



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT CHUKA**

**ELC NO. 3 OF 2017**

**DORIS KAGENI NTHIIRI ..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN MBUBA ..... DEFENDANT /RESPONDENT**

**RULING**

1. This application is dated 26<sup>th</sup> January, 2017 and has been filed under a certificate of urgency.

2. It seeks orders:

1. THAT this application be certified as urgent and service of the same be dispensed with in the first instant.

2. THAT this Honourable court be pleased to issue an order of injunction restraining the defendant whether by himself, his agents, servants, employees and or anyone acting on their behest from disrupting and or interfering with the burial of JAPHET NTHIIRI (deceased) whose remains are to be interred on land parcel number KARINGANI /NDAGANI/86 pending the hearing and determination of this application.

3. THAT this Honourable court be pleased to compel the defendant /Respondent whether by himself to allow and or permit the plaintiff/Applicant inter the remains of Japhet Nthiiri (deceased) on land parcel number KARINGANI/NDAGANI/86 Pending the hearing and determination of this application.

4. THAT this Honourable court be pleased to order the OCS Chuka police station to grant the necessary security to ensure peace during burial ceremony.

5. THAT costs of this application be provided for.

3. The application is buttressed by the supporting affidavit of Doris Kageni, the applicant, Sworn on 26<sup>th</sup> January 2017.

4. The application has the following grounds:

1. THAT the subject land parcel number KARINGANI/NDAGANI/86 constitutes the applicant's only family land.

2. THAT the defendant/Respondent holds the subject parcel in trust of the plaintiff/applicant.

3. THAT the plaintiff/Applicant has been in lawful possession and occupation of the subject parcel of land since the year 1988 when she got married to the deceased herein JAPHET NTHIIRI.

4. THAT now the respondent has restrained the applicant from interring the remains of her late husband in the subject parcel unjustifiably, illegally and without any reasonable cause.

5. THAT the applicant does not own any other property where she can inter the remains of her deceased's husband but only land parcel number KARINGANI/NDAGANI/86 the subject land herein.

6. THAT if the application is not heard and determined urgently and orders issued on a balance of convenience, the applicant stands to suffer irreparably in that the hospital bills continue to grow excessively beyond her reach.

5. On the date the application was slated for interparties hearing, the applicant told the court that the respondent had been properly served. Despite service he was not in court.

6. There is an affidavit of service sworn by a High Court process server deponing that the respondent was served with this application and other apposite documents. It is deponed that the respondent accepted service and acknowledged service by tendering his signature.

7. The applicant told the court that the suit land in dispute belonged to the common father of John Mbuba, the respondent, and the deceased husband of the applicant. She told the court that the land is ancestral land. This claim runs through the pleadings filed by the applicant.

8. By not coming to court, the respondent has not helped his case. He has failed to controvert the claims proffered by the applicant.

9. The applicant claims that she was married to the deceased, Japhet Nthiiri in 1988 and that she and her husband established a matrimonial home on the suit land since then. She avers that the respondent, though the land is registered in his name, holds the family land in trust for himself and for his brothers, who include Japhet Nthiiri, the deceased husband of the applicant.

10. The applicant avers that she and her husband have extensively developed the suit land and have also avocado and mango trees, among other trees. She avers that the suit land contains the family's banana plantation.

11. The applicant says that her husband died on 10<sup>th</sup> January 2017. She avers that the respondent has restrained the family from burying her deceased husband on land parcel number KARINGANI/NDAGANI/86 which she claims is ancestral land.

12. I have considered the evidence tendered by the applicant. I have also considered the pleadings she has proffered. I note that the assistant Chief in charge of the area where the land is situated has written a note to the mortuary asking tht the applicant be assisted with preparation for burial of the remains of the deceased husband of the applicant. This letter does not say anything concerning ownership of the disputed suit land.

13. I, however note, from details in the register of the suit land that following a Chiefs letter dated 3<sup>rd</sup> May 2007, a restriction was placed upon the suit land. This confirms that ownership of the suit land is disputed.

14. I find that the claims made by the applicant are not controverted. The prayers sought in the application will be allowed. I, however, add that ownership of the suit land will have to be proved during the hearing of the main suit. I also point out that allowing the body of the deceased husband of the applicant to be buried on the suit land does not, ipso facto, entitle the applicant to the prayers she is seeking in her plaint. This will have to be canvassed.

15. Technical issues regarding letters of administration will have to be properly addressed. This being a burial matter, however, technical issues should not stay in the way of having substantial justice rendered.

16. Prayers 2, 3 and 4 are granted.

17. Costs shall be in the cause.

18. It is so ordered.

Delivered in open court at Chuka this **1<sup>st</sup> day of February 2017** in the presence of:

CA : Ndegwa

Doris Kageni Nthiiri – Applicant

**P .M. NJOROGE**

**JUDGE**