



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 282 OF 2017

BARBARA JEBET MOI.....PLAINTIFF

VERSUS

EMILY CHESANG.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from burying the remains of a deceased person on the suit property; plaintiff being the registered owner alleges that she has not granted the defendant consent to proceed with the burial; defendant alleging that she has lived on the suit property for over 24 years and is therefore entitled to the land on grounds of adverse possession; no counterclaim filed by the defendant; prima facie case established; application allowed)

1. This ruling is in respect of plaintiff's Notice of Motion dated 7th July 2017. The application is brought under Order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010. The orders sought are:

1) Spent

2) Spent

3) *THAT pending the hearing and the determination of the suit herein, this Honorable court be and is hereby pleased to restrain the defendant, by herself, her agents, servants, hooligans, hoodlums, hirelings and or proxies whatsoever from digging a grave, and/or burying the remains/body of the defendant's grandchild on Land Parcel No. LEMBUS/MUMBERES/2244.*

4) *THAT Officer in Charge of Eldama Ravine Police Station be ordered to enforce orders of the court.*

5) *THAT costs of this application be borne by the defendant.*

2. The application is supported by an affidavit sworn by the plaintiff on 7th July 2017. The plaintiff deposes that she is the registered owner of Land Parcel No. LEMBUS/MUMBERES/2244, the suit property. She has annexed a copy of the title deed as well as a copy of Certificate of Official Search as at 6th July 2017. She accuses the defendant of intending to bury the remains of the defendant's deceased grandchild on the suit property without her consent. I also note that in the plaint dated 7th July 2017, the plaintiff seeks a declaration that she is the owner of the suit property and an order that the defendant be evicted from the said suit property.

3. The defendant responded to the application through her replying affidavit sworn and filed in court on

27th July 2017. The defendant also filed Statement of Defence in which she denies the plaintiff's claim. In the replying affidavit, the defendant deposes that the plaintiff is not the legal owner of the suit property; that she has lived on the land since the year 1993; that the title deed annexed by the plaintiff is not a genuine document; that it is true that her daughter (not her grandchild) passed away and she intends to bury the remains on the suit property.

4. Parties agreed to dispose of the application by way of written submissions. Consequently, the plaintiff's submissions dated 28th July 2017 were filed on 28th July 2017 and the defendant's submissions dated 31st July 2017 were filed on 31st July 2017.

5. I have considered the application, the affidavits in support and in response to the application as well as the submissions by both sides. I note that the plaintiff has placed before the court evidence that she is the registered proprietor of Land Parcel No. LEMBUS/MUMBERES/2244, the suit property. Her ownership of the property is confirmed by the copy of the title deed and the copy of Certificate of Official Search as at 6th July 2017 which she has annexed. Indeed, the defendant has also annexed as "EC2" a copy of the extract of title in respect of the suit property which shows that the plaintiff is the registered proprietor of the suit property. It is noteworthy that "EC2" is certified as a true copy by the District Land Registrar, Koibatek. Under section 26 of Land Registration Act the title deed is conclusive evidence of proprietorship.

6. The plaintiff has accused the defendant of intending to bury the remains of the defendant's deceased grandchild on the suit property without the plaintiff's consent. The defendant concedes that she intends to bury the remains of her daughter on the property.

7. The defendant seems to be laying some claim to the suit property or a portion of it in the nature of adverse possession. She has however not lodged any counterclaim to that effect. The defendant also alleges that she was promised that 10 acres of the suit property would be carved out and given to her. The fact of the matter is that currently, the plaintiff remains the registered proprietor.

8. There being no dispute that the plaintiff is the registered proprietor of the suit property, the plaintiff must be accorded the full rights and privileges conferred by sections 24 and 25 of the Land Registration Act as well as Article 40 of the constitution. Those rights and privileges cannot be watered down by the alleged promise to give the defendant a portion of the property. I am therefore persuaded that the plaintiff has a prima facie case with a probability of success. I do not think that the plaintiff could in the circumstances of this case be adequately compensated by an award of damages.

9. In the end, I order that:

a) Pending the hearing and the determination of this suit, an injunction be and is hereby granted to restrain the defendant, by herself, her agents, servants, or representatives whatsoever from digging a grave, and/or burying the remains/body of any person on Land Parcel No. LEMBUS/MUMBERES/2244.

b) This order be served upon the Officer in Charge of Eldama Ravine Police Station for effective compliance.

c) Costs of the application are awarded to the plaintiff.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 17th day of August 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kipkoech for the plaintiff

Mrs. Wanderi for the defendant

Court Assistant: Gichaba