



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 7 OF 2021

EDWARD MAKOKHA SIMIYU.....1ST APPELLANT

MARGARET NALIKA.....2ND APPELLANT

ISAAC SIMIYU WAFULA.....3RD APPELLANT

VERSUS

ISAAC MACHESO MABONGA.....1ST RESPONDENT

JOSHUA MACHESO MABONGA.....2ND RESPONDENT

RULING

The Application

1. The application dated **16/3/2021** and filed in court on **1/4/2021**, has been brought under **Sections 1A, 1B & 63(e)** of the **Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 3 and 13(1)** of the **Environment and Land Court Act No. 19 of 2011** and **Article 159(2) of the Constitution**. The appellants seek the following orders:-

1. ...spent

2. That pending the hearing of the application *inter partes*, and thereafter pending the determination of this application there be a temporary stay of the judgment delivered on 23/3/2021 and subsequent orders and decree issued in Kitale CMCC No. 438 of 2019 between Isaac Macheso Mabonga (the recognised and approved agent of Joshua Mabonga Macheso) -vs- Edward Makokha Simiyu & 2 Others.

3. The orders of stay be confirmed at the *inter partes* hearing and the same do remain in force until determination of the appeal herein.

4. That directions as to the hearing of the appeal be given by the court in view of the nature of the dispute.

5. Any other order the court shall deem fit.

6. Costs be provided for.

2. The application is supported by the affidavit sworn on **26/2/2021** by the **3rd** appellant on his own behalf and on behalf of all the other appellants.

3. The grounds upon which the application is made are that the appellants being dissatisfied with the judgment in **Kitale CMCC No. 438 of 2019** have appealed to this court; that the trial court through the terms of the judgment has given the respondents a rights over the suit land and they are now harassing the appellants who reside in the suit land; that the subject matter being a burial dispute and in view of the body lying in the morgue for over a year it is necessary that this appeal be heard and determined expeditiously; that the appeal raises weighty issues for consideration and it is in the interest of justice that the appeal be heard expeditiously.

The Response

4. The respondents filed their replying affidavit sworn on **14/4/2021** by **Isaac Macheso Mabonga**, the **1st** respondent. He deposed that the

judgment of the lower court did not vest the right of ownership in the disputed parcel of land on the respondents but only barred any interment of the deceased thereon and erection of any structures; that there is another suit to with **Kitale CMCC Land Case No 52 Of 2019** pending and that the extracted decree is incomplete.

5. The appellants filed their submissions on **26/4/2021**. The respondents filed their written submissions on **27/4/2021**. **Determination**

6. I have considered the application, the response and the submissions filed by the parties.

7. The issue that arises is whether a stay of the judgment of the court can be issued. I will rely on the applicant's own documents and particularly the decree attached to the application.

8. I have noted that it only restrains the defendants in the lower court case who are the applicants herein from interring the remains of one **Esther Nasimiyu Simiyu** -deceased on land parcel number **Saboti/Sikhendu Block 8(Weonia)/41**.

9. The respondents have demonstrated that there is another pending case which is on ownership of the suit parcel in which the deceased was pitted against the respondents herein. In that case the respondents herein seek to have the deceased and another person declared trespassers on the suit land, the plaintiff therein being the registered owner. While the other suit is still pending, a stay of the order herein would leave the parties without any direction as to whether burial should take place on the suit land or not. That is an unnecessary consequence. It is for this court to pronounce itself on that issue at the end of this appeal.

10. I find that the suit **Kitale CMCC No 438 of 2019** whose decree is being appealed against dealt only with the burial issue and that the ownership issue will be determined in the pending case.

11. The upshot of the above is that there is no good ground to conclude that the suit **Kitale CMCC No 438 of 2019** concluded the rights of the parties with respect to the suit land and the application at hand is therefore premised on a total misapprehension of the actual effect of the judgment appealed against. This has been the pitfall of many a litigant. In the case of **Paul Njenga v Leah Wanjiku Njoroge [2005] eKLR** the court stated as follows:

“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”.

12. In the case of **Victoria Distributors v Joseph Abwao Nyawir [2015] eKLR** the court stated as follows:

“As correctly observed by the Honorable Judge in the case of **Dinah Caren Ondiek Akinyi -vs- Leukadia Ajwang Ondero & Another (supra), a burial on a disputed land (suit land) does not confer title or ownership to that land.”**

13. The suit land is apparently registered in the name of another person and unless and until the right of the applicants to bury the remains of the deceased on the premises is determined by this court, this court can not issue orders reversing the decree mentioned herein at this stage. The parties should await the hearing of the substantive appeal herein for the determination of whether the lower court erred in ordering as it did. I need not say more so as not to prejudice the hearing of the appeal at hand.

14. In the circumstances this court finds that the application dated **26th March 2021** lacks merit and the same is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF MAY, 2021.

MWANGI NJOROGI

JUDGE, ELC, KITALE.