



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 5 OF 2021

LOISE NDETO KIMWELI.....PLAINTIFF

VERSUS

RUTH MUTUKU KIMONYI1ST DEFENDANT

NTHENYA KIMONYI2ND DEFENDANT

MWELU KIMONYI.....3RD DEFENDANT

ROSE KIMONYI4TH DEFENDANT

ERICK KIMONYI5TH DEFENDANT

MAUNDU KIMONYI.....6TH DEFENDANT

RULING

1. This Ruling is in respect to two Applications dated 8th April, 2021 and 13th April, 2021. In the Application dated 8th April, 2021, the Plaintiff has sought for the following orders:

a. That pending the hearing and determination of this suit an order of injunction do issue against the Defendants/Respondents restraining them, their agents, servants and/or relatives from burying the body/mortal remains of the late Peter Kimonyi Kimweli (deceased) on land parcel No. Konza North/Konza North Block 2/1462 (formerly Plot No. 1274 situated in Malili Ranch Limited and measuring 7.8 acres or thereabouts, and a commercial plot thereto measuring 50 feet by 100 feet).

b. That an order do issue directing the OCS Salama Police Station together with the officer in charge of Malili Police Post to ensure compliance.

c. That costs of this Application be paid by the Defendants/Respondents.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that at all material times, the 1st Defendant is the wife of one Peter Kimonyi Kimweli (deceased) while the 4th Defendant is the second wife to the said Peter Kimonyi Kimweli.

3. The Plaintiff deponed that the said Kimweli died on 29th March, 2021; that she sued the deceased in respect of plot number 1274 situated in Malili Ranch Limited measuring approximately 7.8 acres and a commercial plot measuring 50 feet by 100 feet vide Machakos ELC. No. 119 of 2011 and that on 20th September, 2019, the court rendered a Judgment in her favour.

4. According to the Plaintiff, although the late Kimweli lodged an Appeal in respect to the said Judgment, the Appeal has not been heard and determined; that while Machakos ELC. No. 119 of 2011 was still pending, the said plot number 1274 was registered in the name of the deceased Konza North/Konza North Block 2/1462 and that the Defendants intend to bury the deceased on the suit property.

5. The Plaintiff finally deponed that neither the deceased nor the Defendants have any right to the suit land and that the Application should be allowed.

6. In response to the Application, the 6th Defendant deponed that indeed the deceased died on 30th March, 2021; that although there was a previous suit in respect to the suit property, there is an Appeal pending against the Judgment and that because the Appeal has not been

determined, the Judgment of this court is not final.

7. The 6th Defendant deponed that the transfer of the suit property to the deceased was done lawfully; that the Defendants have occupied the suit property since it was purchased and that they are still in possession of the suit property.

8. The Defendants filed the Application dated 13th April, 2021 in which they have prayed for the following reliefs:

a. That pending the hearing and final disposal of the Plaintiff's/Respondent's Application dated 8th April, 2021 and the ex parte orders issued in pursuant of the Application, the Plaintiff/Respondent be ordered to deposit Kshs. 1,000,000 as security for costs of losses incurred by the Defendants/Applicants.

b. That costs be provided for.

9. The Application is supported by the Affidavit of the 6th Defendant who has deponed that when the late Peter Kimonyi Kimweli died on 30th March, 2021, they started burial preparations for 10th April, 2021; that they were served with an order stopping them from burying the deceased on the suit property and that having not served them with the ex-parte orders within three (3) days, the said order became null and void.

10. The 6th Defendant finally deponed that they have incurred expenses to the tune of Kshs. 750,000 and that the Plaintiff ought to provide security for costs to the tune of Kshs. 1,000,000.

11. In response to the Defendants' Application dated 13th April, 2021, the Plaintiff deponed that this court issued injunctive orders in exercise of its discretionary powers; that the provision of security is not mandatory and that he is ready to furnish security as the court may determine. The parties filed their respective submissions which I have considered.

12. In the Application dated 8th April, 2021, the Plaintiff has sought for an order for temporary injunction restraining the Defendants from burying the remains of the late Peter Kimonyi Kimweli on parcel of land known as Konza North/Konza North Block 2/1462 (*formerly known as Plot No. 1274 situated in Malili Ranch Limited and a commercial plot measuring 50 feet by 100 feet*).

13. The Plaintiff's Application is premised on the ground that the Plaintiff sued the deceased in Machakos ELC. No. 119 of 2011 in respect to the suit property and that a Judgment was delivered in his favour.

14. The Defendants have not denied that indeed that deceased was sued in Machakos ELC. No. 119 of 2011. However, according to the Defendants, the deceased filed an Appeal against the said Judgment, and that the Appeal is still pending in the Court of Appeal.

15. I have perused the pleadings and the Judgment in Machakos ELC. No. 119 of 2011. In the Plaint, the Plaintiff herein sued the late Peter Kimonyi Kimweli in respect of plot number 1274 situated in Malili Ranch Limited. That is the same land that is in dispute in the current suit.

16. In the Judgment of this court dated 20th September, 2019, this court made the following declaratory orders:

“b. A declaration be and is hereby issued that the Defendant (deceased) holds plot number 1274 situated in Malili Ranch Limited and measuring 7.8 acres or thereabouts, and a commercial plot thereto measuring 50 feet by 100 feet, in trust for the Plaintiff and that these two parcels of land should be transferred to the Plaintiff.

c. The Defendant (deceased) to pay the costs of the suit.”

17. Although the Defendants have deponed that they have filed an Appeal against the said decision, there is no evidence to show that the Court of Appeal or this court has stayed the Judgment of 20th September, 2019. Indeed, there is no evidence to show that the Decree of this court has been set aside, suspended or discharged.

18. That being the case, the Plaintiff is the one who is entitled to the suit property until such a time that the Court of Appeal, or the Supreme Court decrees otherwise.

19. In view of the Judgment of this court dated 20th September, 2019, it is my finding that pending the hearing of this suit, the Plaintiff is entitled to an order of injunction.

20. Indeed, the Plaintiff having succeeded in her suit in this court in respect of the suit property, and the issue of granting security while granting an order of injunction is discretionary, I decline to allow the Defendants' Application for security for costs. Although the Defendants have argued that they are incurring costs because of the existing order of injunction, the said order is justified in view of the Judgment of this court in Machakos ELC. No. 119 of 2011.

21. For those reasons, the Defendants' Application dated 13th April, 2021 is dismissed with costs while the Plaintiff's Application dated 8th April, 2021 is allowed as follows:

a. Pending the hearing and determination of this suit an order of injunction do and is hereby issued against the Defendants/Respondents restraining them, their agents, servants and/or relatives from burying the body/mortal remains of the late Peter Kimonyi Kimweli (deceased) on land parcel No. Konza North/Konza North Block 2/1462 (formerly Plot No. 1274 situated in Malili Ranch Limited and measuring 7.8 acres or thereabouts, and a commercial plot thereto measuring 50 feet by 100 feet).

b. An order do and is hereby issued directing the OCS Salama Police Station together with the officer in charge of Malili Police Post to ensure compliance.

c. That costs of this Application be paid by the Defendants/Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE