



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 346 OF 2013

SAMSON K. A. TIM.....PLAINTIFF

VERSUS

GRACE KIMOI BITOK.....1ST DEFENDANT

COLLINS K. BITOK.....2ND DEFENDANT

ELVIS K. BITOK.....3RD DEFENDANT

NELSON O. ODHIAMBO 286.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

THOMAS KIPTIM.....6TH DEFENDANT

MATHEW KIPRUTO BITOK.....7TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 10TH MARCH, 2020]

1. **Mathew Kipruto Bitok**, the 7th Defendant, filed the above application seeking to have the ruling delivered on the 12th February, 2020 and all consequential orders set aside; process servers be summoned for cross examination, and costs. The application is based on the six (6) grounds on its face that he had not been served with the Court papers; that he was not a party in this suit; that the burial site is a family graveyard and his father is buried there; that he is a bona fide beneficiary in respect of the **Nakuru Succession Cause No. 57 of 2008**; the application and order issued on the 20th February, 2020 have not been served upon him. The application is also supported by the affidavit sworn by **Mathew Kipruto Bitok** on the 10th March, 2020. It is the 7th Defendant’s case that he is a son to the 1st Defendant and the late Joseph Kibitok Kiptim who was a brother to the Plaintiff. That he has since childhood resided on parcel Lembus/Torong/402 which was intended for his late father, but which has been subdivided by the Plaintiff on paper into several parcels without notice of the entire family. That this suit had been against the 1st to 5th Defendants but the Plaintiff later sneaked in his son named **Thomas Kiptim**, and himself as the 6th and 7th Defendants. That the applications dated 20th June, 2019 and 27th May, 2019 were not served upon him. That he had not visited the OCPD as alleged. That the Plaintiff had misled the Court that he was the only beneficiary when obtaining the grant in **Nakuru Succession Cause No. 57 of 2008** while he does not reside on Lembus/Korong/402. That there are no boundary marks on the ground for parcels Lembus/Torong/790 to 792 allegedly subdivided from Lembus/Torong/402, which remains as it was fenced by his late father and family. That the burial took place on the 1st June, 2019 without knowledge of the Court order. That he has challenged the grant issued to the Plaintiff in the Nakuru Succession Cause, and the issues herein will be solved in that cause. That the orders of 27th May, 2019 and 12th February, 2020 should be set aside and that of 20th February, 2020 stayed. That he learnt of the orders of 20th February, 2020 on exhumation of his late wife from a relative who had visited M/s Tarus & Company Advocates.

2. The application is opposed by the Plaintiff through his replying affidavit sworn on the 18th March, 2020. It is his case that the 7th Defendant’s application should not be allowed as the applicant has not told the truth. That M/s Tarus & Company Advocates had filed grounds of opposition and Counsel was present during the interpartes hearing on 17th June, 2019. That the application dated 27th May, 2019 to enjoin the 7th Defendant was allowed on the same date and order restraining him from burying the body of his late wife on parcels Lembus/Torong/790 to 792 was issued. That on 28th May 2019, the order was served upon the 7th Defendant in the presence of the OCPD, who had called him through his sister called **Joyce Jesang Bitok’s** mobile number 0721700413. That on 29th May, 2019, he served the order upon M/s Tarus & Company Advocate as directed by the 7th Defendant. That the 7th Defendant assisted by 3rd and 6th Defendants proceeded to bury the body of his wife on the suit land contrary to the order of 27th May, 2019. That the 7th Defendant’s application is bad

in law and should be dismissed with costs.

3. That the Court gave directions on the service of the application on the 11th March 2020, and on filing of written submissions on the 27th May, 2020. That other mentions of 6th October 2020, 10th December 2020, 24th February, 2021 and the 19th April, 2021 took place and only the Plaintiff filed his submissions dated 30th June, 2020.

4. The following are the issues for the Court's determinations;

(a) Whether the 7th Defendant has made a reasonable case for the setting aside of the orders of 12th February, 2020.

(b) Who pays the costs of the application?

5. The Court has carefully considered the grounds on the application, the affidavit evidence by both parties, the Plaintiff's written submissions, the record, and come to the following findings;

(a) That the record confirms that the Court in its ruling on the Plaintiff's application dated 20th June, 2019 delivered on the 12th February, 2020 found the 7th Defendant to be in contempt of court by burying the remains of his late wife on Lembus/Torongo/791, contrary to the restraining order issued on 27th May, 2019 and extended on the 29th May, 2019 until 17th June, 2019. That the Court proceeded to order the 7th Defendant to remove by exhumation the said body within 45 days under the supervision of the OCPD and County Public Health Officer. That in the said ruling, the issue of service upon the 7th Defendant among others was addressed under paragraph 5(f). The finding of the court was that the 3rd, 6th and 7th Defendants had been served with the order dated the 27th May, 2019. That there is no materials or evidence presented before the court to warrant that finding been reviewed and no appeal has been filed. There is also no reasonable basis of granting the application for cross examination of the process server who is not even named.

(b) That the order of the 27th May, 2020 was clear and unambiguous. That the 7th Defendant was briefed on its contents before the OCPD among others, and his claim of lack of service has no basis. That accordingly, the 7th Defendant's Notice of Motion dated 10th March, 2020 is without merit and he should pay the Plaintiff's costs.

6. That in view of the foregoing, the 7th Defendant's Notice of Motion dated the 10th March, 2020 is dismissed with costs. It is so ordered.

Delivered virtually and dated at Eldoret this 5th day of May, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Present.

Defendants: Absent.

Counsel: M/s Koech for the 7th Defendant/Applicant

Court Assistant: Christine and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.