



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 246 OF 2017

JULIUS SAVA MUGALISTI.....PLAINTIFF

VERSUS

CHARLES IMBWANGA BUSUTU.....DEFENDANT

RULING

This application is dated 14th July 2017 and is brought under Order 40 rule 1, 2, 3, 4 of the Civil Procedure Rules Section 1A and B of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. That the defendant's/respondent's deceased son's body interred on the plaintiff's/applicant's parcel of land No. KAKAMEGA/LUMAKANDA/4159 be exhumed and preserved in the nearest mortuary pending hearing and final determination of this suit.
2. THAT the exhumation process be supervised by a medical officer in the presence of officer in charge Lumakanda Police Station.
3. THAT the defendant herein be restrained from interfering and or dealing with the plaintiff's/applicant's land parcel NO. KAKAMEGA/LUMAKANDA/4159.
4. THAT the costs of this application be provided for.

The applicant submitted that, he is the registered proprietor of LR. NO. KAKAMEGA/LUMAKANDA/4159 (Annexed and marked "JSM 1" is a copy of the land title deed in respect of the same). That he acquired the said parcel of land for valuable consideration having bought the same from PHILEMONA AVISA BUSUTU and EVERLYNE MAITSI ASILIGWA vide sale agreement dated 20th July 2011 (Annexed and marked "JSM 2" is a copy of the land sale agreement). That upon purchase of the said land he took possession forthwith and started developing the same. That the defendant/respondent has since entered into his said land and planted sugarcane on the said parcel of land without his consent. That on the 17th July 2017 the defendant/respondent went ahead and buried the remains of his deceased son on his said parcel of land without his consent. That the said respondent has denied him use of the said land causing him great loss. That he has made several attempts to stop the defendant/respondent from his unlawful dealings to no avail. That the defendant/respondent has no equitable interest on his land. That his advocates issued him with a notice dated 1st April 2014 warning him of his actions (Annexed and marked "JSM 3" is a copy of the said notice) That despite the said notice the defendant/respondent has either refused, neglected and or ignored to comply to the contents of

the said notice hence this suit. That after burying his son on the said land the defendant/respondent has gone further and built houses on the said suit land and settled thereon. That he has never consented to the defendant's/applicant's entry and or dealings on the said land parcel No. KAKAMEGA/LUMAKANDA/4159. That the actions of the defendant/respondent are not only unlawful but are highly provocative and amount to a breach of peace. That he was not able to institute this suit by then since the Kakamega Station had no land judge. That he stands to suffer irreparably unless the defendant/respondent is ordered to exhume the remains of his deceased son from his said land and be estopped from trespassing and or from further dealing on the said suit land.

The respondent in his oral submissions submitted that his parcel No. KAKAMEGA/LUMAKANDA/194 and he has lived there since he inherited the same with his siblings from 1993. The applicant is a neighbor. His father died in 2002 before transferring ownership to him and his siblings. The applicant's never stopped him from burying his son there.

This court has considered both the applicant's and the respondent's submissions and the annexures herein. The application is based on the annexed affidavit of JULIUS SAVA MUGALITSI and on the following grounds; that the plaintiff/applicant is the registered proprietor of LR. No. KAKAMEGA/LUMAKANDA/4159. That plaintiff/applicant acquired the said parcel legally and for valuable consideration. That on 17th July 2017 the respondent and or his agents buried the remains of his deceased son on the applicant's land parcel No. KAKAMEGA/LUMAKANDA/4159 without the applicant's consent. That since the said burial the respondent has since constructed and settled on the said land to the detriment of the applicant. That the actions of defendant/respondent are provocative, unlawful and may lead to breach of peace. That the plaintiff/applicant could not be able to procure the temporary order for induction to restrain the said burial on 17th July 2017 since the presiding judge directed that a date for inter parties hearing be taken in the registry. That the plaintiff stands to suffer irreparably if the prayers herein are not granted. That the plaintiff has a prima facie case with very high chances of success.

It is not in dispute that the applicant is the registered proprietor of LR. No. KAKAMEGA/LUMAKANDA/4159. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

This court in considering this matter referred to the case of **Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. **Hon Justice Munyao Sila** in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

Be that as it may, in respondent submitted that he has been in occupation of the land since 1993. That his land parcel No. KAKAMEGA/LUMAKANDA/194 and he has lived there since he inherited the same with his siblings from 1993. The applicant is a neighbor. His father died in 2002 before transferring ownership to him and his siblings. The applicant's never stopped him from burying his son there.

In prayer 3 of the application the applicant seeks that the defendant herein be restrained from interfering and or dealing with the plaintiff's/applicant's land parcel NO. KAKAMEGA/LUMAKANDA/4159. The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. first American Ban of Kenya Ltd & 2 others {2003}** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

It is the applicant's submissions that he acquired the said parcel of land for valuable consideration having bought the same from PHILEMONA AVISA BUSUTU and EVERLYNE MAITSI ASILIGWA vide sale agreement dated 20th July 2011 (Annexed and marked “JSM 2” is a copy of the land sale agreement). That upon purchase of the said land he took possession forthwith and started developing the same. That the defendant/respondent has since entered into his said land and planted sugarcane on the said parcel of land without his consent. That on the 17th July 2017 the defendant/respondent went ahead and buried the remains of his deceased son on his said parcel of land without his consent. That the said respondent has denied him use of the said land causing him great loss. It is not clear when the respondent is alleged to have trespassed on his land and it was only after the respondent buried his son on the 17th July 2017 that this matter was filed under certificate of urgency. The respondent says he has been living there since 1993 with his family. The applicant has not shown a prima facie case with a probability of success. Secondly the applicant has not shown if the injunction is not granted he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages.

The applicant is seeking orders that the defendant's/respondent's deceased son's body interred on the plaintiff's/applicant's parcel of land No. KAKAMEGA/LUMAKANDA/4159 be exhumed and preserved in the nearest mortuary pending hearing and final determination of this suit. That the exhumation process be supervised by a medical officer in the presence of officer in charge Lumakanda Police Station and the defendant herein be restrained from interfering and or dealing with the plaintiff's/applicant's land parcel NO. KAKAMEGA/LUMAKANDA/4159. These are final and injunctive orders and cannot be granted at this interlocutory stage of the trial. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 13TH DAY OF DECEMBER 2017.

N.A. MATHEKA

JUDGE