



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC 213 OF 2017**

**SHARAD JETHALAL SHAH & ANOTHER.....APPLICANT**

**VERSUS**

**RAMA MOHAMMED.....RESPONDENT**

**RULING**

1. This is a ruling in respect of two separate applications. The first application is dated 15<sup>th</sup> May 2017. It is brought by the plaintiffs/Applicants. It seeks the following orders:-

**1. Spent**

**2. That the Court be pleased to grant a mandatory injunction compelling the Respondent whether by himself, his agent and /or servant to exhume the body of Samuel John Githinji which was buried on 1<sup>st</sup> April 2017 on LR No. Nairobi Block 126/790 located at Kamulu within Nairobi County and keep it in the morgue pending the hearing and determination of this application.**

**3. The court be pleased to grant mandatory injunction compelling the Respondent whether by himself, his agents and/or servants to remove the erected wall/structure on LR No.126/790 pending the hearing and determination of this suit.**

**4. In the alternative the Court be pleased to order that LR No Nairobi Block 126/790 be preserved pending the hearing and determination of this application and suit.**

**5. That the Officer Commanding Kamulu Police Station supervises as well as provides security during exhumation of the remains of Samuel John Githinji from LR No.Nairobi Block 126/790**

**6. The Costs of this application be provided for.**

**7. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.**

**8. That Mr Rama Mohamed be compelled to pay for the immense damage that he has occasioned on the property. That the damage be assessed by the Government Valuer as well as NEMA officials.**

2. The second application is dated 16<sup>th</sup> November 2017. It is brought by the defendant who seeks orders that Mr Jimmy Sausi Advocate for the plaintiffs be barred from representing the plaintiffs in this suit.

**Application dated 15<sup>th</sup> May 2017.**

3. The dispute herein relates to LR No.126/790 (suit property) which is registered in the name of the applicants. The applicants contend that the defendant/respondent trespassed into the suit property and erected a wall and a house on the suit property. He later interred the remains of his father in law Samule John Githinji (deceased) on the suit property. The applicants purchased the suit property from Pauline Mbaire Kariuki who was later added to the suit as a third party.

4. The respondent opposed the applicant's application based on grounds of opposition dated 18<sup>th</sup> May 2017 and filed in Court on 22<sup>nd</sup> May 2017. The respondent contends that he is not the legal representative of the estate of the deceased and that the proceedings herein should have awaited the appointment of a legal representative of the estate of the deceased; that there is no need to exhume the body of the deceased and

that the orders being sought by the applicants are final in nature which cannot be given at inter-locutory stage. The respondent states that he is prepared to have the status quo maintained as prayed for in prayer (4) of the application instead of exhumation .

5. I have considered the applicants' application as well as the grounds of opposition by the respondent. I have also considered the submissions filed on behalf of the parties. The applicants are seeking two mandatory orders; that is an order for exhumation of the body of the deceased and an order for demolition of structures erected on the suit property. It is important to note that as at the time this application was filed, there was a previous one which had been filed on 28<sup>th</sup> March 2017 which sought to restrain the respondent from burying the remains of the deceased on the suit land. This application was overtaken by events in that the respondent went ahead to bury the deceased on the suit property before any orders preventing him to do so could be given. This is what necessitated the applicants to file the present application in which they are seeking exhumation of the deceased.

6. The issue which emerges for determination is whether a court can grant an order for exhumation when the prayer for exhumation is not part of the prayers in the main suit. The respondent has submitted that there was no amendment to the plaint to include the prayer for exhumation and therefore no order can be given based on a relief which is sought in the application but it is not contained in the plaint. The respondent relied on the case of *Morris and Company Ltd Vs Kenya Commercial Bank and others HCCC No.729 of 2003* in which Ringera J as he then was struck out an application for a temporary injunction where there was no prayer in the main suit for a permanent injunction.

7. I agree with the submissions of the counsel for the respondent. If the applicants application for injunction to prevent burial of the deceased had been overtaken by events, the applicants had to amend the plaint to include a prayer for exhumation which will then have formed the basis for a similar order at interlocutory stage. As there was no such amendment, the applicants cannot be allowed to pray for a mandatory order for exhumation which is not anchored in the main suit.

8. The other issue for determination is whether a mandatory injunction can be granted at interlocutory stage compelling the respondent to demolish the wall and structure on the suit property. The law regarding issuance of mandatory injunction is now well settled. A mandatory injunction cannot be given unless there are special circumstances for doing so. In *Sharif Abdi Hassan Vs Nadhif Jama Adan 2006 eKLR*, the Court of Appeal stated as follows:-

***“ The courts have been reluctant to grant mandatory injunction at interlocutory stage. However where it is prima facie established as per the standard spelt out in law as stated above that a party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by courts in such case as those of alleged trespass to the property”.***

9. In the instant case there is a prayer for eviction of the respondent and removal of any structures on the suit property. It is the respondent who erected the structures on the suit property. He even left his mobile phone which was inscribed on a water tank on the suit property. The applicants were informed that the person who was carrying out construction is the respondent whose phone was shown on the water tank. The respondent has nothing to do with the suit property. He was sued as a trespasser. In the case of *Jaj Super Power Cash and Carry Ltd Vs Nairobi City Council & 20 Others( Civil Appeal No.111 of 2002)* the court stated as follows:-

***“ This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”.***

10. The respondent has not denied that he was the one behind the construction of the structure on the suit property. He has no interest in the suit property. Even though it is said that he is a son in-law of the deceased who used to claim the suit property, that does not give him ground to trespass into the suit property. I find that this is a clear case where a mandatory order should be granted ordering removal of any structures erected on the suit property by the respondent. I am fortified in this finding by the fact that after the trespass, the respondent through his advocate wanted to purchase the suit property from the applicants. If indeed the respondent was clear in his mind that the suit property belonged to his father – in-law, he should not even have attempted to buy what was already his father in-law's property. I am aware of the position in law that evidence cannot be introduced in submissions but will not entirely shut my mind when the totality of the case is taken into account in as far as the prayer for mandatory injunction is concerned. However despite this finding and considering the fact that there is a representative of the estate of the deceased who has been brought on board and given that the applicants themselves had prayed for preservation of the suit property and now that the prayer for exhumation has been declined, the interest of justice demand that a mandatory order of eviction should not issue.

11. The issue of damages cannot be addressed at the moment. This is a matter which will be addressed in the main suit. The most appropriate order to be made in the circumstances is that the status quo should be maintained pending the hearing and determination of the suit. The status quo is that there is the body of the deceased which is interred on LR No. 126/790. There is also a structure on the same plot and a wall. There should be no further construction or interference with the suit property by way of alienation until this suit is heard and determined. Costs in the cause.

It is so ordered.

***Application dated 16<sup>th</sup> November 2017.***

12. In this application the defendant/applicant contends that Mr Jimmy Sausi Advocate was involved in the transaction which led to the suit property being transferred to the plaintiffs/respondents. The applicant contends that the said advocate was behind what they call a fraudulent transaction and that there are a number of issues which the respondent will require him to respond to. The applicant intends to call him as a witness and as such, if the advocate was not barred from the respondents, there is likely to be conflict of interest.

13. The advocate who is sought to be barred from representing the respondents has sworn an affidavit dated 23<sup>rd</sup> February 2018 in which he denies the allegations of the applicant. He denies that he was involved in any fraud; that he never acted for the vendor of the property and that the applicant has not demonstrated what prejudice he will suffer if he continued to represent the respondents in this case. The advocate terms the allegation against him as malicious and unfounded.

14. In a supplementary affidavit, the applicant has annexed copies of sale agreement which show that the advocate acted for both the purchaser and the vendor. In his further affidavit, the applicant contends that there are two different sale agreements which can only be explained by Mr Jimmy Sausi or the firm where he is a partner; that he ought to have noticed that Ngundu Farmers Company Limited which transferred the suit property to Pauline Mbaire Kariuki was under liquidation.

15. I have considered the applicant's application as well as the response to the same by Mr Jimmy Sausi . The applicant wants the firm of Ochoki & Ochoki Associates as well as Jimmy Sausi barred from representing the plaintiffs. The ground for this is that the applicant has listed Mr Jimmy Sausi as his witness. The applicant has come under Rule 9 of the Advocates (practice)Rules which provides as follows:-

***“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:***

***Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.***

16. Other than saying that Mr Sausi is the Advocate who acted in the transaction leading to the suit property being transferred to the respondents, there is nothing to show why there is need for Mr Sausi to be barred for either being privy to any confidential information which may prejudice the applicant or involvement of any fraud as alleged by the applicant. Mr Sausi did not act for either the applicant or the interested party. He did not act for Ngundu Farmers Company Limited, its liquidator or even its directors . Mr Sausi's role was to draw a sale agreement between the respondents and Pauline Mbaire Kariuki who has now been enjoined as a third party in these proceedings.

17. The said Pauline Mbaire kariuki is not complaining about Mr Sausi's appearance for the respondents. She is being represented in this litigation by another law firm. I therefore do not see where conflict of interest would come from. The mere listing of an advocate appearing for a party as a witness is no ground for him to be barred. There must be evidence that he is likely to be called as a witness in the same proceedings or that there is likely to be a conflict of interest. The applicant herein seems to complain that the suit property was transferred to Pauline Mbaire Kariuki by Ngundu Farmers Company Ltd fraudulently. The evidence on record is that Mr Sausi acted for the respondents and Pauline Mbaire kariuki in the transaction. There is no evidence that he is also the one who acted for Ngundu farmers Company Limited and Pauline Mbaire Kariuki when the suit property was transferred from the former to the latter.

18. Mr Sausi was not bound to inquire into how Pauline Mbaire Kariuki got title to the property which she was transferring to the respondents who were his clients. The sale agreement between the respondents and Pauline Mbaire Kariuki is not in contention. A party has a constitutional right to an advocate of his own choice. This right can only be taken away lawfully where there are justifiable grounds for doing so. As the applicant has not demonstrated any grounds for barring either Mr Sausi or the firm of Ochoki & Ochoki Associates from representing the respondents, I find no merit in the application which is hereby dismissed with costs.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **19<sup>th</sup>** day of **September 2018**.

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Sausi for Plaintiff : Present

Mr Mutea for M/s Mochama for third parties

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**