



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT**

**ELC CASE NO.306 OF 2015**

**MACEDONIA RESORT CLUB LTD.....PLAINITFF/  
APPLICANT**

**VERSUS**

**SILVANS AWILI .....DEFENDANT/  
RESPONDENT**

**RULING**

**Macedonia Resort Club Limited**, the Applicant, filed the notice of motion dated 6th November 2015 seeking to restrain **Silvans Awili**, the Respondent, from burying the remains of his deceased son on land parcel **Kisumu Municipality/L.R. NO.29685** and **29686** pending the hearing and determination of this suit. The Applicant listed six grounds on the face of the notice of motion which is also supported by the affidavit of Kenya Nyagundi sworn on 6th November 2015 in which he deponed to the following among others.

a) That the plaintiff is the leasehold owner of **Kisumu/Municipality/LR NO.29685** and **29686**. The deponent annexed copies of the title documents issued under the Registration of Titles Act by the Commissioner of Lands on 27th February 2013 indicating that the leasehold were for 99 years from 1st March 1999.

b) That the Respondent had been arrested for trespassing onto **Kisumu Municipality/L.R.No..29685** and booked in **Kondele Police Station under O.B.35/16/7/2015** but was released upon undertaking to vacate in writing by 31st July 2015. The deponent annexed the document signed by Respondent, **Rogers Onyango** and **Ken Odondi**.

c) That the Respondent did not vacate but instead extended the trespass into both parcel. That the Respondent's son died on 30th October 2015 and that he intends to bury the remains on the said parcels and hence this application.

2. The application is opposed by the Respondent through his replying affidavit sworn on 23rd November 2015 in which he depones as follows among others

a) That he is the one entitled to occupy the suit land as he was born there and has lived on it since 1946.

b) That his parents are buried on the said land which is ancestral Community Land reference **L.R. NO.8478/ District of Kisumu**. He annexed a copy of the deed plan for parcel **8478**.

c) That the land has not been adjudicated and registered with individuals and the title documents held by the Applicant are not genuine.

d) That the people occupying that land have petitioned the National Land Commission to have the land adjudicated and are waiting for a response.

e) That burying of his son's body on the land will not occasion any harm to the Applicant or affect the existing dispute on ownership .

3. The notice of motion dated 6th November 2015 had been filed under certificate of urgency and on the same day interim orders restraining the Respondent from interring or burying the body or remains of his deceased son on the two parcels was issued. The application came up for hearing interpartes on the 10th February 2016 when Mr Yogo and Nyasimi for the Applicant and Respondent respectively made their rival submissions which are summarized as herein blow;

#### **4. SUMMARY OF APPLICANT'S COUNSEL'S SUBMISSIONS;**

That the suit properties are registered with the Applicant and under Section 26 (1) of the Land Registration Act a certificate of title issued by the Registrar is sufficient proof of absolute ownership. The counsel therefore submitted that the Applicant has established a *prima facie* case with probability of success as required in the case of **Giella -V- Cassman Brown** [1973] E.A. 358. That the two parcels cannot be subject of the adjudication that the Respondent claimed they are pursuing with the National Land Commission as it is already registered. That photographs attached to the replying affidavit should be rejected as no certificate under **Section 106 (B) of the Evidence Act** has been availed. That in any case the photographs do not proof that the Respondent had been on the land since 1946. That the Applicant acquired the land when it was vacant and that the Respondent moved into it in 2015. That the Applicant reported to the police and the Respondent was arrested for criminal trespass but following a written agreement dated 16th July, 2015 the Respondent was released on agreeing to vacate by 31st July 2015. The counsel submitted that by the Respondent signing the agreement to vacate voluntarily, he had acknowledged the Applicant's title to the land. That unless the Orders sought are granted, the Applicant will suffer irreparable loss.

#### **b) THE RESPONDENT'S COUNSEL'S SUBMISSIONS;**

That the prayer of injunction cannot be issued against the Respondent as he lives on the land with his family since 1946 and cannot be stopped from using that land without viva voce evidence being taken and decision on merit made. The counsel referred to the case of **M/S Gusii Mwalimu Investment Co. Ltd & 2 others -V- M/S Mwalimu Hotel Kisii Ltd** 1996 eKLR in support of his submission that the Respondent had already occupied the land by the time the application was filed and one cannot seek to restrain that which has already occurred. The counsel further submitted that the Respondent has countered the Applicant's claim based on leasehold title with a customary right of claim, recognized under **Section 5 (1) of Land Act** over the same land and the decision can only be made after taking of evidence. That the Respondent intends to have the National Land Commission enjoined into the proceedings and will be challenging the Applicants title to the suit land on the grounds of fraud. That the documents signed by the Respondent at the police station was not signed voluntarily but through coercion. That burying the Respondent's son on the land will not alter the rights of the parties. The counsel referred to this courts decision in **Victoria Distributors – V- Joseph Abwao Nyawir Kisumu ELC No.222 of 2015** where the court allowed the burial on the land as case continued to hearing.

5. The court has considered the grounds on the notice of motion, the affidavit evidence and rival submissions and come to the following findings;

A) That indeed for one to successfully apply and obtain temporary injunction orders, one has to establish a *prima facie* case with a probability of success, that one would suffer irreparable loss if the order is not granted, and that on a balance of convenience the restraining order should issue in favour of such an application. {See **Giella -V-s Cassman Brown Co. Ltd** [1973] E.A.358}. The Applicant herein

has availed documentary evidence to show that they are registered as leasehold owners for 99 years over the two parcels of land. The documents were issued by the Commissioner of Land in 2013 and the 99 years have not lapsed or expired. The Respondent has mounted a challenge on those documents on the basis that they were fraudulently obtained as the land is not adjudicated and that he has customary rights over it. As correctly submitted by counsel for the Respondent, it is only after the parties involved in this matter have been heard that the court will be in a position to conclusively pronounce itself on that issue. This brings into play the provision of **Section 26 of the Land Registration Act No.3 of 2012** which states:

**" 26 (1) 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 title of that proprietor shall not be subject to challenge, except: -**

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party, or**
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."**

This provision when applied to the competing claim of the parties herein leads the court to the obvious finding that until and unless the Respondent challenge on the title held by the Applicant on the suit land is proved and orders to that effect issued, this court has an obligation to take the Applicant as the absolute and indefeasible owner of the suit lands. The Applicant is therefore entitled to the rights and privileges of a registered proprietor under **Section 24 and 25 of the said Act.**

B) That unlike the Applicant in the case of **Victoria Distributors -V- Joseph Abwao Nyawir** (supra) who had no documents of title in their names, the Applicant in this case has availed two copies of title over two parcels of land in their names issued on 27th February 2013. The Applicant has therefore, in view of being the absolute and indefeasible owner of the suit land, established a prima facie case with a probability of success and until such a time orders on ownership to the contrary are issued, he is entitled to have a say on the use and occupation of the lands defined in the documents of title he holds in his favour.

C) That the court agrees with the submissions of Respondent's counsel that the court cannot injunct what has already happened. It was in realization of that fact that the interim orders the court issued was limited to the burying or interring of the body as by the time the application was filed, the Respondent was already on the land. This is discernible from the Applicant's supporting affidavit sworn on 6th November 2015 to the effect that the Respondent did not vacate by 31st July 2015 contrary to their agreement. That fact is also found in the Respondent's replying affidavit that he has lived on the suit and since birth in 1946. Though the Applicant and Respondent differ on which year the Respondent entered onto the land, there is no doubt the date was before the filing of this suit and the application. The court can only make a final determination on the Applicant's title after hearing all the evidence to be tendered by the parties. However, while that is pending, the Applicant as the registered leasehold proprietor is entitled to an order restraining the Respondent from further structural construction of building and burying of the remains of his deceased son on the two parcels of land.

6. That having found as above the court find merit in the application dated 6th November 2015 and the same is allowed in the following terms:

a) That the Respondent, his employees, or any other person acting through his directions is hereby restrained from building new structures upon or burying the remains of his deceased son on the land parcels **Kisumu/Municipality/L.R. 29685 and 29686 owned** by the Applicant, pending the hearing and determination of this suit.

b) That the costs of this application will be in the cause.

It is so ordered.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**Dated and delivered this 10TH day of MARCH 2016**

In presence of;

APPLICANT Absent

RESPONDENT Present

COUNSEL Mr Olel for the Plaintiff/Applicant

Mr Nyasimi for Defendant/Respondent

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/3/2016**

10/3/2016

S.M. Kibunja J

Oyugi Court Assistant

Defendant present

Mr Olel for the Plaintiff/Applicant

Mr Nyasimi for Defendant/Respondent

Court: Ruling delivered in open court in presence of the Defendant/Respondent, Mr Olel for the Plaintiff /Applicant and Mr. Nyasimi for Defendant/Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/3/2016**