



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 21 OF 2012

NAIBOR AJIJK GROUP RANCHPETITIONER

VERSUS

AGRICULTURE DEVELOPMENT CORPORATION

(ADC)1ST RESPONDENT

MINISTRY OF LANDS HOUSING AND URBAN

DEVELOPMENT.....2ND RESPONDENT

HON ATTORNEY GENERAL3RD RESPONDENT

NATOOI ENAIBOR AJIJK COMPANY

LIMITED4TH RESPONDENT

RULING

(Application to stop the burial of a deceased person on certain land under litigation; persons intending to bury being the petitioners in the suit; land registered under the name of the respondents; on a balance of probabilities, respondents entitled to object to the interment of the body in the suit land; application allowed).

1. This ruling is in respect of two applications both filed on 3 March 2016. The first application is by the 1st respondent (Agriculture Development Corporation, or ADC) and it is dated 3 March 2016. The second application is by the 2nd and 3rd respondents, (the Attorney General), and it is dated 3 February 2016 (though this may have been a confusion with 3 March 2016).

2. The application by ADC seeks the following substantive orders :-

That a temporary injunction restraining the Petitioner and in specific one Shadrack M. Kamaamia a member of the Petitioner, by itself, himself and through their agents, administrators and/or executors from burying the body of the late Alfred Leshao Kamaamia anywhere within the parcels of land known as L.R No. 20591, LR No. 410/1, LR No. 410/2, LR No. 7265 and L.R No. 7281 located in Naivasha within Nakuru County described collectively as the suit land in the Petition, pending the hearing and determination of the Petition herein.

That the Petition herein be heard and determined on priority basis to avoid abuse of the conservatory orders issued herein and to bring an end to the wrangles between the disputing groups which have resulted to chaos and bloodshed and loss of lives.

3. The application by the Attorney General seeks the following orders :-

(a) That this application be certified as urgent and inter partes hearing be dispensed with in the first instance.

(b) That the mention date set for 9th March 2016 be varied and set as the date for highlighting the parties' submissions and disposal of the matter soonest.

(c) That there be a stay of cultivation, use, occupation, leasing, burying, or in any way dealing with the suit property pending the hearing and determination of this application.

(d) That there be a stay of cultivation, use, occupation, leasing, burying , or in any way dealing with the suit property pending the hearing and determination of this petition.

(e) That the costs of the application be provided for.

4. In the grounds in support of the application, it is said that the 4th respondent is in the process of subdividing the suit land before the final determination of the suit whereas the Petitioners are in active occupation of the suit parcels of land. It is further averred that there is precious loss of public resources in that money allocated to the 1st respondent for growing nuts in the suit land is being curtailed. It is also said that there has been loss of life over wrangles between the persons allied to the Petitioners and the 4th respondent.

5. It will be seen at the outset that both applications seek an expedited hearing of this matter and further they seek to prevent interference with the land. The application by ADC specifically seeks to stop the burial of an individual on the suit properties.

6. The little background to this suit is that vide a Petition filed on 29 May 2012, which was later amended, the petitioner, the Naibor Ajijik Group Ranch, sought a declaration that they are entitled to various parcels of land on the argument that the same are community land. These land parcels were specified as LR No. 20591 part of which was formerly LR No. 6233; LR No. 410/1 and LR No. 410/2; LR No. 7265 and LR No. 7281. These parcels of land are said to be owned by ADC although ADC has an agreement with the 4th respondent (Natooli Enaibor Ajijik Company Limited) to sell to the 4th respondent, 642 acres comprised in the land parcel LR No. 7265 and 500 acres from LR No. 7281/1.

7. The case was filed in the High Court and has been continuing in that court. There are some orders that were issued restraining the sale, transfer, charging or dealings in the suit land. It is on 19 January 2016 that this matter was transferred to the Environment and Land Court, and my first contact with it was on 3 March 2016 when Mr. Ombui for ADC and Mr. Wachira Nguyo for the AG, appeared before me ex-parte , seeking interim orders on their applications. I did give an interim order staying the burial of the late Alfred Kamaamia on the suit properties and directed that the application be served for inter partes hearing on 9 March 2016. The application proceeded on the day and I took in submissions of counsels for both applicants and respondents.

8. Mr. Ombui for the 1st applicant (ADC), submitted that due to tension on the ground, there was violence which led to the death of the said Alfred Kamaamia. He submitted that the petitioners and specifically, Shadrack Kamaamia, have no right to inter the deceased on the suit properties. He submitted that the only reason that the petitioners want to bury the deceased on the suit properties is because that was his wish, but he submitted that his wish is immaterial as he never owned the land. Mr. Nguyo for the State submitted that the respondents and interested parties are the ones with title and that they have a high chance of success and therefore an injunction should issue in their favour. He submitted that the petitioners have not demonstrated any ownership of land but a mere claim on it.

9. The applicants were supported by Mr. B.N. Kipkoech for the 4th respondent who submitted that the claim of the petitioners is one of historical injustices and that that is not the same as having proprietary rights. He distinguished the authorities relied upon by the petitioners.

10. Mr. Kamwaro and Mr. Aming'a for the petitioners submitted that the applications should be disallowed. They relied on the replying affidavit of Shadrack Kamaamia. Mr. Kamwaro argued that the deceased and his forefathers lived on the suit land and that the deceased was born and bred here. He submitted that he knew no other home. He submitted that the deceased died because of violence meted out by the applicants and the applicants are therefore not in court with clean hands. He submitted that the deceased wished to be buried on the suit properties where his mother and forefathers are buried. He submitted that if the application is to be decided following the principles in ***Giella vs Cassman Brown (1973) EA 358***, the same would be in favour of the petitioners. He submitted that the applicants have not demonstrated any irreparable loss and that if they succeed in this suit, they have the remedy of exhumation available to them. He submitted that the balance of convenience tilts in favour of the petitioners as there is no property in a dead body. He submitted that it would be unfair to subject the family to additional trauma and pain if an order were issued that the body remain in a funeral home incurring costs. He submitted that burial is governed by personal law and that it is Maasai custom that the youngest son be buried where his mother is buried. He submitted that the petitioners live in their thousands in the suit properties and people die and are buried here. He wondered why this particular death has raised interest in the applicants.

11. Mr. Amingá in his submissions referred me to some authorities to support their position. He referred me to the cases of ***Dr. Christopher Muthini Mbatha vs Dr. Florence Mukii Mukita, Nairobi HCCC No. 525 of 2008 (2008) eKLR*** and ***Isaac Ngugi vs The Nairobi Hospital & 2 Others, Nairobi High Court Petition No. 407 of 2012 (2013)eKLR***. He submitted that there was nothing wrong in having the body buried where the home of the deceased was situated.

12. I have considered the matter. The core issue in the applications before me is whether or not the petitioners, especially one Shadrack Kamaamia, should be permitted to inter the remains of the deceased on the suit properties. To me, this is more or less similar to an application for injunction. The principles to be considered in an application for injunction are now well settled. A party needs to demonstrate that he has a prima facie case with a probability of success; show that he stands to suffer irreparable loss; and if in doubt the court will consider the balance of convenience.

13. The applicants in this instance are the 1st, 2nd and 3rd respondents in this petition and I need to question whether they have a prima facie case. But the matter herein is hotly disputed and I would not wish to make any pronouncements as to the respective strengths of the cases of the parties. I opt straight away to decide this application on a balance of convenience.

14. In my view, the balance of convenience is in favour of the applicants and the interested parties. At the moment, the petitioners do not hold any title to any of the properties that they claim. Indeed, that is the very reason that they filed this suit because they want to wrest ownership of the suit properties from the applicants. In the circumstances of this case, the weight of convenience tilts more in favour of the title holder rather than the person without title. I am aware of the submissions of Mr. Kamwaro, that the applicants have not come with clean hands on the allegation that they had a hand in the death of the deceased. I have considered the replying affidavit of Shadrack Kamaamia. It gives some details on how the deceased lost his life. It is said that he was attacked by marauding youths and when he (Shadrack) met

the deceased, he was still alive but with three arrows lodged in his body. The deceased then expressed his desire to be buried on the suit properties. The affidavit does not single out any particular person as having caused the death of the deceased. It is alleged in paragraph 26 that it may be a person from the 4th respondent, but nothing is specific. It is also stated that the deceased had his homestead on the suit property. That may be so, but the fact of the matter is that the deceased never had any title to the suit land and neither does the petitioner. It is also irrelevant that the applicants may not have raised any objections to the burial of other persons on the suit land. That is not a waiver to object to a future burial. They are within their rights as title holders to raise objections on how the land should be used. It was said that they have a remedy in exhumation, but as argued by Mr. Kipkoech, the deceased can as well be buried in a cemetery and if the petitioners in the suit succeed, they can as well exhume the body and inter it on the suit land. That remedy of exhumation is similarly available to the petitioners.

15. In arriving at my decision, I have considered the authorities tendered by the petitioners but I am of the view that the same are distinguishable. The case of ***Dr. Christopher Muthini Mbatha vs Dr. Florence Mukii Mukita***, was a dispute between two estranged parents on where their deceased son should be buried. The defendant who had custody of the child, submitted that the deceased had expressed desire to be buried at Langata Cemetery, a public cemetery in Nairobi. The plaintiff, the father of the deceased, was not agreeable and wished to bury him in any of the parcels of land that he owned. In deciding an application for injunction to stop the burial at the cemetery, Waweru J, held that there would be no irreparable loss if the deceased was buried and exhumed. On a balance of convenience, he held that it is not desirable that a body stays in the mortuary for a long time incurring costs. He further held that the defendant had emotional attachment to the deceased and that the balance of convenience demanded that she be relieved of the emotional burden by allowing her to bury the deceased where she had determined.

In the case of ***Isaac Ngugi vs Nairobi Hospital & 2 Others***, the 1st respondent hospital, had detained a body in hospital for non payment of hospital bills. It was claimed that this was in violation of a person's fundamental rights and freedoms. The deceased was being treated in the hospital and was indeed discharged. She was however allegedly detained until her hospital bill was paid. Sadly, she later died while still in hospital. After her demise, the body was detained until the bills were paid. The court held following the case of ***Ludindi Venant & Another vs Pandya Memorial Hospital, Mombasa HCCC No. 63 of 1998 (1998) eKLR***, that it is repugnant to detain the body of a person because of a pending bill, for a dead body has no property in it and cannot be offered as security.

16. The issue in this case is not similar to what the courts faced in the two cases above. In this matter, the applicants are asserting their rights to property that they have title to. They are not detaining the body of the deceased as in the latter case, and neither do they have any interest in burying the same, as in the former case. They simply do not want the body buried on land that they have title to and as I mentioned earlier, the balance of convenience tilts in their favour.

17. The long and short of the above is that I find merit in the application seeking to stop the burial of the deceased on the suit properties pending hearing and determination of this suit. I make this holding with the deepest of sympathies to the petitioners. I understand their pain and loss and appreciate that this ruling may cause them additional pain. But the interests of the applicants also need to be taken into account and I regret that the balance is in favour of the applicants. The petitioners have a choice of making alternative arrangements for the interment of the deceased or await the outcome of this petition.

18. On the other prayers seeking to have an expedited hearing of this matter, I will give directions upon delivery

of this ruling.

19. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 16th day of March, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Aming'a and Mr. Kamwaro for the petitioners.

Mr Ombui for 1st respondent and holding brief for Mr Kimatta for interested party.

Mr Kirui holding brief for Mr Nguyo for 2nd and 3rd respondents.

Mr B N Kipkoech for 4th respondent

Court Assistant : Janet

MUNYAO SILA

JUDGE

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