



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 37 OF 2017

**MERCY CHEPKORIR CHESIRE (*Suing on behalf of the Estate of the late
STANLEY KANDIE CHESIRE*).....PLAINTIFF**

VERSUS

GEOFFREY NDIEMA.....DEFENDANT

RULING

1. The plaintiff, being Administrator of the Estate of **Stanley Kandie Chesire**, deceased, filed the suit herein on 1/3/2017 together with the application dated 28/1/2017. The first and second prayers of the application have been dealt with. It is the third prayer that the court has to consider. It reads as follows:-

“3 That defendant and his agents, or servants be restrained from, burying the remains of their deceased son namely Hillary Chesire on Land Parcel Number Kitale Municipality Block 19/298 pending the hearing and determination of the main suit”.

2. The name of the deceased at prayer No. 2 has been amended by hand to read “Hillary Ndiema” and it is my belief that failure to amend prayer No. 3 accordingly was a mere oversight that should not affect the merits of the application.

3. It has been urged by the plaintiff that the Estate of the late Stanley Kandie Chesire is the legal owner of the suitland and that the defendant is illegally in possession of the land. The Estate would, according to the applicant, suffer irreparably if the application and orders are not granted.

4. The applicant states that on 20/12/2001, her mother entered into a sale agreement with the defendant. By it the defendant was to buy the land measuring 0.25 acres. The agreement had the blessings of the applicant’s father. After execution of the agreement, the defendant/respondent took possession of the land. The defendant was to pay the purchase price on or before 5th April, 2002 in order for the land to be transferred into his name. However, according to the applicant the respondent breached the terms of the agreement by failing to pay the purchase price as required by the agreement and therefore the sale contract stands repudiated.

5. The defence admits that there was a sale agreement but it was in respect of a quarter acre parcel forming part of the suit property. The respondent however avers that he paid the purchase price by 5th April, 2002, and the issue of breach of contract should not arise. The respondent states that he has resided on the land for the last 20 years and that the applicant’s delay in lodging the claim is unexplained.

6. Further, he states, he has conducted extensive developments on the land, and the applicant has no *locus*

standi to bring the claim. He avers that having been in continuous occupation of the land for a period of more than 12 years, then his ownership and occupation is crystallized by way of adverse possession. Before the sale agreement, the respondent states, he had been in occupation of the suitland for five years as a lessee. These issues are also partly addressed by way of a notice of preliminary objection dated 7/3/2017.

7. In an application for orders of interim injunction the applicant must establish that he has a prima facie case with a probability of success or that he would otherwise suffer an irreparable injury. If the court is in doubt in respect of these first two grounds, it will weigh and decide the application on a balance of convenience.

8. I have observed that though the defendant claims to have paid for the land, no evidence of this is annexed to the replying affidavit. The objection raised by the applicant is no different from that that could have been raised by the applicant's parents had they been alive. The respondent is therefore no less obliged to fully respond to it simply because the persons with whom he contracted are deceased. Their Estate is represented by the applicant who has Letters of Administration to their Estate as demonstrated in the applicant's further affidavit sworn on 9th March, 2017 which exhibits the Grant.

9. The objections raised by the defendant/respondent are serious in nature. It is intriguing that no other objection appears to have been raised with regard to the defendant/respondent's use and occupation of the land before the plaintiff/applicant brought this suit. However, it is noteworthy that the land occupied is not excised from the main parcel registered in the deceased applicant's father's name. None of the normal steps formally required to secure such excision and subsequent transfer to the defendant/respondent have been shown to have occurred. There is no proper explanation for this from the defendant/respondent. It is also not lost on this court that the period during which the defendant/respondent has called the quarter acre plot of land subject matter of the suit home is no less than 16 years. If during all this period no attempt has been made to evict the defendant/respondent for any of the reasons now advanced by the applicant it would appear that the applicant has been sleeping on her rights. Nevertheless the defendant/respondent, if entitled to registration as owner of the land, appears to have also done nothing else to assert ownership during the 16 years of occupation. This is also unacceptable indolence.

10. It was stated by the court in the case of *Dinah Caren Ondiek Akinyi -vs- Leukadia Ajwang Ondoro & Thadius Otieno Ondoro 2014 eKLR* that the mere act of interring the remains of a deceased person on a parcel of land does not confer title to that land to the Estate of a deceased person on the beneficiaries of such Estate.

11. In the current case, the area occupied by the defendant is a definite portion of 0.25 acres. The defendant has his residence built thereon. He has not laid claim on the entire parcel of land known as Kitale Municipality Block 9/298. This is a portion of land which the applicant has not been enjoying the use of for a great many years. I am not therefore persuaded that the applicant would suffer any irreparable harm if the orders sought are granted. She would still be capable of utilizing the remaining land. I am not also able to establish that the applicant has a prima facie case with probability of success.

12. In the circumstances I find that the application dated 28/2/2017 is without merit. The same is hereby dismissed. The costs of the application shall be in the cause.

Signed, dated and delivered at Kitale on this 30th day of May, 2017.

MWANGI NJOROGI

JUDGE

30/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Ms. Malonza for the Applicants

Mr. Khisa for the Respondent

Ruling read in open court in the presence of Counsel for the partes.

MWANGI NJOROGE

JUDGE

30/05/2017