



**REPUBLIC OF KENYA**  
**IN THE LAND COURT OF KENYA AT KAKAMEGA**  
**ELC. MISC. APPLICATION NO. 25 OF 2017**

**PHELIX ESABU OMIDO :::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**EVERLYNE ANDIVA MALOBA ::::::::::::::::::::::DEFENDANT**

**RULING**

This application is dated 26<sup>th</sup> July 2017 and is brought under Section 3 and 3A of the Civil Procedure Act seeking the following orders;

1. This application be certified as urgent and the service of the same be dispensed with in the 1<sup>st</sup> instance.
2. That the administration of St. Monica Mortuary at Kisumu be ordered to release the body and/or remains of one EZEKIEL ESABU ODEMA to the Applicant herein for burial at his other land parcel No. KAKAMEGA/IVORA/899 and not on LR. PARCEL NO. GIMARIANI MWEMBE/905.
3. That the D.O. Tambua Division and the O.C.S. Serem Police Station to ensure the compliance of these orders.
4. That this matter be deemed as closed, after the issuance of the orders since this application is only for the release of the said deceased body for burial but the land matter involving the same parties and the land parcel GIMARIANI/MWEMBE/905 is ongoing vide KAKAMEGA HC E & LC NO. 217 OF 2017).
5. Costs of this application be provided for.

The applicant submitted that, he is the son of the late EZEKIEL ESAU ODEMA whose homestead is situated on LR. PARCEL NO. KAKAMEGA/IVORA/899. On the 5<sup>th</sup> day of July, 2017 one EVERLYNE ANDIVA MALOBA obtained an injunction order vide KAKAMEGA HC E & L NO. 217 OF 2017) restraining the burial of his father on the LR. PARCEL NO. GIMARIANI/MWEMBE/905 claiming purchaser's interest. (Annexed and marked "PEO – 1" is a copy of the said order. The ruling of the aforesaid case is scheduled on the 26<sup>th</sup> July, 2017 of which the issue therein is the LR. PARCEL NO. GIMARIANI/MWEMBE/905 The family members convened a meeting and deliberated that the remains of his father be buried on the alternative LR. PARCEL NO. KAKAMEGA/IVORA/899 registered in common in the names of his father and his other two brothers. (Annexed and marked "PEO-2" is a copy of the official search) The administration of St. Monica Mortuary in Kisumu has refused to release the remains of his said father for burial on an alternative said land parcel due to orders from the O.C.S. Serem

Police Station in conjunction with this court's order dated 5<sup>th</sup> July, 2017. The applicant is likely to suffer irreparably due to increased mortuary charges as he is not employed. The burial of his late father on the alternative land parcel will not cause any harm to the respondent and/or infringe her right and/or interests over the Land Parcel NO. LR. PARCEL NO. GIMARIANI/MWEMBE/905. The remains of his late father is not in issue as nobody else is claiming the same for burial, therefore the St. Monica Mortuary in Kisumu ought to release to him for burial.

The respondent was served but failed to attend court or file any grounds of opposition. This application is based on the grounds that, the applicant's late father died and the respondent obtained a temporary injunctive order vide KAKAMEGA HC E & LC NO. 217 OF 2017 restraining the burial of the same on LR. PARCEL NO. GIMARIANI/MWEMBE/905 which is pending for ruling on the 26<sup>th</sup> July, 2017. That the OCS Serem Police Station has no locus standi to restrain the release of the body of one EZEKIEL ESABU ODEMA from St. Monica mortuary in Kisumu since the orders obtained was not meant to bar the release of the body for burial elsewhere but it was specifically meant to restrain the burial of the deceased body on the LR. PARCEL NO. GIMARIANI/MWEMBE/905. That the applicant's late father has an alternative land parcel better known as NO. KAKAMEGA/IVORA/899, which the burial is now intending to take place not on the LR. PARCEL NO. GIMARIANI/MWEMBE/905, which is in issue. That the applicant has a good cause of action since the remains of his father is also not in issue but the land parcel L.R. PARCEL NO. GIMARIANI/MWEMBE/905 is the issue. That the intended burial will not interfere with the respondent's welfare and/or rights over a portion of LR. PARCEL NO. GIMARIANI/MWEMBE/905 as the same will take place on alternative said land parcel. That the applicant is likely to suffer irreparably due to increased mortuary charges as he is not employed. That this is not a burial dispute where the remains of the deceased can be preserved at the mortuary until the determination but it is a land matter whereby the body of the said deceased can be released to the owners and buried anywhere else apart from the land parcel in issue which is GIMARIANI/MWEMBE/905. That the applicant is apprehensive of incurring a lot of loss and damages due to psychological torture. This court has looked at the court order in KAKAMEGA ELC case number 217 OF 2017 delivered by myself on the 26<sup>th</sup> July 2017 and the same stated as follows;

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.*

For the avoidance of doubt this would mean that the applicants a free to bury the remains of one EZEKIEL ESABU ODEMU elsewhere but not in Land parcel Number 905/GIMARIAN/MWEMBE pending the hearing and determination of that matter. I find therefore that this application has merit and I make the following orders;

1. That the administration of St. Monica Mortuary at Kisumu be ordered to release the body and/or remains of one EZEKIEL ESABU ODEMA to the Applicant herein for burial at his other land parcel No. KAKAMEGA/IVORA/899 and not on LR. PARCEL NO. GIMARIANI MWEMBE/905.
2. That the D.O. Tambua Division and the O.C.S. Serem Police Station to ensure the compliance of these orders.
3. That this matter be deemed as closed, after the issuance of the orders since this application is only for the release of the said deceased body for burial but the land matter involving the same parties and the land parcel GIMARIANI/MWEMBE/905 is ongoing vide KAKAMEGA ELC NO. 217 OF 2017).

4. That there will be no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**