



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 80 OF 2018**

**PETER NZIOKA KITHONGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARIA MWENDE MULANDI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUINDE MUSILA KITATI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FRANCIS MUTISO MUTUNYU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DANIEL MASILA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. What is before this court for ruling is the Plaintiff's/Applicant's Chamber summons application dated 31<sup>st</sup> December, 2019 and filed in court on 02<sup>nd</sup> January, 2020 for orders: -

**1. Spent.**

**2. Spent.**

**3. THAT this Honourable Court be pleased to issue a Temporary Injunction restraining the 2<sup>nd</sup> Defendant and in specific one MUINDE MASILA KITATI, by, himself and through their agents, administrators and/or executors from burying the body of the late FRANCISCA TABITHA MUINDE anywhere within the parcels of land known PARCEL NO. L.R.MAKUENI/NGUU RANCH/1067 located in Thithi Sub-location, Wolwa Location, Nguu Division within Makueni County described collectively as the suit land in the Main Suit, pending the hearing and determination of the Main Suit.**

**4. THAT all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.**

**5. THAT costs of this Application be in the cause.**

2. The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Peter Nzioka Kithongo, the Plaintiff/Applicant herein sworn at Nairobi on 31<sup>st</sup> December, 2019 and 03<sup>rd</sup> February, 2020 respectively.

3. The Defendants/Respondents have opposed the application vide the replying affidavit of Muinde Masila Kitati, the 2<sup>nd</sup> Defendant/Respondent herein, sworn at Nairobi on 30<sup>th</sup> January, 2020 and filed in court on even date.

4. The Plaintiff/Applicant has deposed in paragraphs 2, 3, 4 and 5 of his supporting affidavit that he is the legal, bonafide and lawful owner of all that piece of land known as LR No. Makueni/Nguu Ranch/1066 and LR Makueni/Nguu Ranch/1067 situated in Nguu within Makueni County as per the attached copies of title deeds marked as PNK-1, that the 2<sup>nd</sup> Respondent herein plans to inter and/or bury the remains of his deceased wife Francisca Tabitha Muinde in parcel No. LR Makueni/Nguu Ranch/1067 that is subject matter of the main suit herein which has been pending for 18 years, that the aforesaid illegal and unlawful burial ceremony is scheduled to take place on Friday 3<sup>rd</sup> January, 2020 in direct contempt and spirit of interim injunctive orders issued by Hon. Justice R. N. Nambuye, J on 06<sup>th</sup> June, 2002 with a further motive of forestalling the expeditious disposal of the hearing of the main suit coming up on 20<sup>th</sup> March, 2020, that the aforesaid interim injunctive orders as issued only cover parcel No. LR Makueni/Nguu Ranch/1066 therefore, it is prudent that they be extended to cover parcel No. LR Makueni/Nguu Ranch/1067 whose title deed had not been processed by the time the subsisting interim injunctive orders were being issued by the court and that the substratum of the main suit deals with trespass of the Plaintiff's/Applicant's land by the Defendants/Respondents herein whereby, the Applicant seeks inter alia their eviction from the disputed parcels of land.

5. In response, the 2<sup>nd</sup> Defendant/Respondent has deposed in paragraphs 3, 4, 5, 6, 7 and 10 of his replying affidavit that he was born and grew up on the suit premises and he has been in occupation of the same for over 69 years long before the Plaintiff/Applicant came to the site, that the title deed the Plaintiff/Applicant is using to claim ownership of the suit premises was obtained fraudulently and unlawfully and after he had already filed this suit as can be seen from the copies of transfer form and title deed marked MMK1 “a” and “b”, that the Plaintiff/Applicant has attempted but failed over the years to evict him and his family from the suit premises including using the police and lodging criminal charges, that besides having been in possession of the suit premises for many years, the 2<sup>nd</sup> Defendant/Respondent has his matrimonial home with permanent buildings on it where he resides with his family as can be seen from photographs marked MMK2, that his deceased wife will not be the first to be buried on the suit premises after he buried his son sometime in 1990 as can be seen from copies of burial permit and photographs marked MM 2(a) and (b) and that due to irregular, fraudulent, and unlawful issuance of title deeds in Nguu Settlement Scheme, the County Government of Makueni and the National Government have established a task force to ascertain the lawful and genuine title deeds and those fraudulently and irregularly issued and that the task force is yet to issue its report.

6. In his further affidavit, the Plaintiff/Applicant has deposed in paragraphs 2, 4, 5, 6 and 9 that when he purchased the parcel of land LR Makueni/Nguu Ranch/1066 and Makueni/Nguu Ranch/1067 there was no one in occupation, that the 2<sup>nd</sup> Respondent was allocated his land through a letter of offer dated 29<sup>th</sup> September, 1995 marked PNK-1, that the burial permit annexed to the 2<sup>nd</sup> Defendant/Respondent’s replying affidavit and marked MMK 2 “a” clearly indicates that the 2<sup>nd</sup> Defendant/Respondent’s late son was buried in Kikumini/Nzau and not in Nguu as alleged in paragraph 7 of the replying affidavit, that he is not aware of any commission appointed to interrogate titles in Nguu and in any event he procedurally and legally obtained the two title deeds to the suit properties and certificates of titles issued to him by the Registrar and that upon purchase of the suit land, he immediately took quiet possession until the Defendant/Respondent herein illegally trespassed into it which action the Plaintiff/Applicant reported to the police whereby the Defendants/Respondents were arraigned, charged and convicted as can be seen from a copy of the judgement in Makindu criminal case No.1455 of 2009 marked PNK2.

7. On the 25<sup>th</sup> February, 2020, the 2<sup>nd</sup> Defendant/Respondent filed what he referred to as “supporting affidavit” which he swore at Nairobi on 14<sup>th</sup> February, 2020. This was in response to the Plaintiff’s/Applicant’s further affidavit filed in court on 04<sup>th</sup> February, 2020. For the record the Plaintiff’s/Applicant’s further affidavit should have been headed “supplementary affidavit” while that of the 2<sup>nd</sup> Defendant/Respondent should have been headed “further affidavit”.

8. In paragraphs 4, 6 and 9 of his affidavit, the 2<sup>nd</sup> Defendant/Respondent has deposed that the Plaintiff/Applicant bought and settled in land parcel number 1065 which is about 300 metres from the suit premises and has been his neighbour since then, that his son is buried in the suit premises which are within Nguu area which administratively falls within Kikumini sublocation, Nzau location of the then Machakos District and that he appealed against criminal case No.1455 of 2009 Machakos High Court Criminal Appeals Nos. 1 and 2 of 2011 and the conviction was quashed and the sentence set aside.

9. On 30<sup>th</sup> January, 2020, the Plaintiff/Applicant and the Defendant/Respondents were given seven days each to file and serve their respective submissions.

10. As can be seen from the Plaintiff/Applicant’s submissions, the same were filed on the 13<sup>th</sup> February, 2020. The said submissions are dated 13<sup>th</sup> February, 2020.

11. The 2<sup>nd</sup> Defendant/Respondent filed his submissions on 25<sup>th</sup> February, 2020 the same being dated 20<sup>th</sup> February, 2020.

12. Both parties are agreed that the guiding principles for the grant of the injunctive orders sought by the Plaintiff/Applicant are as stated in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. I need not repeat the three principles herein.

13. On the principle that a Plaintiff/Applicant must show a prima facie case with a probability of success, the Plaintiff’s/Applicant’s Counsel submitted that the Plaintiff/Applicant is the registered proprietor of land parcels numbers Makueni/Nguu Ranch 1066 and 1067. The Counsel cited **Section 26 of the Land Registration Act** which provides that:-

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, .....”*

The Counsel urged the Court to take note of the title deed of the suit property as prima facie evidence that the Plaintiff/Applicant is the registered absolute proprietor.

14. On the other hand, the Counsel for the 2<sup>nd</sup> Defendant/Respondent submitted that the validity of the title in which the Plaintiff/Applicant bases his claim is challenged. The Counsel went on to submit that the Defendant/Respondent has annexed transfer forms in his replying affidavit which forms are not dated and lawfully executed thus the Plaintiff/Applicant has not shown a prima facie case with probability of success. The Counsel further submitted that the Plaintiff/Applicant has not come to court with clean hands and injunction being an equitable relief, the Court should decline to exercise its discretion in his favour. The Counsel relies on the case of **Kenya Projects and Investments Ltd vs. Kenya Post Office Savings Bank Ltd** in Nairobi High Court Civil case number 2811 of 1995.

15. Regarding the principle that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Plaintiff’s/Applicant’s Counsel submitted that the Plaintiff/Applicant has deposed in paragraphs 2 and 3 of his further affidavit that there was no one in occupation of the suitland when he purchased it and hence he stands to suffer irreparable loss if the application is not allowed. The Counsel added that Plaintiff/Applicant purchased the suit land for valuable consideration from parties who had been allocated the land in question and procedurally and lawfully

obtained title deeds. It was submitted that the 2<sup>nd</sup> Defendant/Respondent was allocated his land through a letter of offer dated 29<sup>th</sup> September, 1995 annexed to the Plaintiff's/Applicant's further affidavit and marked as PNK-1. The Counsel was of the view that this being a land matter and land matters are emotive the Plaintiff/Applicant had met the standard set in Giella's case.

16. The Counsel for the 2<sup>nd</sup> Defendant/Respondent submitted that the Plaintiff/Applicant will not suffer any irreparable loss if the orders sought are not granted. The Counsel added that the 2<sup>nd</sup> Defendant/Respondent lives, resides and has been in occupation of the suit premises for many decades. It was also submitted that it has been held by the courts of law that there is no property in a dead body thus burying the deceased in the suit premises where she was living and residing with her family when she was alive will not confer any right of ownership to the Defendants/Respondents as is feared by the Plaintiff/Applicant. The Counsel submitted that the suit will be decided and determined on its merits and added that the Plaintiff/Applicant has not shown the irreparable injury and/or loss that he will suffer that cannot be compensated by damages if injunction is not granted. The Counsel pointed out that it is the 2<sup>nd</sup> Plaintiff/Respondent and his family who are suffering psychologically, emotionally and financially by the continued delay of the burial of their beloved wife and mother.

17. Regarding the principle of if the Court is in doubt, it will decide an application on the balance of convenience, the Plaintiff's/Applicant's Counsel submitted that looking at the prima facie facts relayed before court, a plausible conclusion can be made on the right owner of the suit parcel of land. The Counsel pointed out that the Plaintiff/Applicant has produced title deeds which are prima facie evidence of ownership under Section 26 of the Land Registration Act while on the other hand, the 2<sup>nd</sup> Defendant/Respondent has not produced any documents of ownership but has instead produced photographs which no one can tell when and where they were taken. That arising on a balance of probability, the Plaintiff's/Applicant's application should be allowed as prayed.

18. The Counsel pointed out that it is worth noting that the Defendants/Respondents are in direct contempt of the interim injunctive orders issued on 06<sup>th</sup> June, 2002.

19. The Counsel concluded by submitting that the application has met the threshold set in Giella's case and hence qualifies to be allowed as prayed.

20. The Counsel for the 2<sup>nd</sup> Defendant/Respondent submitted that the balance of convenience tilts in favour of the 2<sup>nd</sup> Defendant/Respondent who has been in possession of the suit premises for many years. The Counsel added that there is no danger of the suit premises being wasted, alienated, transferred, sold, and/or disposed, as envisaged under the provisions of Order 40 Rule 1 of the Civil Procedure Rules.

21. I have considered the application together with the supporting and supplementary affidavits as well as the replying and the further affidavits. I have also considered the submissions filed by the Counsel for the parties herein. My finding is as follows: -

22. Firstly, on whether or not the Plaintiff/Applicant has shown a prima facie case with probability of success, I do note that the Plaintiff/Applicant has a title deed to land parcel number Makueni/Nguu Ranch/1067. The Plaintiff/Applicant has gone ahead to show that the 2<sup>nd</sup> Defendant/Respondent was offered his own parcel of land where he can bury his deceased wife as can be seen in the letter of offer marked PNK-1 in paragraph 4 of the Plaintiff's/Applicant's Supplementary affidavit. The Defendant/Respondent has not denied this fact save that he says that he has been in possession and occupation of the suit premises for many years. The 2<sup>nd</sup> Defendant/Respondent has gone further to allege that the Plaintiff/Applicant obtained his title deed to the suit land fraudulently in that the transfer forms were not dated and/or lawfully executed. In my view, this issue cannot be determined at interlocutory stage as it will require for the calling of evidence and cross-examination of the same so as to test its veracity. I am in agreement with the Plaintiff's/Applicant's Counsel submissions that under Section 26(1) (a) & (b) of the Land Registration Act number 3 of 2012 the certificate of title is to be held as conclusive evidence of proprietorship at this stage and hence my finding is that the Plaintiff/Applicant has satisfied the first principle in Giella vs. Cassman Brown's case (supra).

23. Secondly on the principle of an injunction will not normally be granted unless the Plaintiff/Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages, my finding is that whereas I agree with the 2<sup>nd</sup> Respondents Counsel that there is no property in a dead body and that burying the deceased wife of the 2<sup>nd</sup> Defendant/Respondent in the suit property will not confer any ownership to the 2<sup>nd</sup> Defendant/Respondent, it is not lost on me that once the deceased is buried on the suit land, the gravesite cannot be used for any other purpose. Should the suit be ultimately determined in favour of the Plaintiff/Applicant at the conclusion of the hearing of the substantive suit, the gravesite however small, will amount to wasting of the suit property. That kind of wastage cannot be compensated by award of damages.

24. Thirdly, on the principle of if the Court is in doubt, it will decide an application on a balance of convenience, for the reasons that I have given in the first and the second principle, it is pretty clear to me that the balance of convenience herein tilts in favour of the Plaintiff/Applicant.

25. The upshot of the foregoing is that the application has merits and I hereby proceed to allow it in terms of prayers 3 and 5.

**Signed, dated and delivered at Makueni this 28<sup>th</sup> day of February, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hassan holding brief for Mr. Muia for the 2<sup>nd</sup> Defendant/Respondent

Mr. Muthiani holding brief for Mr. Musyimi for the Plaintiff/Applicant

Ms. C. Nzioka – Court Assistant

**MBOGO C.G, JUDGE,**

**28/02/2020.**