



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 217 OF 2017

EVERLYNE ANDIVA MALOBA ::::::::::::::: PLAINTIFF/APPLICANT

VERSUS

PHELIX ESABU OMIDO :::::::::::::::DEFENDANT/RESPONDENT

RULING

This application dated 3rd July 2017 and is brought under section 3A, 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. THAT this application be certified urgent and be heard exparte for the first instance dispensing of with service.
2. THAT an order of temporary injunction do issue restraining the defendant either by himself, relatives, agents or any other person acting under his instructions from interring the remains of the deceased EZEKIEL ESABU ODEMU in land parcel Number 905/GIMARIAN/MWEMBE pending the hearing and determination of this application.
3. THAT an order of temporary injunction do issue restraining the defendant either by himself, relatives, agents or any other person acting under his instructions from interring the remains of the deceased EZEKIEL ESABU ODEMU in Land parcel Number 905/GIMARIAN/MWEMBE pending the hearing and determination of the suit herein.
4. THAT the OCS Serem Police Station, Vihiga County do ensure compliance with the above orders.
5. THAT the costs of this application be borne by the defendant.

The application is supported by the annexed affidavit of Everlyn Maloba and predicated upon the following grounds:- That the plaintiff/applicant, sometimes in 2016, bought land from the defendant's father who is now deceased. The defendant and his relatives intend to inter the remains of his deceased father in the plaintiff's Land Parcel Number 905/GIMARIAN/MWEMBE. If the defendant proceeds with the interment, then the defendant shall lose his proprietary interest in the land parcel number 905/GIMARIAN/MWEMBE. The plaintiff has a prima facie case with a probability of success.

The applicant submitted that in the year 2016 she bought land parcel 905/GIMARIAN/MWEMBE from the defendant's father and they signed a sale agreement to that effect (A copy of the sale agreement dated 23rd November, 2016 and 15th October, 2016 are herein attached and marked altogether as "EMI"). The defendant's father known as Ezekiel E. Odemu is since deceased and is supposed to be buried on the 6th

day of July, 2017 on her land parcel that she bought from him. The plaintiff/applicant has paid the whole purchase price though the same has not been transferred to her. She stands to lose her proprietary interest in the suit land unless an order is issued barring the burial of the deceased in the said land parcel. The defendant was served but failed to attend court or file any grounds of opposition.

This court has considered the plaintiff/applicant's submissions and the supporting affidavit therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial***
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
- 3. If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

It is the plaintiff/applicant submissions that, sometimes in 2016, she bought land from the defendant's father who is now deceased. The defendant and his relatives intend to inter the remains of his deceased father in the plaintiff's Land Parcel Number 905/GIMARIAN/MWEMBE. If the defendant proceeds with the interment, then the defendant shall lose his proprietary interest in the land parcel number 905/GIMARIAN/MWEMBE. The plaintiff has a prima facie case with a probability of success. She has attached a copy of the sale agreement dated 23rd November, 2016 and 15th October, 2016. The plaintiff/applicant's submissions have not been challenged by the respondent. I find therefore that, the applicant has established a prima facie case with a probability of success at the trial and has shown that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages. I find this application is merited and grant the following orders;

1. THAT an order of temporary injunction do issue restraining the defendant either by himself, relatives, agents or any other person acting under his instructions from interring the remains of the deceased EZEKIEL ESABU ODEMU in Land parcel Number 905/GIMARIAN/MWEMBE pending the hearing and determination of the suit herein.
2. THAT the OCS Serem Police Station, Vihiga County do ensure compliance with the above orders.
3. THAT the costs of this application be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE