



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CIVIL CASE NO. 19 OF 2018**

**COSMAS WANDERA KHASINO.....PLAINTIFF/APPLICANT**

**= VERSUS =**

**DAMIANO OUMA.....DEFENDANT/RESPONDENT**

**RULING**

1. What is before the Court for determination is the Plaintiff's Application dated 22<sup>nd</sup> October 2019 and filed on 23<sup>rd</sup> October 2019. It is brought under order 11 rule 3(2) (a) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant seeks the following orders:

**a) Spent**

**b) Spent**

**c) That a temporary injunction be issued restraining the Defendant by himself or through his servants, agents and/or employees from burying the remains of the late RISPA MAKOKHA OJIAMBO on the land known as SAMIA/WAKHUNGU/ODIADO/1206 pending the hearing and determination of this suit.**

**d) That the OCS Funyula Police Station be served to supervise compliance with the order.**

**e) That costs of this application be in the cause.**

2. The application is supported by the affidavit of the Plaintiff/Applicant, Cosmas Wandera Khasino. He depones that the Application herein concerns ownership rights and interests in the suit property. The Applicant is a son of the Late John Khasino. That the late John sold the suit property to Fredrick Ojiambo Mboko, also deceased. According to the Plaintiff, the Defendant who has been living on the property as a caretaker witnessed the transaction between the above named parties together with his late wife, Rispa Makokha Ojiambo. The same is evidenced by exhibits **CWK-1** and **CWK-7**, the sale agreement and a chief's letter where their names are indicated as witnesses. The Plaintiff alleges that the Defendant fraudulently had the suit property registered in his name. Upon learning that the Defendant's wife died on 21<sup>st</sup> October 2019 and that there were plans underway for her burial on the property initially fixed for 2<sup>nd</sup> November 2019 the Plaintiff moved and filed the current application to stop the burial.

3. The Defendant/Respondent filed a cross-application dated 28<sup>th</sup> October 2019 seeking stay and vacation of the Court's orders of 24<sup>th</sup> October 2019 which orders restrained the Defendant from interring the body of his deceased wife on the suit property pending the hearing and determination of the application. Parties agreed that this application operate as a substantive response in opposition to the Plaintiff's application of 22.10.2019. The Defendant deposed that he is the registered proprietor of LR NO. SAMIA/WAKHUNGU/ODIADO/1206 and annexed a copy of title deed to that effect. That he had all along lived on the suit property whereupon some of his relatives have been buried.

4. The Plaintiff also filed a further affidavit on 5<sup>th</sup> November 2019, on which date the two Applications (dated 22<sup>nd</sup> and 28<sup>th</sup> Oct) were heard together. Mr. Wasike, Counsel for the Plaintiff urged that the Estate of the late John Khasino held the property in trust for the Estate of the late Fredrick Ojiambo Mboko. He pointed out certain discrepancies in the Defendant's version and documents used in acquisition of the suit property. Firstly, that the Defendant in his witness statement states that he purchased the property at a consideration of Kshs.70,000 while the transfer indicates that it was given to him as a "gift." Secondly, the Land Control Board Consent and Title bore different names being Damiano Khasino and Damiano Auma respectively.

5. Mr. Wasike informed the Court that the Defendant and his wife had the suit property fraudulently registered in their names. That the fraud was reported to the police. He contended that the Plaintiff has demonstrated that he has a *prima facie* case and that the balance of

convenience tilts in the burial not taking place. Counsel argued that there was a constructive trust in place with the Plaintiff holding the title to the suit property on behalf of the legitimate buyer; the late Fredrick Mboko. That the sons of the late Fredrick who he named as Patrick and Michael will be called as witnesses in the main hearing and that Patrick is an administrator of the late Fredrick's estate.

6. Mr. Ipapu appearing for the Defendant asserted that the Plaintiff does not have a *prima facie* case. That the Plaintiff's list of witnesses filed on 23<sup>rd</sup> March 2018 lists Patrick Evans Ouma as a witness. However, on 7<sup>th</sup> February 2019, the said Patrick filed a different suit against the present Defendant. Counsel submitted that the Applicant in concert with the aforementioned parties were on a fishing expedition with an intended witness also laying claim to the same property. He stated that the Defendant has been in occupation of the suit land since 1987. Further, that in 1994, the defendant buried a relative, one Isaac Ouma on the suit property with no objection raised by the Plaintiff/applicant. Counsel concluded that the applicant has exhibited great indolence by bringing this application so many years later.

7. Mr. Ipapu submitted further that burial does not constitute irreparable harm as the process can be reversed. Moreover, the Applicant has not offered them any security for costs in the event that his application does not succeed. Counsel was also of the position that the Defendant as the title holder ought not to be prevented from exercising his proprietary rights. That the Plaintiff's claim, documents and assertions were capable of being successfully challenged in Court. For instance, the Plaintiff has not told the Court where the late John Khasino and Fredrick Ojiambo were buried and when they died. He concluded that no case had been made to warrant the grant of the orders sought and urged the Court to dismiss the plaintiff's application with costs.

8. In reply to the Defendant's submissions, Mr. Wasike learned Counsel for the Applicant stated that there was no conflict of interest between the Plaintiff and Patrick Evans Ouma. That the celebrated authority of *Giella vs Cassman Brown (1973) EA 358* does not mention security for costs as a requirement neither has the Plaintiff/Applicant approached the Court with unclean hands. Further, that the Defendant is in violation of Section 45 of The Law of Succession Act, Cap 160 Laws of Kenya which provides that it is an offence to intermeddle with the Estate of a deceased person. He contended that the intended burial of the Defendant's wife on the suit property would diminish its value resulting into irreparable harm. That the property should go to the proper party in accordance with Article 40 of the Constitution.

9. I have considered the parties' pleadings, oral submissions and the applicable law. The essentials for the granting of a temporary injunction were set out in the celebrated case of *Giella vs Cassman Brown (supra)* thus;

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

10. The Applicant seeks injunctive orders restraining the Defendant/Respondent from interring his deceased wife upon the suit property pending the hearing and determination of this suit based on an ownership claim. Has the Plaintiff established a *prima facie* case with a probability of success? A *prima facie* case was defined in the case of *Mrao Limited Vs First American Bank of Kenya Limited & 2 Others (2003) eKLR* as follows:

***“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there is a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”***

11. It was urged that the Plaintiff is the legal representative of the Estate of the original seller, John Khasino and holds title to the suit property in trust for the beneficiaries of the Estate of the late Fredrick Ojiambo Mboko. That a constructive trust arose in favour of Fredrick once the consideration was received. However, it is clear that the direct beneficiaries of the late Fredrick's estate are not in possession of the suit property neither have it demonstrated that they have ever been in possession from the date of the sale.

12. The issues of capacity to sue and/or *locus standi* are also visible questions on the face of the pleadings filed. What relief does the Plaintiff deem himself to be entitled to and what right has been infringed upon? The Plaintiff is suing on behalf of the Estate of the Deceased seller but has not annexed a copy of the Ad litem grant giving him authority to do so. Moreover, he has sued for the benefit of the Estate of the Deceased buyer. The Applicant has not disclosed to this Court his source of authority to file suit for the benefit of the estate of the late Fredrick Ojiambo Mboko. Instead, Counsel submitted that the beneficiaries are listed as witnesses and that one of them is stated to be an Administrator who is capable of agitating the claim in his own right.

13. In paragraph 12 of the Further Affidavit, the Applicant deposed that the law of succession prohibits dealing in the estate of a deceased person until grant has been issued. Yet in paragraph 17 he goes on to depose that the estate of the late Fredrick Ojiambo Mboko are desirous of instituting criminal proceedings against the defendant for the fraud committed. The question arises as to where the Applicant has derived authority to depose on these issues without being the administrator of the late Fredrick. In *Alfred Njau & 5 Others vs City Council of Nairobi (1983) eKLR*, the Court of Appeal defined *locus standi* thus:

***“The term, locus standi means a right to appear in Court and conversely, as is stated in Jowitt's Dictionary of English Law, to say a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding..”***

14. In the Plaintiff's application filed on 23<sup>rd</sup> March 2018, there is nothing pleaded that the estate of the late John Khasino Khasaburi is claiming the suit land. To the extent that it is brought for the benefit of the late Fredrick Ojiambo Mboko without evidence of capacity to sue, is good reason to strike out the application.

15. Has the Applicant demonstrated that he has a “genuine and arguable” case and therefore a *prima facie* case with a probability of success at the main trial? The Applicant deposed that the late John Khasino died in the year 2010. In the grounds listed in support of the motion, the Applicant stated *inter alia* that;

i) *The application concerns the ownership of rights & interest on the suit land.*

ii) *That the estate of the late John Khasino holds the suit property in trust for the estate of Fredrick Ojiambo.*

iii) *The Respondent has no valid claim to the land.*

iv) *That it would be prejudicial for the Respondent to bury his wife on the land whose title is contested.*

16. The Respondent in the replying affidavit deposed that he has lived on the suit land from 1987 to date. That previously he had buried deceased relatives without objection from the Plaintiffs. That Patrick Ouma has also sued him in Busia ELC Case No. 7 of 2019 claiming the same land. The Plaintiffs in the pleadings and submissions have not denied occupation of the land by the Respondent. His contention is that the Respondent was only a caretaker of the late Fredrick Ojiambo. To the extent that the Defendant has been in occupation of the suit land for quite a long time and to the extent that the property is registered in the defendant’s name; I am not persuaded that a *prima facie* case has been laid out to warrant the granting of the orders of temporary injunction.

17. It is also my considered view that the balance of convenience tilts in favour of the Defendant as burying a body is not something which cannot be undone in the event the Applicant is successful in his suit. The upshot of the foregoing is that the Application dated 22<sup>nd</sup> October 2019 is dismissed for lack of merit with costs to the Respondent.

**Dated and signed at BUSIA this 14<sup>th</sup> day of November 2019.**

**A. OMOLLO**

**JUDGE**