



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 47 OF 2014

ALI MWADUNA.....PLAINTIFF

VERSUS

MASHA MUKADHA.....DEFENDANT

RULING

1. By this Notice of Motion application dated and filed herein on 25th March 2019, the Plaintiff Ali Mwaduna prays for an order of injunction to restrain the Defendant Masha Mukadha from burying or interring the remains of his deceased wife on the suit property known as Kilifi/Ngerenyi/331. At the same time, he urges that the OCS Kilifi Police Station be directed to ensure compliance with the orders sought.

2. The application which is supported by the Plaintiff's Supporting Affidavit sworn on 25th March 2019 is premised on the grounds:-

i. That the Plaintiff/Applicant purchased the suit property in a public auction emanating from Malindi SRMCC No. 8 of 1989, a case between the Respondent herein and one Khamisi Mwandoro;

ii. That the Defendant has lost his wife and is in the process of interring her remains on the suit property;

iii. That unless the Court intervenes, the nature of the claim shall be altered if the Defendant proceeds with the planned burial on the suit property;

iv. That unless the issue of the ownership of the suit property is heard and determined, the parties herein cannot lay a claim and/or utilize the same to the detriment of each other; and

v. That it is therefore only fair and in the interest of justice that the Defendant be restrained from burying the body of the deceased on the Plaintiff's Plot No. Kilifi/Ngerenyi/331.

3. In a Replying Affidavit filed herein on 28th March 2019, the Defendant denies that the Plaintiff is the beneficial owner of the suit property as stated in the application. The Defendant avers that Plot No. Kilifi/Ngerenyi/331 is no longer in existence as the land was sub-divided sometime back to create parcel Numbers Kilifi/Ngerenyi/1267 and 1268.

4. The Defendant asserts that the suit property belongs to himself and states that no proper auction took place that may confer any proprietary rights upon the Plaintiff. It is his case that he has been in actual occupation and possession of the land for more than 50 years and the Plaintiff will not in any way be prejudiced by the laying of the remains of his late wife who passed on on 19th March 2019 on the suit property.

5. In any event the Defendant contends that he has in the past peacefully buried his mother, his four children and two grandchildren on the suit property without any interference from the Plaintiff who comes from the same neighbourhood and knew of the burials and it is therefore strange that the Plaintiff seeks to stop the burial of his wife on the same land.

6. The Defendant asserts that to bury a body on any property cannot confer or deprive ownership of such property to or from any person and the Plaintiff should be stopped from engaging on a fishing expedition with the sole purpose of dispossessing him of his land.

7. I have considered the application and the response thereto. I have also taken into account the oral submissions made before me by Ms Ruttoh, Learned Counsel for the Applicant as well as Mr. Nyachiro, Learned Counsel for the Respondent/Defendant.

8. As it were, what is before me at the moment is an interlocutory application. The dispute between the parties concerns the ownership of the suit property. The main suit in which the rights of the parties over the suit property would be conclusively determined is yet to be heard. From the material placed before me, the dispute between the Plaintiff and the Defendant herein has been in our Courts for more than 20 years.

9. For all that period the Defendant has been residing on the said parcel of land. During that period, he claims to have buried seven members of his family on the disputed property. While no evidence was placed before me in proof of this claim, I am prepared to accept that such period of occupation is long and a lot may have happened during the Defendant's stay in the land.

10. As it were, the Plaintiff's claim to the land arises as a result of an auction that was apparently conducted after the Defendant lost a case in Malindi SRMCC No. 8 of 1989. It is evident that prior to the filing of the said suit, the Defendant was and remains in occupation of the said parcel of land to-date.

11. From the averments made in the Plaintiff's Supporting Affidavit he asserts that he will be highly prejudiced if the Respondent inter his late wife in the suit property during the pendency of this matter and hence the application herein.

12. I am however not persuaded that such burial if it takes place shall occasion the Plaintiff/Applicant irreparable loss or damage. From the material presented before me, the Applicant purchased the parcel of land for a sum of Kshs 68,500/-. While that figure has certainly gone up given the lapse of time, I think the Plaintiff's interest in the parcel of land is quantifiable and may be compensated by way of damages. At any rate, the body of the deceased could always be exhumed if at the end of this case, it is determined that the Plaintiff is the rightful owner of the land.

13. On the other hand, I think when it comes to the disposal of the body of a married woman, the Spouse would ordinarily play a leading role. Both the Defendant and his wife have lived on the disputed parcel of land ever since the dispute arose more than 20 years ago. During that period, they have used the land through cultivation, building of houses and other normal activities without restriction. Emotionally I think the Defendant stands to suffer more prejudice if the orders sought herein were to be granted to stop the burial of his wife from a place they have both jointly called home for more than two decades.

14. Accordingly, it is my view that the balance of convenience tilts in favour of the Defendant/Respondent in the circumstances herein. As a result, I decline to issue the orders sought herein.

15. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 29th day of March, 2019.

J.O. OLOLA

JUDGE