Mwangi for the plaintiff

Mr Ratemo and Mr Nyanyuki for the defendant

