



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**CIVIL APPEAL NO. 8 OF 2015**

**JULIUS RUKIOYAH.....APPLICANT**

**VERSUS**

**JOHN KIRIMANA IKABU .....RESPONDENT**

**J U D G M E N T**

*(appeal from ruling/order of Hon D.O Onyango SPM in Meru CMCC No. 592 of 2010 dated 27.01.15).*

**BACKGROUND**

The appellant Julius Rukioyah was the 5<sup>th</sup> Plaintiff while Respondent was the first defendant in the lower Court case. The wife of 5<sup>th</sup> Plaintiff, one Rose Kabeti Rukioyah died and 1<sup>st</sup> defendant learnt that there were plans to bury deceased on the disputed land No. 476. Therefore, the 1<sup>st</sup> defendant filed the application of 2.1.15 seeking orders to bar the 5<sup>th</sup> Plaintiff from interring his wife's body in the suit land. The temporary injunction was granted on same day with the interpartes hearing set for 13.01.15. 3 days later on 5.1.15, the Appellant filed an application seeking variation of the Court's orders for the 5<sup>th</sup> Plaintiff to be allowed to bury deceased on land parcel No. 2004 Uringu 11 Adjudication Section.

The trial Magistrate dealt with the two applications simultaneously and delivered a ruling on 27.01.15, whereby the Respondents (then 1<sup>st</sup> defendant's) application of 02.01.15 was allowed while Appellants application of 5.1.15 was dismissed. 5<sup>th</sup> Plaintiff was dissatisfied with the said ruling hence the present appeal.

The grounds set out in the Memorandum of Appeal are that:-

- 1) The Learned Magistrate erred in Law and in fact in that he failed to consider or sufficiently consider the matter and all material placed before him.
- 2) The Learned Magistrate erred in law and in fact in that he failed to consider or sufficiently consider and apply the principles of law applicable in the case and the matter before him.
- 3) The Learned Magistrate erred in law in ignoring and failing to consider or sufficiently consider the Appellant's evidence that was availed.
- 4) The Learned Magistrate failed to properly apply the principles of granting or refusing injunctions as set out by the law and precedents.
- 5) The Learned Magistrate Ruling is bad in law.

On 25.04.15, directions were given for the suit to be heard by way of Written Submissions. Both sides have complied with the said directions.

### **The Appellants case.**

The arguments advanced by the appellant are that the trial Magistrate failed to apply the well laid down principles that govern the arena of interlocutory/injunction Applications. In particular, Appellant avers that the trial Magistrate erred in confining himself to the pleadings in the counterclaim ignoring plaintiff's pleadings that the two parcels of land 476 and 2004 are distinct and separate.

### **Case for Respondent**

On the other hand, Respondent avers that the land parcel No. 2004 is a subdivision of parcel No. 476, the suit land in dispute. He avers that the trial Magistrate made a correct ruling.

### **Determination**

From the outset, I must point out that this Court is not seized of the full facts as I am not the trial Court.

I find that the trial Court did take into account the issue of ownership of land parcel No. 2004. The Courts finding was that this was a disputed parcel of land.

From the records in the lower file, parcel number 2004 is a disputed one, since appellant is saying that it is not part of 476 whereas Respondent avers that the said parcel of land is part of 476.

In paragraph 10 of the Respondents affidavit of 02.01.15, he states that:-

***“The 5<sup>th</sup> Plaintiff has several parcels e.g. in Giankombe area where his wife can be buried”.***

The trial Magistrate did capture this argument when he stated that the ***“assertion is not contested and I have no reason therefore to doubt that 5<sup>th</sup> plaintiff has alternative parcels where the remains can be interred”.***

I have combed through the Replying Affidavit of the appellant, the one filed on 06.01.15. Indeed he has not rebutted this claim, that he has other parcels of land. It therefore follows that the trial Magistrate did arrive at a correct decision taking into account all the material presented before him.

There are other weak and or missing links in this case. Firstly my own assessment is that there is something inconsistent about the particulars of land parcel No. 2004. In his Submissions, Appellant avers that ***“it was impractical and illogical for parcel No. 476 measuring 3.36 acres to give birth to parcel No. 2004 measuring 12.5 acres”.*** This is also captured in the appellants Replying Affidavit filed on 06.01.15 at paragraph 15. However in paragraph 18 of the same affidavit, he avers that parcel No. 2004 is 2. 50 acres, and this is also the acreage reflected in his annexure marked JR 6, (a letter from ministry of lands and settlement dated 14.09.12). In another annexure JR 4, appellant is seeking to subdivide parcel No. 2004 to family members where the total acreage being considered is 10.0 acres.

This clearly shows that the particulars of the parcel of land No. 2004 require further clarification, and interrogation in a full trial.

Secondly, I find that Appellant has submitted that his wife's body still lies in the mortuary where bills continue to accumulate. However, particulars to that effect have not been availed.

Finally, I find that this is a case whereby deceased apparently died on 27.12.14. 2 years and 8 months down the line, what is the state of the lower Court case as at now? By the time the ruling of 27.01.15 was delivered, the lower Court case had been earmarked as ripe for trial, pretrial having been conducted way back on 04.12.14. The question is, did the trial proceed?. The appellant should have captured this aspect

in their Submissions especially if they made any request to have the trial fast tracked.

This Court would be cautions of granting any orders that would impede the trial Court's proceedings. I am of the considered view that the best way to deal with the issue is for the appellant to request for hearing of the case on priority basis so that the issues in dispute are resolved once and for all.

For now, the appeal fails and suit is hereby dismissed. Appellant is condemned to pay costs of this suit.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MERU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2017 IN THE PRESENCE OF:-**

CA: Janet

Muthomi h/b for Miss Muna for Appellant

Carlpeters Mbaabu for Respondent

Appellant present

Respondent present

**Hon. L. N. MBUGUA**

**ELC JUDGE**