



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA.**

**ELC NO. 217 OF 2017**

**EVERLYNE ANDIVA MALOBA ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**PHELIX ESABU OMIDO ::::::::::::::::::::::::::::::::::: DEFENDANT**

**RULING**

This application 4<sup>th</sup> October 2017 and is brought under Section 3, 3A, 63 (E), 80 and 95 of the Civil Procedure Act and orders 40 (7), 50 (6) and 51 (1) of the Civil Procedure Rules 2010 and seeks the following orders;

1. THAT this application be certified urgent.
2. THAT the applicant herein be granted leave to enter appearance and file defence herein out of time in terms of the draft Memorandum of Appearance and Defence attached hereon.
3. THAT the orders made on 26/7/2017 herein be discharged, varied or set aside.
4. THAT an order be issued and which is hereby issued directing the in-charge ST. MONICA HOSPITAL MORTUARY in KISUMU to release the body of the late EZEKIEL ESABU ODEMU to the applicant herein PHELIX ESABU OMIDO for burial on his land L.R. KAKAMEGA/IVORA/899 (1.4 HA)
5. THAT the plaintiff/respondent herein be ordered and which is hereby order to meet all the funeral expenses incurred by the applicant herein of Ksh. 100,000/= and foot all the mortuary expenses accruing up to now at ST. MONICA HOSPITAL MORTUARY in KISUMU of over Ksh. 50,000/=.
6. THAT the O.C.S. SEREM POLICE STATION do ensure compliance with the above orders and provide security to the applicant herein during the burial of the late EZEKIEL ESABU ODEMU.
7. THAT costs be provided for.

The applicant/defendant submitted that, his said late father is a joint registered proprietor of L.R. KAKAMEGA/IVORA/899 (1.4 HA) with his brother PHANUEL ODEMU NYAMBEGA alias FANUEL NYAMBEKA and SOLOMON UKIRU ODEMU alias SOLOMON UKIRU both of whom are still alive (annexture marked PEO – 2 attached hereon). On 6<sup>th</sup> July 2017 they were conducting the last burial rites and intended to bury the remains of the late on his said land. The said deceased herein had a home on his said land where he, the applicant, was born and is still living to date and also where they

buried their late brother MELKIZEDECK MAGOMERE who died in April, 2016 and their late mother BEATRICE ADEGU OMBACHO who died on 15<sup>th</sup> November 2016 peacefully without any objections from anybody including the plaintiff/respondent herein (annextures marked PEO-3 and 4 attached herein). There does not exist and has never existed in any records a parcel of land known as 905/GIMARIAN/MWEMBE thus the same is fictitious. No evidence was tendered to show if the said suit land herein ever exists and who the registered proprietor is. They have no claim nor interest whatsoever in the said fictitious suit land herein and they don't even know where it is. They have tried in vain to obtain an official search for the suit land herein to verify its owners but were advised by the Land Registrar, Vihiga County that such a parcel is non-existent in his records hence fictitious. His late father has never sold any portion of his land to anybody and particularly the plaintiff/respondent herein. His late father used to work and stay in Sudan in his lifetime and only came back in April, 2017 when he was very ill and died soon thereafter. His late father never even attended the funeral and burials of his said late brother and mother herein. The purported agreements annexed herein and marked "EM1" are thus forgeries and were never executed by his late father and were made when his mother had passed on and it is so indicated therein. There are grave discrepancies in the considerations in the purported agreements herein wherein its Ksh. 200,000/= in the agreements and Ksh. 2,000,000/= (Two Million Shillings) in the plaintiff's statement filed herein dated 3<sup>rd</sup> July 2017. When this application came for inter parties hearing the applicant was present but his advocate whom he had instructed was absent and he went out looking for him only to return and find he matter had been canvassed ex-parte. The applicant's advocate also failed to enter appearance, file defence and replying affidavit to the application herein in time despite receiving instructions. The mistakes of an advocate should not be visited upon an innocent ignorant party and he thus urge the honourable court to enlarge time and allow the applicant herein to enter appearance and file his defence out of time as per the draft copies attached herein (annextures marked PEO 5 and 6 attached herein). The applicant's draft defence herein raises serious triable issues and it shall be in the interest of justice to give him an opportunity to be heard. The interim orders herein were granted by a court without jurisdiction yet this honourable court with competent jurisdiction was present and the same should not have been confirmed on 26<sup>th</sup> July 2017 but set aside and or varied. The orders of 26<sup>th</sup> July 2017 are unenforceable and unexecutable as L.R. 905/GIMARIAN/MWEMBE is non-existent and fictitious. When the interim orders of 5<sup>th</sup> July 2017 were served upon the applicant herein they were not given an opportunity to show that indeed the land on which they were preparing to bury deceased herein was his. The plaintiff/respondent herein has never occupied, utilized, developed and or dealt in any manner whatsoever with the deceased's said L.R. KAKAMEGA/IVORA/899 (1.4 HA) and has no claim nor right whatsoever in the same. The plaintiff/respondent herein does not have clean hands to be entitled to the equitable orders sought and granted herein as she came with falsehoods and non-disclosures thereby misleading this honourable court. The plaintiff/respondent herein has no prima facie case against him with any chances of success and she has not met the principles of the celebrated case of **GIELLA VS. CASSMAN BROWN**. They had incurred funeral expenses of Ksh. 100,000/= which the plaintiff/respondent herein should be condemned to pay plus all the accruing mortuary expenses at ST MONICA HOSPITAL MORTUARY in KISUMU of over Ksh. 50,000/=. That he lacks means to meet the above stated expenses as he is a student and orphaned. The plaintiff shall not suffer any prejudice if this application is allowed and orders sought therein granted.

The respondent/plaintiff was served but failed to attend court or file any grounds in opposition. This court has considered the application and the submissions therein. The applicant submitted that the deceased herein EZEKIEL ESABU ODEMU is a joint proprietor of L.R. KAKAMEGA/IVORA/899 (1.4 HA) together with his brothers PHANUEL ODEMU NYAMBEGA alias FANUEL NYAMBEKA and SOLOMON UKIRU ODEMU alias SOLOMON UKIRU both of whom are still alive. That there does not exist anywhere within the Republic of Kenya a parcel of land known as 905/GIMARIAN/MWEMBE and the same is fictitious. The said deceased herein has never sold any piece of land to the plaintiff/respondent herein. The suit land herein which is no-existent and fictitious is not registered in the names of the deceased herein and its owner, if any, is unknown and no proof has been tendered thereof. The deceased has a home on L.R. KAKAMEGA/IVORA/899 (1.4 Ha) where his late son MELKIZEDECK MAGOMERE who died in April, 2016 and wife BEATRICE ADEGU. The applicant herein was wrongly sued in this suit as he lacks the locus standi (legal capacity) to be sued herein as he is not the legal representative of his late father. The deceased herein used to stay and work in Sudan and only came back home in April, 2017 when he was very sick and died soon thereafter and did not thus execute any of the

purported agreements annexed herein which are forgeries. The applicant herein has no claim whatsoever in L.R. 905/GIMARIAN/MWEMBE if it ever exists, and they intended to bury the remains of his father on his land L.R. KAKAMEGA/IVORA/899 (1.4 Ha) on 6<sup>th</sup> July 2017 and still intends to do so. The applicant had incurred funeral expenses amounting to Ksh. 100,000/= which the plaintiff/respondent herein should be ordered to pay and all accruing mortuary expenses at ST. MONICA HOSPITAL MORTUARY, KISUKU of over Ksh. 50,000/=. The applicant is a first year student at the University of Eldoret and thus lacks means of meeting the said expenses. The plaintiff/respondent herein misled this court into granting the orders herein thus came with unclean hands. There is no prima facie case established to enable this court grant the orders made on 26/7/2017 and all the principles set out in the celebrated case of **GIELLA VS CASSMAN BROWN** were not satisfied. The applicant herein engaged an advocate who delayed in entering appearance, filing defence and replying affidavit to the application herein on time whom he has now removed from record and when the application came up for hearing he was absent for the second calling as he had gone to trace his advocates. That it shall be in the interests of justice to grant the prayers sought herein in view of the foregoing in the following terms;

1. THAT the applicant herein be granted leave to enter appearance and file defence and serve herein out of time in terms of the draft Memorandum of Appearance and Defence attached hereon with the next 14 days.

2. THAT the orders made on 26<sup>th</sup> July 2017 herein are varied in the following terms that an order be issued directing the in-charge ST. MONICA HOSPITAL MORTUARY in KISUMU to release the body of the late EZEKIEL ESABU ODEMU to the applicant herein PHELIX ESABU OMIDO for burial elsewhere other than on 905/GIMARIAN/MWEMBE.

3. THAT the O.C.S. SEREM POLICE STATION do ensure compliance with the above orders and provide security to the applicant herein during the burial of the late EZEKIEL ESABU ODEMU.

4. THAT costs be in the cause

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14<sup>TH</sup> DAY OF DECEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**