



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

**AT MOMBASA**

**ELC CAUSE NO. 312 OF 2017**

**ELIUD TIMOTHY MWAMUNGA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**NYALE KARISA.....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff/applicant moved the Court vide his notice of motion application dated 28<sup>th</sup> August 2017 for the following orders:

**1. Spent**

**2. Spent**

**3. That pending the hearing and determination of this suit, this honourable Court do order for the exhumation of the remains of one KARISA NYALE from LR. NO. MN/III/2389.**

**4. That pending the hearing and determination of this suit, this honourable Court do issue orders restraining the Defendant, his agents and/or servants or any other person acting under his authority from trespassing, occupying, cultivating and/or interfering with the Applicant's peaceful possession of the suit property.**

**5. That the O.C.S Mtwapa and Kijipwa Police Station do provide security for compliance of these orders.**

**6. That the costs be in the cause.**

2. The application is supported by the grounds on the face of it and the affidavit deposed to by the applicant. In brief, the applicant deposes that the Respondent has settled his family members and other people on the suit property without his consent. That he has a right to own property which is protected under the Constitution and the Respondent's action are improper, unconscionable and a gross violation of his Constitutional rights.

3. The application is opposed by a preliminary objection and a replying affidavit sworn by Tabu Nyale who said she is a sister to the deceased defendant. She deposed that she was served with the pleadings herein on 3<sup>rd</sup> September 2017. Ms Tabu deposes that the defendant is deceased and that there are several suits against the deceased defendant concerning the suit property to wit Mombasa ELC No 3 of 2014, 214

of 2014 and Malindi ELC No 177 of 2015 (O.S) which are all still pending. The said Tabu also annexed a burial permit bearing name of Karisa Nyale Mwachiru as the deceased person.

4. The Respondent deposes that by suing the deceased defendant, the applicant is still keen in interfering with more than the 500 residents living on the suit property especially on plot No 313/III/MN. She also deposed that there are several subdivisions that were carried out in the year 1998/1997 to the detriment of Barani residents living on plot No 313 and who have lived on this plot since 1968. She urged the Court to dismiss this application.

5. The advocates agreed to exchange written submissions which they did file on 12.10.2017. During the pendency of this application, the Respondent conceded to the grant of prayer 4 of the motion. I will therefore only determine prayer 3 of the motion which asks for an order of exhumation. According to the applicant in his submission, it is **Karisa Nyale Mwachiru** and not **Nyale Karisa** who is dead. Secondly that this suit does not relate to land L.R No 313/III/MN. Further that the pending suits have not been concluded thus the purported settlers have not acquired any rights. On the preliminary objection raised, he submitted that the respondent lost the right to raise a preliminary objection immediately they raised other factual issues.

6. The Respondent on his part gave a summary of the facts as brought out by the pleadings. He submits the suit is defective for having been filed against a deceased defendant. Further that the applicant has not established a prima facie case because there are other suits over the same property. The defendant also states that the application is overtaken by events since the suit has been inhabited for a long time since 1968 and the balance of convenience should be to protect the rights of the majority residents of Barani Villagers.

7. The order 3 sought herein is mandatory in nature. It is a well-established principle of law that mandatory orders are only granted in clear cases and special circumstances. The principle was elaborated by the Court of Appeal in the case of **Kenya Breweries Ltd & Another vs Washington Okeyo (2002) eKLR** where that Court quoting paragraph 948 volume 24 Halsbury's Laws of England 4<sup>th</sup> Edition that mandatory injunction will be given in cases where;

**i. There is special circumstance or,**

**ii. One which ought to be decided at once or,**

**iii. The act done is a simple and summary one which can easily be remedied or,**

**iv. Defendant has attempted to steal a match on the plaintiff**

8. The standard of proof required to qualify for the grant of orders of mandatory injunction is higher than that for prohibitory (temporary) injunction. Has the case before the Court met the criteria set out above? First, the replying affidavit is sworn by a party who is a stranger to these proceedings but the applicant did not take issue with the deponent except for stating that the defendant is not the same person referred to in the burial permit. It is therefore disputed whether the defendant is indeed deceased or not. The second issue raised by the deponent of the Replying Affidavit is that they have lived on the land for several years and there are over 500 of them living there. She continued to state that there are several pending cases over the same subject land to wit **Mombasa ELC No 3 of 2014 and No 214 of 2014 (O.S)**. The applicant admitted the existence of these cases but submits that the cases have not been concluded therefore the cases have not bestowed any rights on the litigants in those suits over the suit parcel of land.

9. The fact that the applicant has admitted that the defendant is on the land as per paragraph 4 of the supporting affidavit; ***“That the Respondent has settled his family members and other people on the suit property without my consent.”*** And adding to the admission of the existence of other pending cases over the suit land. Further, in this claim, the plaintiff has prayed for an order of eviction as against the defendant. All these factors put together makes this matter not to be a simple and clear matter that can be

decided at once. Secondly it cannot be said that the defendant is trying to steal a match as the averment in paragraph 7 of the replying affidavit ***“that the residents have been using the same suit property to bury their dead”*** was not contested by the applicant by filing of a supplementary affidavit. There was also no foundation laid to support the averment by the applicant that the burial of the deceased on the suit property has lowered the value of the land.

10. Consequently I am not satisfied that the applicant has shown that his prayer for mandatory injunction merited. It is my finding that the same has not been proved to a higher standard as required by law and is hereby dismissed. He is at liberty to pursue the claim of exhumation during the hearing of the main suit. The application therefore succeeds to the extent of prayer No 4 only being allowed. Each party shall bear their costs of the application.

**Dated, signed & delivered at Mombasa this 24<sup>th</sup> November 2017.**

**A. OMOLLO**

**JUDGE**