REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC NO. 139 OF 2013.

ERNEST ODHIAMBO..... PLAINTIFF.

VERSUS

PETER GABRIEL ONYANGO.....DEFENDANT.

RULING.

1. This ruling is on two things viz: The application filed here on 18th August, 2015 and a preliminary objection, whose notice was filed here on 2nd March, 2016. Written submissions were availed to dispose both.

2. The dispute between the parties is about land parcel NO. L.R NO BUNYALA/MUDEMBI/1735, which plaintiff – ERNEST ODHIAMBO – claims as an adverse possessor while the defendant – VINCENT GRADIUS ONYANGO REPRESENTS his decesed father – PETER GABRIEL ONYANGO AKILEO – who was the registered owner.

3. At this stage, the application is mainly concerned with preventing the burial of the late GABRIEL WANYADE on the disputed land. As filed, the application has 7 prayers but at this stage prayers 1, 2, and 3 are certainly not for consideration. They were considered at the exparte stage. Prayer 4 was also considered but it seems to be the case of the applicant that the court should revisit it with a view to issuing it afresh, this time to run until the suit is heard and determined.

4. To be precise, the prayers for consideration are 4, 5, 6 and 7. And they are as follows:

> Prayer 4: That an interim order of injunction do issue against the plaintiff restraining him by himself, his agents, servants and those persons claiming under him from burying the remains of one GABRIEL WANYADE on L.R. NO. BUNYALA/MUDEMBI/1735 pending hearing and determination of this application or until further orders of this court.
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> Prayer 5: That the OCS of Port Victoria police station be mandated to ensure that the order of honourable court is complied with.
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> Prayer 6: That pending further orders of the court, the body of the deceased – GABRIEL WANYADE – be preserved at Busia Referral Hospital mortuary.
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> Prayer 7: That costs of this application be provided for.

5. The plaintiff is said to be intending to bury the deceased on the disputed land yet the land is registered in the names of the defendants late father. The defendant averred that such burial would be illegal. The

plaintiff is said to own other parcels of land where the deceased can be buried.

6. The preliminary objection raised by the same defendant raises a different issue. And the issue is that the advocate for the plaintiff – OUMA OKUTTA – is not properly on record as per the provisions of Order 9 Rule 5 of Civil Procedure Rules. He is said not to have filed an application to be on record and such application was never served.

7. The plaintiff responded to the application vide a replying affidavit filed on 11th February, 2016. The plaintiff alleged, interalia, that the application is mischievous and unmerited. It was also said to be RES JUDICATA. Busia Chief Magistrate's court NO. 116 of 2015 and High court of Kenya Civil Appeal NO. 17 of 2015 where similar applications were handled and dismissed. The application is also faulted for not meeting the threshold set in ***GIELLA VS CASSMAN BROWN & CO LTD: [1973] E.A 358.***

8. The applicants submissions were filed on 30/3/2016. The thrust of the submissions is that the defendant enjoys the rights of a registered owner over the disputed land. That right by taking possession of the land and attempting to inter the remains of his relative thereon.

9.The plaintiff filed two sets of submissions. The first set was filed on 1/3/2016. The second set was filed on 17/3/2016. The first set focused on the application. The second set its focus on the preliminary objection.

10. In the first set, it emerged that the deceased is the plaintiff father. He and his family had lived on the disputed land for 70 years. The family included the plaintiff. During that period, several members of the family are said to have passed on and were all buried in the disputed land. And all that happened without any opposition from the defendants father who was then alive.

11. According to the plaintiff the defendant has not articulated and/or demonstrated the principles necessary to grant injunctive relief. He has also not demonstrated that he has superior rights over the disputed land. It was also asserted that maintaining the body of the plaintiffs father in the mortuary is both financially and emotionally draining.

12. The second set of submissions had the preliminary object as its target. According to plaintiff, the defendant is stopped from raising it. The court is said to have entertained and ruled on an application without the defendant raising the issue. He cannot therefore be allowed to raise the issue at this stage. The plaintiff averred further that blocking the counsel from representing him would interfere with his constitutional right to be heard and to be represented by an advocate of his choice.

13. I have considered the application, the responses made, the preliminary objection and the rival submissions.

14. While reading the application, I noticed that the defendant made only one prayer for injunctive relief. And that prayer was formulated to run until the application was heard and determined. An extra feature in the prayer is that the court can issue further orders but the said further orders were unspecified or unstated. At this stage, the defendant wants to get a restraining order to run until the suit is heard and determined. Such prayer is not expressly asked for in the application. The court is left to assume that such prayer can be subsumed under prayer 4 as formulated. That is why I have observed earlier in this ruling that prayer 4 seems intended to run until the determination of the suit.

15. It is necessary to point out that prayer 4 was granted by the court Exparte on 24/8/2015. It was granted exactly as formulated in the application. The defendant is wrong to assume that the court will revisit that same prayer and engage in the exercise of re-considering it, this time to run until the suit is heard and determined. The usual practice is to have the same prayer expressly reformulated in the application as a separate prayer to run until the suit is determined. The alternative of course would be to specify in the same prayer that it is meant to run first for the duration of the application and secondly to run for the duration of the suit.

16.The defendant was wrong to assume the second aspect without expressly stating so in the application. It behoved the defendant to know that court orders generally, and interlocutory injunctive orders in particular, have to be precise, clear, unambiguous, and period – specific. You cannot proceed on the basis of suppositions and expect to get the orders you want. This mistake or omission by the defendant makes the application incurably defective and is enough to warrant dismissal. No order can issue on an assumed prayer.

17. But it is necessary to say a little bit more. A look at the defendants submissions show that he has not addressed the principles set out in Giella's case (supra). It would have been necessary, for instance, to hear from the defendant why damages would not suffice as a remedy. Indeed, it would be necessary to show the damage likely to be caused or occasioned. This was not done. The plaintiff said that numerous other deceased persons are already buried on the disputed land. He wondered what harm would come to the defendant if the deceased herein was buried there. The defendant had no answer for this.

18. It needs to be noted that the plaintiff is alreay claiming the suit land as an adverse possessor. What this means is that the defendant title is already challenged. In MUNYU MAINA VS HIRAM GATHIMA [2013] eKLR, the court of Appeal held, interalia, that where a registered proprietors title is under challenge, it is not enough to dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title. He has the duty to show that the acquisition was legal, formal and free from any encumbrances. I do not see this in the defendants submissions.

19. Then there is the issue of the preliminary objection. The simple fact here is that the defendant filed the objection and left it at that. The court granted both sides ample opportunity to file submissions. The plaintiff filed submissions; the defendant did not. The defendant instead chose to go by the submissions filed earlier. The submissions had made no mention of the preliminary objection. The defendant was duty-bound to articulate the objection and prove it. He did not do so. This alone would entitle the court to dismiss the objection. But I would wish to add that the plaintiff raised a pertinent issue when he observed there is estoppel to run against the defendant.

20. The kind of stopped the plaintiff had in mind was estoppel by record. I do not exactly see it as such. I see it as estoppel by conduct. The plaintiff and the defendant had engaged each other earlier in an application in which the same counsel was on record. The matter proceeded without a hitch. The court later delivered its ruling. This is the same defendant now who turns round to fault the presence of the same counsel in this matter. This is prevarication and the court cannot be party to it.

21. It can be seen clearly at this stage that there enough weighty reasons to dismiss both the application and the preliminary objection. The defendant had raised other issues but I don't consider it necessary to delve into all of them. I am dealing with the preliminary and interlocutory issues. I run the risk of being seen to be pre-determining the main case if I deal with some the issues.

22.Suffice it to say now, that the application and the preliminary objection are, for the above reasons hereby dismissed with costs.

A.K. KANIARU,

JUDGE.

DATED AND DELIVERED ON 28TH DAY OF APRIL, 2016.

IN THE PRESENCE OF;

PLAINTIFF…….PRESENT.

DEFENDANT…….PRESENT.

COUNSEL – MUKELE & ASHIOYA ADVOCATES PRESENT.

JUDGE.