



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO.117 OF 2017**

**PHILIP KIPKEMOI TONUI.....PLAINTIFF**

**VERSUS**

**JOEL KIPTOO CHEPKWONY.....1<sup>ST</sup> DEFENDANT**

**NELSON CHERUIYOT TANUI.....2<sup>ND</sup> DEFENDANT**

**THE DISTRICT ADJUDICATION AND**

**SETTLEMENT OFFICER NAKURU.....3<sup>RD</sup> DEFENDANT**

**THE DIRECTOR OF LANDS**

**AND SETTLEMENT.....4<sup>TH</sup> DEFENDANT**

**NAKURU DISTRICT LANDSREGISTRAR.....5<sup>TH</sup> DEFENDANT**

**RULING**

**(Application for an order of exhumation; body interred despite an order of injunction; application allowed)**

1. The application before me is that dated 16 November 2017 filed by the plaintiff. The application seeks the following orders :-

(a) *Spent (a certification of urgency)*

(b) *That this Honourable Court be pleased to order the 1st defendant/respondent to within 7 days of this order, remove and/or exhume the remains of Elena Mosonik (deceased) buried on the suit land parcel No. Kamara Chesupeno Settlement Scheme Parcel No. 800 against the court orders issued on 13th November 2017.*

(c) *That the court do order that at the time of exhumation, the OCS Mau Summit Police Station, the Area Chief and/or Assistant Chief and the Public Health Officer- Nakuru County do provide security and supervise the exhumation exercise.*

(d) *That pending the hearing and determination of the suit herein, the Honourable Court be pleased to issue an order of mandatory injunction restraining the 1st defendant either by himself, his relatives, agents and or assignees from burying any other person or interfering with the suit land in any way whatsoever.*

(e) *That the costs of this application be borne by the respondents.*

2. A little background will shed light as to why the applicant has deemed this application necessary.

3. The suit herein was commenced by way of a plaint which was filed on 20 March 2017. It is pleaded in the plaint that the plaintiff is the lawful proprietor of the land parcel Kamara Chesupeno Settlement Scheme Parcel No. 800 (hereinafter "the suit land"). It is averred that the plaintiff acquired the suit land by virtue of being a member of Kamara Settlement Scheme and that he was allotted the land in the year 2002. He avers that he took occupation of the said by fencing and cultivating crops until the year 2013, when the defendant without any colour of

right trespassed into it and took possession. In the suit, the plaintiff has sought orders of a declaration that he is the lawful allottee of the suit land, an eviction order against the 1st and 2nd defendants, and a permanent injunction against them.

4. Despite being served, the 1st and 2nd defendants did not file any defence.

5. On 13 November 2017, the plaintiff filed an application under certificate of urgency, for injunction, seeking to restrain the 1st and 2nd defendants from interring the remains of Elena Mosonik (deceased) on the suit land. It was said in the application that the deceased died on 8 November 2017, and the 1st and 2nd defendants were intending to inter her remains on the suit land, which would result in them suffering irreparable loss. The application was placed before my brother, Ohungo J, who was the duty judge, and he gave orders restraining the burial of the deceased on the suit land pending inter partes hearing of that application dated 13 November 2017.

6. In this application, the plaintiff has averred that despite being served with the restraining order on 14 November 2017, before the deceased was buried, the 1st and 2nd defendants disobeyed the said order and proceeded to inter the body of the deceased in the suit land. That is why he wants the order to have the body exhumed.

7. Despite being served, the 1st and 2nd defendants have not filed anything to respond to the motion. To support his application, the plaintiff has annexed an affidavit of service sworn by one Benjamin Randiga, who has sworn that he did serve the order of injunction.

8. I have no reason to doubt that the 1st and 2nd defendants were duly served with the order restraining the burial of the deceased on the suit land. They have not come to court to explain themselves and give reasons why the body of the deceased should not be exhumed. From the material before me, the only conclusion I can reach is that the 1st and 2nd defendants proceeded to inter the body of the deceased, so as to defeat the application for injunction before it is even heard. To allow the body of the deceased to rest interred in the suit land is tantamount to allowing a party to get away with violating an order of the court. I have little choice but to allow this application.

9. I hereby allow prayer (b) of the application and order the 1st and/or 2nd defendants to exhume the remains of the deceased within the requested 7 days. If they do not do so, then the plaintiff is at liberty to exhume the said body with the assistance of the OCS Mau Summit Police Station, the area Chief and/or Assistant Chief, and the Public Health Officer- Nakuru and have the body placed in the nearest mortuary. I will not issue a mandatory injunction as sought in the application, for there is still the application dated 13 November 2017, for interlocutory injunction, which has yet to be heard inter partes. I will give further directions on the hearing of that application at the delivery of this ruling.

10. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of November 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

**Ms. Kipruto C. J. for the applicant**

**No appearance for the respondent**

**Court Assistant: Carlton Toroitich**