

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

LAND AND ENVIRONMENT 253 OF 2013

LEONIDA L. LYOSHI OWEGI suing as personal

representative of the estate of

LUCIA LYOSHI SAYISI (DECEASED) PLAINTIFF

V E R S U S

LUCY LUGONZO ODHIAMBO 1ST DEFENDANT

MAURICE LUGONZO 2ND DEFENDANT

MARY LUGONZO 3RD DEFENDANT

R U L I N G

The application dated 4.9.2013 seeks to restrain the respondents from burying the remains of the late **STEPHEN LUGONZO** who died on 31.8.2013 on plot number **BUTSOTSO/SHIBEYE/676**. The application also seeks other restraining orders against the respondents in relation to the above property. The application is supported by the applicant's affidavit sworn on the 4.9.2013 and a supplementary affidavit sworn on the 31.10.2013. The respondents filed an affidavit sworn on the 16.10.2013 by the 2nd respondent. Parties agreed to file written submissions to determine the application.

The basis of the application is that the suit land belonged to one **LUCIA LYOSHI SAISI** who died on the 14.5.2012. The plaintiff herein filed Nairobi Succession Cause No. 1995 of 2012 and was issued with a grant. It is the applicant's contention that she is a sister to the deceased owner of the suit property and is now registered as the owner. Stephen Lugonzo was married to Lucia who owned the land and the applicant contends that Stephen had other properties as well as wives where he can be buried. It is her contention that her sister left a **Will** and developed the suit land on her own without the assistance of Stephen Lugonzo. Stephen and Lucia had no child. Stephen did not bury Lucy at his ancestral land and mistreated her. The applicant maintains that the deceased left a Will and indicated how her estate should be distributed.

According to the respondents their late father was lawfully married to Lucy on 19.12.1981. The two lived together on the suit land. Lucia died on the 14.5.2012 and was buried on the suit land by Stephen Lugonzo. The applicant attended that burial. According to the respondents Stephen Lugonzo was buried on the suit land on the 7.9.2013 and by then no restraining orders had been issued.

The contention is whether the deceased should be buried on the suit land. A copy of official search dated 30.5.2012 shows that Lucia Lyoshi Saisi was the registered owner of plot number **BUTSOTSO/SHIBEYE/676** from 20.6.1977. The plot is about 14 ½ acres. It is also established that the applicant herein obtained letter of administration on the estate of her sister and is now the registered owner of the suit land. From the pleadings it is clear that Lucia got her property before they got married in 1981. The respondents indicate that their father lived with Lucia on the suit land. Lucia was buried on the suit land and they have already buried their father on the land.

The applicant herein got registered as the proprietor of the suit land on the 7.10.2013 after this suit was filed in court. It is clear to me that during his lifetime the late Stephen Lugonzo could have visited

the suit land or even lived there with his late wife. Even if the two had no children that cannot be a reason to say that there was no marriage between the two. The contentions by the applicant that Stephen Lugonzo mistreated her sister are misplaced as there was no divorce between the two. Even if the property was registered in the names of Lucia there is no evidence that Lucia had barred the deceased from entering that land. This is a big portion of land and the applicant is only an administrator who should not cloth herself with powers to bar her sister's late husband from being buried on the land. I am certain that Lucia herself would have buried her husband on the suit land. The respondents were not aware of the succession cause and did not participate in that matter. It is not clear to me how Lucia could have written the purported Will on the 24.10.2000 indicating that she did not want Stephen to be buried on the suit land. The purported Will was not tested before the succession court and cannot be the basis for granting the orders being sought. Lucia could not have anticipated the death of Stephen 13 years ago and also prophase that a burial dispute would occur on where Stephen was to be buried.

Given the pleadings herein I do find that no irreparable damage will be suffered by the applicant in the event that the deceased is buried on the suit land. There is no prima facie case with a probability of success established against the defendants. It is established that the deceased Stephen Lugonzo has already been buried on the suit land and granting the orders would lead to exhumation of the body. The application lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 3rd day of July 2014

SAID J. CHITEMBWE

J U D G E