



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 126 OF 2015**

**AUGUSTINE BARASA KHISA .....PLAINTIFF**

**VERSUS**

**LAZARO NAMASAKE }**

**BUNG'AA NATO } .....DEFENANTS**

**JUDGEMENT**

**INTRODUCTION**

1. The plaintiff is the beneficial owner of **Plot No. 30 at Nyasi Settlement Scheme** (suitland) having purchased the same from **Stephen Fwamba Murunga** (deceased). The suitland measures five acres. The first defendant claims that the deceased was his uncle from Barambwa sirikwa clan.
2. The deceased passed on on 1/9/2015 and on 3/10/2015, the defendants in the company of about 200 hired goons forcefully buried the body of the deceased on the suitland. This is what prompted the plaintiff to file this suit against the defendant seeking an order that the body of the deceased be exhumed from the suitland and be interred in a Public cemetery. He also prays for a permanent injunction restraining the defendants from interfering with the suitland.

**PLAINTIFF'S CASE**

3. The plaintiff testified that he is also called **Augustine Nawanje**. On 9/2/1980, he and his brother **Richard Nawanje** entered into a sale agreement with the deceased whereby the deceased sold to them the suitland at a consideration of Kshs 25,000/-. The deceased surrendered all documents relating to the suitland to him.
4. The deceased delayed in signing transfer documents in favour of the plaintiff. The plaintiff filed a suit against the deceased in Kiatle Senior Resident Magistrate's Court in **Civil Case No. 181 of 1991**. The court ordered the deceased to sign transfer documents in favour of the plaintiff failing which the executive officer was to do so on his behalf. The deceased failed to sign transfer documents as ordered. The executive officer signed transfer documents on behalf of the deceased.
5. After the sale of the suitland, the deceased who is said to have been a Ugandan re-located elsewhere. He came back to the offices of the area chief. He was sick and he collapsed at the chief's office and died in a nearby dispensary. His body was taken to a mortuary. On 3/10/2015 the defendants in the company of more that 200 hired goons took the body from the morgue and forcefully interred it on the suitland after chasing away the plaintiff.

## DEFENDANTS CASE

6. The defendants contend that the deceased had not sold the suitland as claimed by the plaintiff. That the deceased was staying as a squatter at the area on land owned by a European Settler. He was a milkman. He was later allocated five acres which is the suitland. In 1980, the deceased moved from Nyasa area and went to look for work at Wamuini. In 2015 when he came back, he found the plaintiff had occupied his land. He was elderly and ailing. He went to report the incident to the area chief where he collapsed and died. The defendants contend that the body of the deceased was interred on his land and the deceased had never sold the suitland.

### ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

7. I have carefully considered the evidence adduced by the plaintiff and the defendants in this case. The issues which emerge for determination are firstly, whether the deceased sold the suitland to the Plaintiff and secondly whether it was proper for the defendants to bury the remains of the deceased on the suitland.

#### Whether the deceased sold the suitland to the Plaintiff

8. Though the defendants contend that the deceased did not sell the suitland to the plaintiff, there is evidence that the deceased entered into an agreement for sale of the suitland. The agreement between the plaintiff and his brother on the one part and the deceased on the other part was produced as exhibit 1. The agreement was made on 9/2/1980 before the area assistant chief Julius Nate. The agreement was duly witnessed by witnesses as required by law.

9. The plaintiff called Julius Nate as his witness. This witness testified on how the deceased and the plaintiff appeared before him and signed the agreement. The witness who was an assistant chief then witnessed the agreement. When the deceased delayed in signing transfer documents in favour of the plaintiff, the plaintiff moved to court and filed a suit against him. The court ordered that the transfer documents be signed by the executive officer. A decree of the court to that effect was produced as exhibit 5.

10. A transfer in favour of the plaintiff was duly signed by the executive officer of the court. The transfer was produced as exhibit 6. The deceased had paid some money to the settlement fund trustee in 1979. The plaintiff continued to pay the balance owed to the Settlement Fund Trustee after he purchased the suitland. Two receipts were produced as exhibit 3 and 4. The plaintiff also produced a charge document [exhibit 2] in respect of the suitland. One of the receipts and the charge document had been given to the plaintiff by the deceased.

11. The defendants are not related to the deceased. The first defendant claimed that the deceased was like his uncle from their local clan. This is not true. The deceased is said to have been a Ugandan and had no relatives in Kenya. The first defendant had recorded in his statement that the deceased was his uncle. When he was cross-examined, he was categorical that he did not say in his statement that the deceased was his uncle. He however agreed that he was in a group of about 200 people who buried the deceased on the suitland.

12. **DW2 Francis Nyongesa Barasa** testified that he knew the deceased in 1975. That the deceased used to tell him that his children were in Uganda. That the deceased moved out of the suitland in 1980. It is therefore not true when the first defendant claims to be a nephew of the deceased. I find that the deceased actually sold his land and came back because he knew he had nowhere to go to and had no relatives.

#### Whether it was proper for the defendants to bury the deceased on the suitland

13. Having found that the deceased sold his entire interest in the suitland, it was not proper for the defendants to bury his remains on the suitland. The burial of the deceased on the suitland was by force.

The plaintiff did not want the body burried there. The first defendant has admitted that he was one of those who were involved in the burrial. The deceased should bot have been burried on the suitland having sold the same many years ago.

### **DECESION**

14. For the reasons given hereinabove, I find that the plaintiff has proved his case on a balance of probabilities. An order is hereby given that the body of the deceased be exhumed and the same be burried in a Public cemetry.

A permanent injunction is hereby issued restraining the defendants or anyone acting on their behalf from ever trespassing on to the suitland or in any manner interfering with the same. The costs of this suit shall be paid by the defendants.

Dated, signed and delivered at Kitale on this 26th day of September 2016.

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**E. OBAGA**

**JUDGE**

In the presence of Mr Analo for Mr Okile for the Plaintiff and both Defendants.

Court Assistant – Isabellah

**E. OBAGA**

**JUDGE**

**26/9/16**