



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 370 OF 2017

(Formerly Machakos ELC Case No. 235 of 2014)

ANNE KAREGI BETT.....PLAINTIFF

VERSUS

MERIO OLAMROI.....1ST DEFENDANT

HASSAN TAJEY alias MZUNGU.....2ND DEFENDANT

SOPHILAL alias MZUNGU.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiff’s two Notice of Motion Applications dated the 16th March, 2018 and 20th April, 2018. In the application dated 16th March, 2018, the Plaintiff seeks for a mandatory injunction against the 2nd and 3rd Defendants to exhume the 1st Defendant’s body from land parcel number KAJIADO/ LORNGUSUA/ 1299 hereinafter referred to as the ‘suit land’ to rebury elsewhere. As for the application dated the 20th April, 2018, the Plaintiff seeks for orders that the 2nd and 3rd Defendants be cited for contempt and be committed to civil jail for disobeying the order of the Court issued by Justice Charles Kariuki on 9th March, 2015.

The two applications are based on the summarized grounds that the 2nd and 3rd Respondents buried the remains of the 1st Respondent on the suit land despite an Order of injunction that had been granted by Justice Kariuki restraining them from interfering with it. The Plaintiff hence wants the body of the 1st Defendant exhumed and the 2nd as well as 3rd Defendant cited for contempt and committed civil jail. It is the Plaintiff’s contention that the Order restraining the Respondents from interfering with the suit land was read and issued in the presence of the Defendants advocate. She contends that on the 13th April, 2018, the 2nd and 3rd Defendants proceeded to the suit land and commenced constructing a headstone on the grave of the 1st Defendant and cemented the area surrounding the site.

The application is supported by the affidavits of the Plaintiff ANNE KAREGI BETT who avers that together with her husband they are the registered proprietors of land parcel number KAJIADO/ LORNGUSUA/ 1299 which they acquired from SAINKE OLE LEMPESAI after which they were issued with a title deed on 15th September, 2006. She claims they enjoyed quiet possession of the land until sometime in November, 2014, when the Defendants trespassed on their land which led them to institute the instant suit against them. She states that on the 9th March, 2015, the Honourable Court issued injunctive as well as demolition orders against the Defendants, in the presence of all the parties. She avers that the 1st Defendant died on 10th March, 2018 and the 2nd as well as 3rd Defendants in the company of unknown people forcefully interred his remains on their land on the 15th March, 2018 . She contends that the 2nd Defendant threatened, intimidated and physically assaulted her foreman. Further, that this was in contravention of the order of the court issued on 9th March, 2015. She reiterates that the 2nd and 3rd Defendants have acted contrary to the orders of the Court and should be held in contempt.

The 2nd and 3rd Defendants opposed the application dated the 16th March, 2018 and filed a replying affidavit sworn by HASSAN TAJEU alias MZUNGU where he averred that the suit land belongs to the 1st Defendant but was fraudulently and illegally sold to the Plaintiff by Sarinke Ole Lempesai as was confirmed by the Directorate of Criminal Investigation vide their letter dated the 20th August, 2015 addressed to the State Counsel Kajiado. He contends that the said Sarinke Ole Lempesai together with other officials of the Ilpartimaru Group Ranch were charged with the offence to defraud the deceased 1st Defendant of title to the suit land vide Kajiado CM Cr Case No. 1711 of 2015 which suit is still pending. Further, that Sarinke Ole Lempesai is facing a second count of giving false information that the owner of the suit land had died thereby causing the District Land Registrar to issue him with a title deed as legitimate proprietor before he sold it to the Plaintiff. He contends that the Director of Public Prosecution terminated charges of forcible detainer against the deceased 1st Defendant and himself vide Kajiado CM Cr Case No. 8 of 2015. He insists they have filed a counterclaim where they have sought for cancellation of the title. He avers that the deceased 1st Defendant was allocated the suit land by the Ilpartimaru Group Ranch. He admits that the 1st Defendant died and that members of the community including his family buried him in his property in accordance with the Maasai Customary rites. He

further states that the 3rd Defendant has never resided on the suit land and that the Plaintiff has used Police to intimidate as well as harass them. He explains that at the behest of the Plaintiff, he has been arrested together with the 3rd Defendant by the Police officers from Kajiado. He reiterates that the Plaintiff has not come to court with clean hands since the ownership of the suit land is contested and she is guilty of concealing material facts from court. Further, that the prayers sought by the Plaintiff are untenable, punitive and sacrilegious to the Maasai Customs, which forbid exhumation of a dead body.

Both the Plaintiff and the 2nd including 3rd Defendants filed their submissions that I have considered.

Analysis and Determination

Upon consideration of all the materials presented in respect of the two Notice of Motion applications dated the 16th March, 2018 and 20th April, 2018, the following are the issues of determination:

- Whether a mandatory injunction should issue to compel the 2nd and 3rd Defendants to exhume the body of the 1st Defendant from land parcel number KAJIADO/ LORNGUSUA/ 1299.
- Whether the 2nd and 3rd Defendants are in contempt of Court for disobeying the Order of the Court dated 9th March 2015.

As to whether a mandatory injunction should issue to compel the 2nd and 3rd Defendants to exhume the body of the deceased 1st Defendant from land parcel number KAJIADO/ LORNGUSUA/ 1299.

It is the contention of the Plaintiff that the 2nd and 3rd Defendants have acted in contempt of the order of the Court by burying the 1st Defendant on the suit land. The 2nd and 3rd Defendant on the other hand insist it is the community members who buried the 1st Defendant in accordance with the Masaai Rites and further that ownership of the suit land is an issue in dispute. I note from the pleadings filed herein that both the Plaintiff as well as the 1st Defendant are claiming ownership of the land. In the case of **Elliid Kingwara Adawo v Philip Achieng John & another [2015] eKLR** where Justice Okongo when faced with similar circumstances has this to say: ' **Due to the foregoing, I am not inclined to make an order for the exhumation of the body of the deceased at this stage. Although, I have found that the burial of the deceased on the suit property was carried out illegally, I would for the reasons that I have given above defer the order for exhumation until the hearing and determination of this suit when final orders would be made with respect to the rights of the parties over the suit property. The remainder of the body of the deceased on the suit property would in no way prejudice the plaintiff's claim or rights herein. On the other hand, if the body was to be exhumed and it turns out after the trial that the plaintiff has no right over the suit property, the body of the deceased would have been disturbed unnecessarily and may have to undergo a second burial ceremony on the suit property. I am not satisfied that there are very compelling reasons that would justify the exhumation of the body of the deceased from the suit property at this stage. I have said enough to show that an order for the exhumation of the body of the deceased from the suit property is not for granting in the present application.**'

In being persuaded by this authority as well as facts as presented and since the dispute over ownership of the suit land is the main contention herein, I decline to grant an order for exhumation of the body at this juncture and direct that the obtaining status quo be maintained until this matter is heard and determined when the Court will make the necessary orders.

As to whether the 2nd and 3rd Defendants are in contempt of Court.

The Plaintiff insists the 2nd and 3rd Defendants contravened an order of the Court by interring the remains of the 1st Defendant on the suit land. Further that the 2nd and 3rd Defendants were well aware of the injunctive orders restraining them from interfering with the suit land but still proceeded to inter the remains of the 1st Defendant therein. The 2nd and 3rd Defendants insist they are not in contempt and deny forcefully burying the deceased on the suit land. Further, they claim it is the community that buried the deceased on the land. The 3rd Defendant has even denied ever going to the suit land. The Plaintiffs in their submissions relied on the case of **Hadkinson –vs- Hadkinson (1952) ALLER 567 and Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Another (2013) eKLR** to buttress their arguments and averred that everyone has an obligation to obey a court order. The 2nd and 3rd Defendants on the other hand deny being served with a copy of the Court Order dated the 9th March, 2015 or ruling delivered on 27th February, 2015. Further, they contend that Justice Charles Kariuki did not have jurisdiction to deal with the matter at that time. They relied on the case of **Mwangi H. C Wangondu Vs Nairobi City Commission Civil Appeal No. 95 of 1988 and Refrigerator & Kitchen Utensils Limited Vs Gulabchand Popatlal Shah & Others Civil Application No. Nai 39 of 1990** to support their arguments.

Section 27(b) of the Contempt of Court Act provides that a person who willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding; Section 28(1) of the Contempt of Court Act provides that save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.'

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: ' **writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

- ' there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's

conduct was deliberate.'

In relying on the facts as presented and being persuaded by the above cited authority, I find that the 2nd and 3rd Defendants who had a counsel on record were well represented in court at the time the ruling on the application for injunction was delivered and hold that they were hence aware of the said order of injunction restraining them from interfering with the suit land. Insofar as they were well aware of the order, I note that the Plaintiff did not seek a specific order to stop the burial of the 1st Defendant on the suit land. Further, the 2nd and 3rd Defendants insist it is the community who buried the deceased on the suit land which fact has not been controverted by plaintiff. I opine that it would have been sufficient if the Plaintiff obtained a specific order to restraining anybody to interfere with burial on the suit land. Since I have held above that the main issue in dispute concerns the ownership of the suit land and that the issue of contempt arose from the burial of the deceased on the said land. I decline to allow the application for contempt at this juncture but in the interest of justice order that the Defendants be restrained from interfering with the suit land pending the outcome of the suit, failure of which I will cite them for contempt.

It is against the foregoing that I find the two Notice of Motions unmerited and disallow them.

I urge the parties to comply with order 11 and set the suit down for hearing as soon as possible.

Costs will be in the cause.

Dated signed and delivered in open court at Kajjado this 28th day of March, 2019

CHRISTINE OCHIENG

JUDGE