



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.354 OF 2014

**IN THE MATTER OF THE ESTATE OF LOLO INZOBERI INDIKA alias LOLO INZOBELI –
DECEASED**

PATTERSON MULATI INZOBELI1ST PETITIONER/APPLICANT

VERSUS

JULIUS KOMBO LOLO alias

OMURAMBI LOLO2ND PETITIONER/RESPONDENT

RULING

Introduction

1. The applicant and respondents herein were jointly granted letters of administration to administer the estate of the deceased herein LOLO INZOBERI INDIKA alias LOLO INZOBELI who died at Indangalasia sub location on 6th November 1979.

2. The grant was issued by this Court on the 1st of September 2014 and the same is yet to be confirmed. The 1st Petitioner/applicant has filed a summons for confirmation of grant and has proposed his mode of distribution. The Summons for Confirmation is pending determination before this Court.

The Application

3. Unfortunately the wife of the 2nd petitioner/respondent by the name JOYCE MASITSA KOMBO passed on before the confirmation and the 2nd petitioner/respondent is said to want to bury her on land parcel number Butso/Indangalasia/463 subject matter in this succession cause. The 1st petitioner/applicant has moved this Court by way of the Chamber Summons dated 18/09/2015 which was certified urgent and interim orders granted in terms of prayer

The applicant is seeking for the following orders: that

1.spent
2.spent
3.spent

4. The Respondent herein either by himself, his agents, employees and/or assigns be restrained from burying the body of one JOYCE AMASITSA KOMBO (deceased) on land parcel No. Butsotso/Indangalasia/463 the subject matter in this succession cause and the O.C.S. Kakamega Police station to enforce these orders and to maintain peace pending the hearing and determination of this cause.(sic)

5. The OCS Kakamega Police Station do ensure compliance.

6. Costs of this application be provided for.

4. The application is premised on the grounds set out on the face of the application and supported by the affidavit of PATTERSON MULATI INZOBELI. In the supporting affidavit the 1st petitioner/applicant who is a beneficiary to the estate of the deceased herein claims that he is entitled to 7.0 acres out of land parcel no. Butsotso/Indangalasia/463 as shown in annexure "PM 1" whereas the 2nd Petitioner/Respondent is not entitled to any portion. The reason being that the 2nd Petitioner/Respondent is the registered owner of land parcel No. Butsoto/Indangalasia/459 which he inherited from his late father the deceased herein and had the same transferred to his name (see annexure "PM 1 – 2). The applicant says that since the wife of the 2nd Petitioner/Respondent died, the 2nd Petitioner/Respondent plans to bury her body on the land he (1st Petitioner/Applicant) is entitled to.

5. The applicant avers that if the estate of the deceased is not preserved and the burial allowed to proceed he is bound to suffer irreparable loss which may involve exhuming the body. He claims that if the estate is preserved both his interest and those of the Respondent shall be preserved and no prejudice will be suffered if the orders sought are granted. He further maintains that the orders sought herein are in the best interests of justice.

Response to the Application

6. The application is opposed. The Respondent filed his replying affidavit sworn on the 23/09/2014. He depones therein that he is the registered proprietor of land parcel number Butsotso/Indangalasia/459 which he acquired on 1st registration and the same is not a subject matter in this cause. He states that he was allocated approximately 1.6Ha of land parcel registration number Butsotso/Indangalasia/463 by his father the deceased herein in the year 1962 in the presence of the applicant and all his brothers and the boundaries were duly marked. He explains that he has exclusively developed his portion and put up a matrimonial home. He further explains that the deceased herein was survived by five (5) wives who have since died and the land is now occupied by him, the applicant, Ruth Muchenga & Jonathan Aunda who bought land from his brother Khatiuwi Lolo.

6. He maintains that the applicant is aware that he has been in use and occupation of a portion of the suit land and has even condoled with him and his family during funerals and burial of his mother and two sons on the portion allocated to him from the cause parcel. He also stated that he has stayed in the said land for over 50 years and since his wife is deceased he has no alternative place to bury her.

7. He explains further that it is against the culture and customs of the Luhya tribe to bury a wife outside her matrimonial home when the husband is still alive. That is also against his culture to bury his wife on land that he does not occupy.

8. The Respondent further claims that he is not aware of the application for confirmation of grant filed by the 1st Petitioner/Applicant or the intended mode of distribution. It is his opinion that the issue of distribution is yet to be finalized. He states that though the applicant is trying to disinherit him of what is rightfully his, he intends to oppose the mode of distribution as proposed by the applicant. He explains that the applicant will suffer no loss because:-

a) The applicant is not in occupation of his (Respondents) portion measuring 1.6 Ha but has his own portion comprised in the cause parcel.

- b) The applicant has witnessed him (Respondent) burying his two sons and mother BELDINA LOLO on the cause parcel and he never raised objection.
- c) The applicant has not exhibited anything to show the extent of the loss he will suffer.
- d) The applicant has distributed 7 acres to himself while the others get smaller portions and he (Respondent) gets nothing which is unfair.
- e) The applicant has no interest whatsoever in his 1.6ha of the cause land.

9. He adds that the applicant has come to Court with unclean hands since he (applicant) has made financial contributions towards his wife's funeral and thus he cannot stop him (Respondent) from burying her.

Oral Submissions

10. The application was canvassed orally. Mr. Minishi for the applicant sought for orders in terms of prayers (3), (4) and (5) of the application. Counsel relied wholly on the 1st Petitioner's/Applicant's affidavit and the grounds on the face of the application.

11. M/s Andia, Counsel for the Respondent submitted that since both parties are beneficiaries of the deceased's estate and the respondent occupies part of the suit land where he has established a matrimonial home and since the confirmation of grant is pending, applicant cannot purport to restrain the respondent from burying his wife on the suit land. She also submitted that if the wishes of the deceased were to be obeyed, the 2nd respondent has lost his wife and the wife wished to be buried in her matrimonial home according to Luhya custom. She asked the Court to dismiss the applicant's application.

12. In response Mr. Minishi opposed paragraph 4 of the replying affidavit and submitted that respondent has not denied that he was allocated the LP Butso/Indangalasia/459 land by his father but only says that he acquired it on first registration. As concerns paragraph 8 he submitted that the land where the respondent's mother was buried was the homestead of his (Respondent's) late mother and there is no proof that 1st petitioner consented to respondent to bury his two sons on that land.

13. In response to paragraph 9 of the replying affidavit Mr. Minishi submitted that the respondent has an alternative piece of land on which to bury his wife being plot 459 where he (Respondent) has refused to relocate his matrimonial home. In response to paragraph 9 he submitted that the applicant does not wish to disinherit the respondent who is registered owner of plot 459 measuring 8.0 acres which to him means that if respondent was to get an extra acre from 463 the other beneficiaries would be prejudiced. He adds that the respondent has an obligation of filing objection proceedings to summons for confirmation.

Analysis

14. Both the applicant and respondent herein are brothers and beneficiaries to the deceased's estate herein. They both stay and occupy portions of parcel number Butso/Indangalasia/463. The 2nd respondent claims to have built his matrimonial home on the suit parcel where his mother and two (2) sons have been buried. He (Respondent) has 1.6ha on the suit land which he claims he was given by his father (the deceased) in this succession cause. The applicant maintains that the respondent has no claim in the suit land herein and therefore cannot bury his wife on it. He maintains that the respondent has about 8 acres on plot 459 but has refused/ignored to move and build his home there it is submitted that the land where the mother of the Respondent and his (Respondent's) sons were buried belonged to the Respondent's mother who is deceased and is not his (Respondent's) matrimonial home.

15. The respondent alleges he has stayed on the suit parcel for over 50 years, has built a matrimonial home planted trees and grows some crops thereon. Nothing much has been said about parcel No.459 only

that the Respondent is the 1st registered owner. The respondent has raised very pertinent issues in these proceedings which go to the root of the customs of the Luhya tribe:

- Whether it is against the culture and customs of the Luhya tribe to bury a wife outside her matrimonial home?
- Whether it is against the culture and customs of the Luhya tribe to bury a wife on land that the husband does not occupy?

16. This is a unique burial dispute. In most burial disputes it is the widow who either moves the Court to stop the burial of her husband or who is sued by the clan or other parties when her husband dies. It is rare to find a husband to a deceased wife being sued in a burial dispute. This is one of those rare cases.

17. Having made that observation it is important to get the facts right in this case. Nowhere in the pleadings has it been shown that the respondent's wife had a wish/desire to be buried in any particular place. The submissions by the Respondent's Counsel are therefore misleading and are unsupported by evidence. In paragraph 4 of the replying affidavit by the Respondent he depones that he is the 1st registered owner of parcel no. Butsotso/Indangalasia/459 which he (Respondent) acquired. It is therefore wrong for the Counsel for the applicant to submit that the respondent has not denied that he was allocated the suit land by his father. The suit land in issue herein is Butsotso/Indangalasia/463. It is important to get this position right to avoid any confusion

Issues for Determination

18. From the pleadings and the submissions made, the real issue for determination is whether the respondent should be restrained from burying his wife on land parcel Butsotso/Indangalasia/463. The determination of this issue is closely linked to the alleged Luhya customs alluded to by the Respondent. At the outset, it is noteworthy that no expert on Luhya burial customs was called to testify in this matter to help the Court appreciate what those customs are.

19. Counsel for the respondent cited two authorities in support of the respondent's case though no reference was made to the authorities during submissions. The case of **Apeli -vs- Buluku [2008] 1KLR873** was cited for the proposition that where parties to a suit were generally subject to African customary law in such cases, "the most important rule is that the wishes of the deceased person though not binding, must so far as possible, be given effect" and for the further proposition that "where the wishes of a deceased person are not contrary to custom nor contrary to the general law or public policy or safety as it was in this case, the High Court has a general discretion to order the removal of the remains of the deceased from one place to another subject however to the grant of a permit by the Minister in charge of health." Since the respondent's wife is yet to be buried the authority is not quite relevant.

20. The second authority cited was the case of **Martha Wanjiru Kimata & another -vs- Dorcas Wanjiru & another [2015] e KLR**. The issue therein being who, under customary law was the first in line of duty in relation to the burial of any deceased person to bury the deceased. That really is not an issue in the instant case as the problem concerns on which parcel of land the respondent's wife Joyce Masitsa Kombo should be buried.

21. In the instant case, there are contentions and counter contentions as to whether or not the respondent is entitled to a share of Butsotso/Indangalasia/463. There is no dispute that the respondent owns land parcel No. Butsotso/Indangalasia/459 as first registered proprietor and the contention of the applicant is that the respondent ought to bury the remains of Joyce Masitsa Kombo on the said parcel of land. There is also no dispute that the succession cause herein is still pending confirmation of the grant and the respondent who says he is dissatisfied with any proposed distribution by the applicant intends to oppose such mode of distribution. In effect, the deceased's estate comprising LP No. Butsotso/Indangalasia/463 is yet to be distributed and there is no knowing whether the respondent will get the 1.6Ha he says he is entitled to. Since affidavit evidence is always scanty, it is not clear to this Court whether indeed the respondent is living on the 1.6Ha and why he has left land parcel Butsotso/Indangalasia/459 to lie idle or whether indeed the land is lying idle.

Findings

22. At common law, there is a public duty on the husband to bury his wife. The same is true even under most if not all customary laws in Kenya. As earlier stated, in most burial disputes the law applicable for the time being is customary law since there is no legislation in place yet. In **JOHN OMONDI OLENG and ANO VS SUEFLAN RADAL** [2012] e KLR Mabeya J had this to say:

“.....when it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in”

23. In this case the respondent has the right and duty to bury his wife. Under most customs it was expected that a son (elder) would move from his ancestral home and build his own matrimonial home not far from the ancestral home. In some instances the elder son would only change his door or gate to face the opposite direction from the gate of his parents/ancestral home and there build his home. This does not appear to have come out clearly in this cause. The respondent claims to have built his home in the land given to him by his father, that is where he stayed with his wife who is now deceased and it is where he allegedly buried his mother and his two sons. He claims that his matrimonial home is right there and that he has lived there for over fifty (50) years together with his wife now deceased.

24. In the instant case, the land on which the respondent wants to bury his wife is still under dispute and in the circumstances, I find that an injunction in terms of prayer 3 of the Chamber Summons dated 18/09/2015 is in order. As pointed out earlier, there is no evidence that the deceased wished to be buried in any particular place. There is also no expert evidence on Luhya customary burial customs. It is also not in dispute that there is a contest over land parcel No.Butsotso/Indangalasia/463 so that the better option for all the parties concerned is to preserve that land parcel as it is until the issue of distribution is either agreed or determined by this Honourable Court. I find the respondent's argument that he should be allowed to bury Joyce Masitsa Kombo on this parcel because he buried his mother on it to be irrelevant in the sense that as a wife of the deceased, the respondent's mother had a right to be buried where she was buried. The case for the respondent is different and has to await determination of the proposed distribution of the deceased's estate. In any event the respondent has an alternative site where he can inter the remains of his dear wife.

Conclusion

25. For the above reasons, I allow the Chamber Summons dated 18/09/2015 in terms of prayer 3 thereof. The respondent is thus restrained from burying the body of one Joyce Masitsa Kombo on land parcel number Butsotso/Indangalasia/463 pending the hearing and determination of this succession cause. In that regard, parties are directed to proceed and fix the Summons for Confirmation of Grant for taking of directions within 30 days from the date of this ruling. Any party not satisfied with the proposed distribution shall file their affidavits of protest within 21 days from today's date.

Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 8th day of October 2015.

In the presence of:

Mr. Minishi (present) for Applicant

Miss Andia (absent)for Respondent

Mr. LagatCourt Assistant

R.N. SITATI

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