



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

MISCELLANEOUS APPLICATION NO. 5 OF 2019

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF THE BURIAL DISPUTE IN RESPECT OF THE BODY OF THE LATE GEOFFREY KIPLAGAT MASWAI

BETWEEN

ERNEST KIPROP ARAP KOGO.....APPLICANT

VERSUS

JOHN KIBET.....1ST RESPONDENT

JAMES KIPSONGOK.....2ND RESPONDENT

PAULINE JEPKORIR.....3RD RESPONDENT

RULING

Geoffrey Kiplagat Maswai (now deceased) filed an originating summons on the 15.3.2016 for a declaration that he has acquired title and ownership of land reference number Nandi/Kamobo/234 measuring 4.4. hectares having been in exclusive open and peaceful, continuous and uninterrupted possession and occupation and use of the whole of the said land. He prays for an order that the title to the said land held by Ernest Kiprop Arap Kogo has been extinguished hence the land has to be transferred to the plaintiff. He prays for a vesting order in respect of the land and that the defendant to execute a transfer. In a nutshell, the deceased claims that he has been in possession since 1976 and therefore entitled to the land by adverse possession.

The respondent on the other hand states that he allowed the applicant's mother on the land. The applicant's mother stayed with the applicant on the land until 2003 when she died. The applicant asked for more time to vacate the land but never vacated.

The above matter came for hearing and the plaintiff testified and called one witness. It is coming for further hearing on 25.3.2019 unfortunately, the plaintiff has died and is yet to be buried. The defendant has filed a Miscellaneous application seeking orders to bar the burial of the plaintiff on the land.

The defendant prays that there be an order of a permanent injunction to restrain the respondents, their agents and/or servants from trespassing upon and/or burying the body of the late Geoffrey Kiplagat Maswai, deceased on land parcel registration No. Nandi/Kamobo/234 measuring approximately 4.4 ha duly registered in the name of the applicant.

The application is heard on grounds that the applicant is duly registered owner of land parcel registration No. Nandi/Kamobo/234 measuring approximately 4.4 Ha and that the applicant and the late Geoffrey Kiplagat Maswai had a dispute over the suit land vide Eldoret Employment and Land Court Case No. 53 of 2016 (OS) which is pending hearing and determination and it is scheduled for hearing on 25th March, 2019.

The said late Geoffrey Kiplagat Maswai died on 4th March, 2019 and the respondents are planning to bury his body on the suit land on 8th of March, 2019. That it is in the interest of justice that the Honourable court do restrain the respondents by way of an injunction from burying

the body of the deceased herein on the suit land. The instant application is made in good faith and in the interest of justice.

M/s Pauline Jepkorir, the widow to the deceased states that the deceased passed on 4.3.2019. He instituted the Case No. 53 of 2016 and testified. Her husband was in possession of the land when she married him in 1985. They live on the land with their children. She opposes the application and prays that she be allowed to bury the husband.

This case has to be decided on the principles of in ***Giella vs Cassman Brown & Co Ltd [1973] E.A 358***, where all the court is required to do at this stage is to satisfy itself if either party had shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court was to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the applicant or with the respondents.

In the case of ***Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004*** the court of appeal held:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the *Giella* case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

I do find that there is no controversy that the deceased was in possession of the suit property for more than 12 years before he died. There is no controversy that the defendant/applicant is the registered owner of the property. The only controversy is whether the deceased was allowed to stay on the suit property with the mother and was supposed to vacate at the demise of his mother. I do find that there is a prima facie case with a likelihood of success if the defendant/applicant proves that the deceased was allowed to take possession and was to vacate when called to do so. This is because he is the registered proprietor.

The second issue is whether the respondent will suffer irreparable loss if the deceased is buried on the land. On this part, I do find that the respondent/applicant has not been in possession of the land for a long period of time. The deceased has been in possession. There is no irreparable loss demonstrated by the respondent if the deceased is buried on the land.

The balance of convenience tilts towards allowing the deceased body to be buried on the suit land due to the fact that they are in possession and that the body will stay in the mortuary for a long period of time at their expense if the orders are given. In any event, if the respondent succeeds in the suit, the body can be exhumed and buried elsewhere. Application is dismissed with no order as to costs.

Dated and delivered at Eldoret this 12th day of March, 2019.

A. OMBWAYO

JUDGE