



No. 191

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**ENVIRONMENT AND LAND CIVIL CASE NO. 34 OF 2014**  
**PETERSON MOTURI MORANGA.....PLAINTIFF**  
**VERSUS**  
**ALICE MORAA MORARA.....DEFENDANT**

**RULING**

1. This suit was brought by the plaintiff on 5<sup>th</sup> February 2014 through a plaint of the same date. In the plaint, the plaintiff sought only one principal prayer namely; a permanent injunction to restrain the defendant by herself or through her agents and/or servants from burying the body of one, **George Morara Nyabuto**, deceased (hereinafter referred to only as “**the deceased**”) on the parcel of land known as **LR No. Central Kitutu/Mwamosioma/1544** (hereinafter referred to as “**the suit property**”) instead of burying him on **LR No. Nyaribari Masaba/Bomobea/208** (“hereinafter referred to only as “**plot no. 208**”). The plaintiff’s suit was brought on the grounds that; plaintiff is the registered owner of the suit property and that the defendant, her children and relatives are making arrangements to inter the body of the deceased who died on 2<sup>nd</sup> February 2014 on the suit property without the plaintiff’s consent or permission instead of burying the deceased on plot no. 208 which is the deceased’s ancestral land. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 5<sup>th</sup> February 2014 for interlocutory injunction to restrain the defendant from burying the body of the deceased on the suit property pending the hearing and determination of this suit and that, the OCS Kisii Police Station do ensure compliance with the order. That is the application which is the subject of this ruling. The plaintiff’s application was brought on the grounds set out on the face thereof and on the affidavit of the plaintiff sworn on 5<sup>th</sup> February 2014. In his affidavit in support of the application, the plaintiff deposed that he is the registered proprietor of the suit property and that he is not related to the deceased in any way. The plaintiff deposed further that the defendant has made extensive arrangements to bury the body of the deceased on the suit property notwithstanding the fact that the deceased has a share in plot no. 208 which is his ancestral land where his father who is still alive is residing and on which he can be buried. The plaintiff deposed further that he had a civil case with the deceased and another person over the suit property namely, **Kisii High Court Civil Case No. 21 of 2005** which was determined in his favour (hereinafter referred to as “**the previous suit**”). The plaintiff deposed further that the defendant’s motive in trying to bury the deceased on the suit property is to enable her stake a claim over the suit property. The plaintiff deposed further that the interest of justice would be served if the orders sought are granted. The plaintiff annexed to his affidavit in support of the application; a copy of the title deed in respect of the suit property in his name as the proprietor thereof, a copy of a certificate of official search dated 5<sup>th</sup> December 2012 in respect of the suit property which shows that as at that date, the plaintiff was the

registered proprietor of the suit property and a copy of the judgment in the previous suit which was delivered on 24<sup>th</sup> January 2014 in which an order was made for the eviction of among others the deceased from the suit property.

2. The plaintiff's application was opposed by the defendant. The defendant swore an affidavit in reply to the application on 24<sup>th</sup> February 2014. In her affidavit, the defendant deposed that she is the wife of the deceased and that she was married to the deceased in 1990. She deposed further that her marriage to the deceased is blessed with 4 children and that since she was married to the deceased her matrimonial home has been on the parcel of land where she intends to bury the deceased and which the plaintiff claims to belong to him. The defendant has deposed further that she is not aware of any other parcel of land owned by the deceased leave alone plot no. 208 which is not even registered in the name of her father in law, one, **Andrew Nyabuto Momanyi** as claimed by the plaintiff. The defendant deposed further that her said father in law had two wives whom he settled on different parcels of land. She deposed that the deceased mother who was her father in law's first wife was settled together with her family of 4 sons the deceased included on the parcel of land which is now in dispute and that the deceased and his 3 brothers have stayed peacefully on the said parcel of land that was given to the deceased's mother by her said father in law and on which parcel she intends to bury the deceased for over 40 years. The defendant deposed that she was not aware that the deceased was involved in the previous suit. She deposed further that her father in law has informed her that he did not sell the suit property to the plaintiff and that her said father in law is still in possession of the original title deed for **LR No. Central Kitutu/Mwamosioma/1010 ("Plot No. 1010")** which was given to the deceased's mother and which is alleged to have been sub-divided to give rise to the suit property. The defendant denied in any event that the plaintiff purchased the entire parcel of land previously comprised in Plot No. 1010. The defendant contended that if the portion of Plot No. 1010 that was purchased by the plaintiff measured 0.10ha then there is a portion of the original parcel of land measuring 0.057ha which remains and which does not belong to the plaintiff. The defendant annexed to her affidavit in reply; a copy of the mutation form through which Plot No. 1010 is said to have been sub-divided into two portions namely, **LR Nos. Central Kitutu/Mwamosioma/1544** ("the suit property") and **Central Kitutu/Mwamosioma/1545 ("Plot No. 1544")** by the defendant's said father in law, Andrew Nyabuto Momanyi, a copy of the agreement for sale dated 26<sup>th</sup> September 2001 said to have been entered into between the said Andrew Nyabuto Momanyi and the plaintiff with respect to the suit property, a copy of the witness statement said to have been given by the said Andrew Nyabuto Momanyi in the previous suit, a copy of what is referred to as "*commitment and acceptance*" which is said to have been signed by among other the said Andrew Nyabuto Momanyi in relation to the sale of the suit property to the plaintiff, a copy of the title deed for Plot No. 1010 and a certified copy of the register for Plot No. 1010.

3. When the plaintiff's application came up for hearing on 25<sup>th</sup> February 2014, Mr. Sagwe advocate appeared for the plaintiff while Mr. Ogari advocate appeared for the defendant. Mr. Sagwe argued in his submission in support of the application that the title relating to Plot No. 1010 which gave rise to the suit property and Plot No. 1545 does not exist as it was closed upon sub-division. He submitted that both portions of what was initially Plot No. 1010 namely the suit property and Plot No. 1545 have been the subject of previous suits before this court with the suit property being the subject of the previous suit and Plot No. 1545 being the subject of Kisii HCCC No. 79 of 2009 which cases have all been determined. Whereas the suit property was decreed in favour of the plaintiff, Plot No. 1545 was decreed in favour of one, **Daniel Kangwana Nyagokana**. Due to the foregoing, Mr. Sagwe submitted that the alleged parcel of land known as Plot No. 1010 said to be owned by the defendant's said father in law, Andrew Nyabuto Momanyi which the defendant claims to occupy and on which she wishes to bury the body of the deceased does not exist. The plaintiff's advocate submitted that the documents that the defendant attached to her affidavit in reply left no doubt that the suit property was sold to the plaintiff by the defendant's said father in law, Andrew Nyabuto Momanyi. In conclusion, the plaintiff's advocate submitted that neither the defendant nor the deceased are registered as proprietors of the suit property and as such the defendant has no right to bury the body of the deceased on the suit property.

4. In his submission in reply, the defendant's advocate, Mr. Ogari submitted that Plot No. 208 which the plaintiff claims to belong to the deceased father, Andrew Nyabuto Momanyi does not actually belong to him. He submitted further that all the documents which are attached to the defendant's affidavit in reply

which the plaintiff claims to support his case were retrieved from the previous suit in which the same had been produced as exhibits. The defendant's advocate submitted that the said documents are all forgeries which forgery can be easily discerned from various signatures purported to be of the deceased father and the defendant's father in law, Andrew Nyabuto Momanyi. The defendant's advocate submitted that Andrew Nyabuto Momanyi has denied these documents and maintained that Plot No. 1010 is still intact and duly registered in his name. The defendant's advocate submitted that the defendant is occupying the suit property as of right and has a right to bury the deceased thereon as the land was given to the deceased's "mother's house" by the deceased's father, Andrew Nyabuto Momanyi. Mr. Ogari submitted further that the title held by the plaintiff is a forgery. In this regard, the defendant's advocate asked the court to look at page 2 of a copy of the title deed which is annexed to the plaintiff's affidavit in support of the application herein as annexure "PMM1" which contains particulars which are different from those on page 1 of the same document. The defendant's advocate submitted that plans are underway to set aside the judgment that was entered in the previous suit against the deceased.

5. In conclusion, the defendant's advocate submitted that from the various inconsistencies and defects which the defendant pointed out on the documents that the plaintiff had relied on in support of the application herein, there is no doubt that the plaintiff has failed to establish a prima facie case to warrant the granting of the orders sought herein. In closing reply to the submissions by the defendant's advocate, the plaintiff's advocate submitted that the mere fact that the defendant's father in law still holds the original title deed for Plot No. 1010 does not mean from the material before the court that the parcel of land is still in existence. On the title held by the plaintiff over the suit property, the advocate submitted that the same is genuine and that the variations that appear at page 2 of the said title deed are mere typing errors. He submitted that the plaintiff has presented to court a copy of a certificate of official search which leaves no doubt that the suit property is registered in the name of the plaintiff as the proprietor thereof. The plaintiff's advocate denied the defendant's claim that the documents which are attached to the defendant's affidavit which the plaintiff had relied on in the previous suit are forgeries. The plaintiff's advocate wondered how the plaintiff could have been involved in the alleged forgery relating to the sub-division of Plot No. 1010 which was carried out several years before the suit property was sold to the plaintiff. The plaintiff's advocate urged the court to grant the orders sought in the application.

6. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit filed in opposition thereto and the submissions made by the parties' respective advocates. The law on interlocutory injunction is now well settled. As was stated in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for interlocutory injunction must establish that he has a prima facie case with a probability of success against the respondent and that unless the order is granted he will suffer irreparable harm. If the court is in doubt as to the above, the court would determine the application on a balance of convenience. The plaintiff's case as presented to court is straight forward. The plaintiff has claimed that he is the registered proprietor of the suit property and that without his consent, the defendant is planning to bury the body of the deceased on the property. The plaintiff has exhibited to his affidavit in support of the application a copy of his title deed for the suit property dated 11<sup>th</sup> April 2002. The plaintiff has also exhibited a copy of a certificate of official search dated 5<sup>th</sup> December 2012 in respect of the title of the suit property which shows that the suit property was registered in the name of the plaintiff on 10<sup>th</sup> April 2002 and that the plaintiff was issued with a title deed for the same on 11<sup>th</sup> April 2002. In addition to the foregoing, the plaintiff has also exhibited a copy of a judgment that was delivered by this court on 24<sup>th</sup> January 214 in a case that was brought by the plaintiff against among others, the deceased by which judgment this court upheld the plaintiff's title over the suit property and ordered among others, the deceased to be evicted from the suit property.

7. I am satisfied on the material before me that the plaintiff has proved on a prima facie basis that he is the registered proprietor of the suit property. The defendant has not persuaded me that the plaintiff's title to the suit property was obtained by fraud as she has claimed. If anything, the material that the defendant has presented to court is contrary to the position that she has taken and supports the plaintiff's contention that he is the proprietor of the suit property. The defendant who claims that the suit property does not exist has presented to court a copy of the mutation form dated 24<sup>th</sup> October 1994 through which Plot No. 1010 was sub-divided into two portions namely the suit property and Plot No. 1545. The defendant has

also exhibited a certified true copy of the register of Plot No. 1010 which shows that the title of the said Plot was closed on 5<sup>th</sup> March 1997 on sub-division of the said parcel of land into Plot No. 1544 (“the suit property”) and Plot No. 1545. Section 37 (2) and (3) of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) under which the suit property is registered provides that every copy of or extract from a document certified by the registrar to be a true copy or extract shall in all proceedings be received as a prima facie evidence of the document and that every entry or note in or on any register shall subject to sections 142 and 143 of the said Act be received in all proceedings as conclusive evidence of the matter or transaction which it records. It follows therefore that these documents presented to court by the defendant are receivable by the court as prima facie evidence of the contents thereof. It is not true as claimed by the defendant that all the documents that she annexed to her affidavit in reply were obtained from the court file of the previous suit where they were produced as exhibits. From a copy of the judgment made in the previous suit which is annexed to the plaintiff’s affidavit in support of the application herein, the plaintiff produced only 3 exhibits in that suit namely, an agreement for sale, a title deed and a certificate of official search. The plaintiff never produced a copy of the mutation form dated 24<sup>th</sup> October 1994 or a certified copy of the register for Plot No. 1010.

8. In any event, a copy of the register for Plot No. 1010 which has been annexed to the defendant’s affidavit was certified by the land registrar on 17<sup>th</sup> February 2014 after the judgment in the previous suit and as such the same could not have been produced in that suit as an exhibit. The two (2) documents namely the mutation form and a copy of the register for Plot No. 1010 completely defeats the defendant’s argument that she is in occupation of and is planning to bury the deceased on her father in law’s parcel of land known as Plot No. 1010 which according to her has never been subdivided by her said father in law and a portion sold to the plaintiff as claimed by the plaintiff. The defendant has not convinced me that she intends to bury the deceased on any other parcel of land other than the suit property. From annexures AMMI (a) (the mutation form) and AMM2 (b) (the register), Plot No. 1010 was subdivided into two (2) portions only namely, the suit property and Plot No. 1545. The plaintiff has placed evidence before the court that shows that Plot No. 1545 was the subject of an earlier case before this court namely, Kisii HCCC No. 79 of 2009 in which a decree was issued declaring one, Daniel Kangwana Nyagokana as the registered and lawful owner of the said Plot No. 1545. That decision left the suit property as the only remaining portion of the original parcel of land known as Plot No. 1010 which portion the plaintiff claims to have been sold to him. It follows from the foregoing that if the defendant claims to be in occupation of a portion of Plot No. 1010 and on which she wants to bury the deceased, that portion of Plot No. 1010 can only be the suit property. It is instructive to note that in the previous suit which was decided in favour of the plaintiff against among others the deceased, the plaintiff had claimed that the deceased was in occupation of the suit property. The court held that the deceased was in occupation of the suit property illegally and ordered for his eviction there from. That decision has not been set aside or varied. I am satisfied therefore that the defendant intends to bury the body of the deceased on the suit property. Having found that the suit property is registered in the name of the plaintiff as the absolute owner thereof, the defendant cannot bury the body of the deceased on the suit property without the plaintiff’s permission as to do otherwise would amount to trespass.

9. Due to the foregoing, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. I am also satisfied that the plaintiff would suffer irreparable harm unless the orders sought are granted. If the deceased’s body is interred on the suit property the plaintiff would be kept out of the portion of the suit property where the deceased’s grave would be situated as a result of which he will not be able to fully enjoy his proprietary rights over the suit property.

10. In conclusion, I am persuaded that the plaintiff has made out a case for the orders sought. I therefore allow the plaintiff’s application dated 5<sup>th</sup> February 2014 and order that pending the hearing and determination of this suit, the defendant by herself or through her servants or agents is hereby restrained from making a grave, putting up any structures or shades, and burying and/or interring the body of the deceased, George Morara Nyabuto on **LR No. Central Kitutu/Mwamosioma/1544** pending the hearing and determination of this suit. In view of the nature of the order that has been issued, the OCS Kisii Police Station is directed to ensure compliance therewith. The plaintiff shall have the costs of the application.

**Delivered, dated and signed at Kisii this 10<sup>th</sup> day of March 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Sagwe for the Plaintiff

Mr. Ochwang'i h/b for Ogari for the Defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**