



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT

AT KAKAMEGA

ELC NO. 340 OF 2014

LIVINGSTONE NGAIRA ANJILA.....PLAINTIFF/APPLICANT

VERSUS

STEPHEN LIKAMI LIPANGA.....1ST DEFENDANT

PATRICK MAJIMBO LIKAMI..... 2ND DEFENDANT/RESPONDENT

DAVID OKUMU.....3RD DEFENDANT

GENERAL SUPRITENDANT P.A.G KENYA.....4TH DEFENDANT

P.A.G CHURCH- SHIBIRIRI 5TH DEFENDANT

KIZITO SHITSAMA.....6TH DEFENDANT

RULING

This application is dated 21st January 2020 and is brought under Section 1A, 1B and 3A, 38, 63 of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. That service of this application be dispensed with, the same be certified urgent and heard ex parte in the 1st instance.
2. That pending the hearing and determination of this application inter partes, there be an order of injunction restraining the 2nd defendant/judgment debtor, his agents, servants, employees or any other person claiming through him and/or the estate of the 1st defendant/judgment debtor from burying the body of the 1st defendant/judgment debtor on the plaintiff's land parcel No. Butso/so/Shikoti/1281.
3. That there be an order of permanent injunction restraining the 2nd defendant/judgment debtor, his agents, servants, employees or any other person claiming through him and/or the estate of the 1st defendant/judgment debtor from burying the body of the 1st defendant/judgment debtor on the plaintiff's land parcel No. Butso/so/Shikoti/1281.
4. That the Officer Commanding Station (O.C.S) Kakamega Police Station do enforce these orders.
5. That costs of this application be provided for.

It is based on the annexed affidavit of Livingstone Ngaira Anjila plaintiff/applicant and the grounds that the plaintiff/applicant is the decree holder and the respondent is planning to bury the 1st defendant's body on the suit land in an effort to defeat the decree herein. That such burial shall affect the applicant's use/development plans on his land and he shall suffer irreparable loss. That the respondent is acting in abuse of the court orders made herein. That the deceased has his land parcel No. Kakamega/Shivagala/344 on which he ought to be buried as his wife was buried there.

The respondent submitted that he is the registered owner of land parcel No. Butso/so/Shikoti/1281 (annexed and marked LNA-1 is a copy of

the green card). That the court entered judgment in his favour in this matter against the defendants on 11th July, 2018. That the 2nd defendant/judgment debtor is a son to the 1st defendant/judgment debtor. That the 1st defendant/judgment debtor is deceased and his body is pending burial (annexed and marked LNA-2 is a copy of the Chief's letter dated 21st January, 2020). That the 2nd defendant/judgment debtor, his agents, servants, people claiming through him and or the estate of the deceased plans to bury the deceased on his land parcel No. Butso/1281. That such planned burial is in disobedience of and will defeat the judgment herein, it will affect use, development plans and value of his land and he stands to suffer irreparable loss. That the deceased was the registered owner of land parcel No. Kakamega/Shivagala/344 on which he should be buried (annexed and marked LNA-3 is a copy of the official search).

The respondent submitted that the application is bad in law, misplaced, misconceived and without any basis and justification. That the court herein lacks jurisdiction to hear and determine the dispute herein. That the application lacks merit. That the application discloses no reasonable cause of action, frivolous, vexatious and is an abuse of the due process of the court. That the defendant (s) respondent (s) lacks the locus standi to be sued in this matter. That the court herein is functus officio in this matter.

This court has considered the application and the submissions therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of Giella Vs Cassman Brown & Co. Ltd 1973 E.A 358 and which are:-

1. The applicant must show a prima facie case with a probability of success at the trial
2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,
3. If in doubt, the Court will decide the application on a balance of convenience.

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity.

The application is based on the grounds that the plaintiff/applicant is the decree holder and the respondent is planning to bury the 1st defendant's body on the suit land in an effort to defeat the decree herein. That such burial shall affect the applicant's use/development plans on his land and he shall suffer irreparable loss. That the respondent is acting in abuse of the court orders made herein. This court has perused the court record and finds that indeed the court granted a stay of execution of the decree pending the hearing and determination of the appeal in this matter on the 9th October 2018. It did not grant status quo in the matter. Hence this court cannot now grant orders of injunction against the respondent herein. I agree with submissions by the respondents that this court is functus officio and any other applications should be made before the court hearing the appeal. I find that this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 16TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE