



**MARGARET MWITHAKI NJOROGHE..... PLAINTIFF/APPLICANT**

**VERSUS**

**THE ESTATE OF**

**THE LATE JAME MBUGUA KIMOTHO ..... DEFENDANT/RESPONDENT**

**RULING**

1. There are two applications in this matter. Both applications have been filed by the Plaintiff/Applicant. The first application is the Chamber Summons dated 9<sup>th</sup> November, 2009 and seeks the following orders:-
  1. *THAT this application be certified as urgent and be heard ex parte in the first instance.*
  2. *THAT a temporary injunction restraining the Estate of the late James Mbugua Kimotho, by itself or through its agents, administrators, executors, servants or employees from burying the body of the late James Mbugua Kimotho anywhere within L.R. No. Kabete/Kibichiku/205 pending the hearing and determination of this suit.*
  3. *THAT a temporary injunction restraining the Estate of the late James Mbugua Kimotho, by itself or through its agents, administrators, executors, servants or employees from burying the body of the late James Mbugua Kimotho anywhere within L.R. No. Kabete/Kibichiku/205 pending the hearing and determination of **High Court Miscellaneous Civil Application No. 8 of 2008 – James Mbugua Kimotho & Another v Margaret Mwithaki Njoroge & Others.***
  4. *THAT interim orders in terms of prayers 2 and 3 above be granted pending the inter partes hearing of this application.*
  5. *THAT the costs of this application be in the cause.*
2. The application, which is brought under Order 39 Rule 1,2,3 and 9 of the Civil Procedure Rules, sections 63 and 3A of the Civil Procedure Act and all other enabling provisions of the law is based on grounds that:-
  1. *The applicant and the late James Mbugua Kimotho were engaged in a dispute in respect of the ownership of L.R No. Kabete/Kibichiku/205 (hereinafter the suit*

property). In this respect, several legal proceedings which have been instituted namely;

(a) *Kiambu Land Dispute Tribunal – Land Dispute Tribunal Case No. 116/20/12 of 2007.*

(b) *Kikuyu Law Courts – Principal Magistrate’s Court Miscellaneous Case No. 24 of 2007.*

(c) *High Court of Kenya – Constitutional and Judicial Review Division – Miscellaneous Civil Application No. 8 of 2008*

2. *At the time of the demise of the late James Mbugua Kimotho, **High Court Miscellaneous Civil Application No. 8 of 2008 – James Mbugua Kimotho & Another v Margaret Mwihaki Njoroge & Others** was and is still ongoing.*

3. *It has come to the plaintiff’s attention that the late James Mbugua Kimotho , will be buried at the suit property on or about 10<sup>th</sup> November, 2009.*

4. *That should the said late James Mbugua Kimotho be buried at the suit property, the plaintiff will suffer grave prejudice, in view of the ongoing court proceedings.*

5. *That it is in the best interest of justice that this application be allowed.*

3. The application is also supported by the affidavit sworn by **Margaret Mwihaki Njoroge** on 9<sup>th</sup> November, 2009.
4. The dispute herein revolves around land parcel known as **KABETE/KIBICHIKU/205** and the burial thereon of the body of one James Mbugua Kimotho (the deceased) contrary to Courts orders. On the 9<sup>th</sup> November, 2009, this court granted the Plaintiff’s application in terms of prayer 2 of the application pending inter partes hearing of the application. The Defendants who were duly served with the application did not file any replying papers, nor did they appear in court for the hearing of the Plaintiff’s application. The Plaintiff is saying that the said order of injunction was breached without a blink of the eyelid because the deceased was buried on the suit land on or about the 10<sup>th</sup> November, 2009.
5. The application proceeded by way of written submission. Since the Defendants did not appear it is only the Plaintiff’s submissions that are on the file. There submissions were filed on 4<sup>th</sup> February, 2010. It is contended on behalf of the Plaintiff that the whole purpose of burying the deceased on the suit land was a ruse to obtain title to the suit land. It was also contended on behalf of the Plaintiff that the dispute on the suit land has resulted in a number of court cases as detailed in the grounds in support of the application.
6. It is the Plaintiff’s case that the Defendants are trying to get title to the suit land through the back door, an action which the Plaintiff says is in bad taste. According to the documents on the file, and in particular copy certificate of the ‘Title

show that' the suit land is registered in the joint names of **Wambui** w/o **Kimotho and Wairimu** wife of **Kimotho** as absolute proprietors thereof. There is also a certificate of search dated 6<sup>th</sup> march, 2008 which shows that the suit land is registered in the joint names of **James Mbugua Kimotho** – 0.52 H.

- **Edward Njuguna Kimotho (0.52 Ha)** and
- **Warimu Kimotho**

7. The Plaintiff further contended that the Defendants actions are a flagrant breach of the law. Counsel for the Plaintiff also submitted that there is no excuse for the estate of the deceased to bury the deceased on the suit land when the deceased has his own parcel of land and a home located in Mutumu Village. Counsel for the Plaintiff also submitted that the Defendants acted with impunity and in breach of the court orders when on the 10<sup>th</sup> November, 2009, the Master of the burial ceremony for the deceased called on irate mourners to attack the process server who had gone to serve this court's order dated 9/11/2009. The Plaintiff's counsel has asked the court to punish the Defendants for contempt. The Plaintiff's counsel cited the case of **Mutitika vs. Baharini Farm Ltd** [1985] KLR 227. That a case dealt with contempt of court and the standard of proof required in such case. It was held, inter alia that –

*“A person who, knowingly of an injunction or an order of stay, willfully does something or causes others to do so, to breach the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice”.*

8. The second application is the Chamber Summons dated 17<sup>th</sup> November, 2009 seeking orders for exhumation of the body of the deceased **James Mbugua Kimotho** from the suit land. The application also prays for an order to punish James Warano for contempt of court by imposing a fine in such an amount as this Honourable Court may deem fit. The Plaintiff's also wants the Officer-in-Charge (OSC) of the relevant Police Station to supervise compliance with the court orders.
9. The facts of this application have already been given in the preceding paragraphs of this ruling, being that despite the temporary orders of injunction granted by this honourable court on the 9<sup>th</sup> November, 2009, the Defendants went a head and buried the deceased on the suit land. The Plaintiff contends that disobedience of court orders threatens the very foundations of the administration of justice and paints the court as being weak, powerless and ineffective.
10. I have now considered the two applications. On the basis of the facts before me. I am of the considered opinion that the application dated 9<sup>th</sup> November, 2009 was overtaken by events when the Defendants went ahead and buried the deceased upon the suit land. For this reason, the application is struck out in its entirety with no order as to costs.
11. As for the 2<sup>nd</sup> application dated 17<sup>th</sup> November, 2009, I am persuaded that this application has merit. Adequate evidence has been placed before this court to show that the deceased was buried on the suit land on 10<sup>th</sup> November, 2009 contrary to the order issued by this Honourable on 9<sup>th</sup> November, 2009. The Defendants have not come to court to explain why the deceased was buried on the suit land despite the court order restraining them to do so. Further the Defendants went ahead to bury the deceased on the suit land when they knew that there was a dispute over the suit land. For the above reasons, I would allow the Plaintiff's Chamber Summons application dated 17<sup>th</sup> November, 2009 in terms of prayers 2(a), 2(e) and 4 thereof.
12. As for prayer 2(b), (e) and (d) I am also of the considered view that these prayers are warranted. Ordinarily, an application for contempt would be preceded by an application for leave to commence contempt proceedings. However, under Order 39 rules 2A (2) of the Civil Procedure Rules such leave is not required. The only principle to be applied in this case is that propounded in **Re Maria Annie Davies (1889) 21QBD 236** at page 239 these principles

were set out in the **Mutitika** case (above) at page 234 lines 20-40 and page 238 line 7 thus :-

*“Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the Rolls in the case of **Re Clement** seem much in point: “It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealousy and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him. On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction “must be born in mind”.*

13. Now, applying the above principles in this case, there is no doubt in my mind that the Plaintiff’s application dated 17<sup>th</sup> November, 2009 is meritorious. The same is hereby allowed in terms of prayers 2(a) (b) (d) (e) and 4. The Plaintiff shall also have the costs of the two applications.
14. **Mr. James Warano** shall be punished by payment of the sum of **Kshs.200,000/=** in default he shall be committed to civil jail for a period of two months. The said sum of **Kshs.200,000/=** imposed upon **Mr. James Warano** shall be paid into court forthwith and in any event not later than twelve o’clock on Thursday, 4<sup>th</sup> March, 2010.
15. Orders accordingly.

**Dated and Delivered at Nairobi this 3<sup>rd</sup> day of March, 2010**

**R. SITATI**

**JUDGE**

Delivered in the presence of:

Mr. Sani for Mayamba (present) for the Plaintiff/Defendant

No appearance for the Defendant/Respondent

Weche – court clerk