



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 12 OF 2020

SAMWEL ATIKA NCHOGU.....APPLICANT

VERSUS

CHRISTOPHER CHWEYA.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 8th March 2021, the Respondent/Applicant moved the court seeking an assortment of prayers including an order to vary or review the order issued on 9th February 2021, by issuing a temporary injunction restraining the Appellant either by himself or through his agents, servants, representatives or funeral committee members from interring the remains of Cecilia Kemunto Nchogu (deceased) or in any manner whatsoever, interfering with the Respondent's land parcel known as L.R No. NYARIBARI CHACHE/KEUMBU/2474 situated in Keumbu Sub-County, Kisii County pending the hearing and determination of the appeal herein or until the suit in the lower court is finalized.
2. In the alternative he sought an order to set aside or discharge and vacate the orders issued on 9th February 2021. The application is premised on the grounds stated in the Notice of Motion and the affidavit of Christopher Chweya Nchogu the Respondent herein sworn on 8th March 2021.
3. The application was opposed by the Appellant through his Grounds of Opposition dated 3rd May 2021.
4. On 9th February 2021 this court delivered a ruling staying the orders issued by the Principal Magistrate's court in CMELC Case no. 22 of 2020 together with all consequential orders made thereto. This ruling was made pursuant to an application filed by the Appellant dated 28th October 2020 in which he complained even though the lower court had merely granted an order of injunction to restrain the Appellant from interring the remains of his mother Cecilia Kemunto Nchogu on L.R No. NYARIBARI CHACHE/KEUMBU/2474, the Respondent had extracted an order for the eviction of the Appellant from the suit property.
5. What prompted the instant application is the fact that the Respondent learnt that the Appellant was making arrangements to bury the remains of his mother on the suit property on 12th March 2021. Owing to the urgency of the matter, the court directed that the counsel for both parties attend a virtual session on 11th March 2021 and after listening to their brief submissions, it granted an interim order of injunction restraining the Appellant from interring the remains of Cecilia Kemunto Nchogu (deceased) on the suit property pending the hearing of the application inter partes on 17.3.21.
6. In spite of the said order, the Appellant went ahead and buried the remains of his late mother on the suit property on 11.3.21. When the matter came up for inter partes hearing on 17.3. 21, counsel for the Appellant informed the court that external forces were responsible for what had happened. He was evasive as to when the burial took place and claimed the burial had taken place on 10.3.21 but this was disputed by the Respondent.
7. The court subsequently directed that since the prayer for injunction had been overtaken by events, the Respondent was at liberty to pursue the alternative prayer for setting aside or discharging the orders made on 9th February 2021. The court further directed that the same be disposed of by way of written submissions.
8. In his submissions, learned counsel for the Respondent/Applicant contended that the Appellant had obtained orders of stay of the lower court's ruling pending the hearing of his appeal to this court but while the said orders were still in force, he went ahead and buried his late mother on the suit property. He contended that as a result of the Appellant's act, a great injustice had been occasioned to the Respondent and his rights to human dignity and equal protection of the law under Article 27 of the Constitution were violated. He urged the court to vacate the said orders as they had been willfully disobeyed by the Appellant.

9. In his Grounds of Opposition, the Appellant contends that the Respondent's application does not meet the threshold for setting aside or discharging the Honourable Court's order issued on 9th February 2021. He further contends that since prayers 1-4 of the application are spent, the application is without shape as allowing prayer 5 would be tantamount to conforming to the suspended orders of the lower court simply because the said orders were favourable to the Respondent.

10. The main issue for determination is whether the court should set aside the orders dated 9th February 2021.

11. It is trite law that the court has a wide discretion to set aside or vary its orders on such terms as are just. See the case of **Patel v E.A Cargo Handling Services (1974) EA 75**. However, before determining whether or not to set aside the orders dated 9th February 2021, it is important to appreciate the context within which the said orders were issued. When the Appellant moved the court for a stay or suspension of execution of the lower court's orders, he complained that the Respondent had extracted an order of eviction and demolition of the Appellant's houses whereas the lower court had only issued an order of injunction to restrain the Appellant from interring the remains of his late mother on the Respondent's land.

12. Even though the court takes great exception to the blatant disobedience of its orders by the Appellant who proceeded to bury the remains of his late mother on the suit property when an injunction had been issued by this court, reinstating the erroneous orders of the lower court would not serve the interests of justice. As the main suit is still pending in the lower court, the Respondent is at liberty to amend his pleadings and seek appropriate orders.

13. In view of the foregoing, I am not persuaded that there are good reasons to set aside the orders issued on 9th February 2021. Consequently, I find no merit in the application and I dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF OCTOBER, 2021.

J.M ONYANGO

JUDGE