REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 14 OF 2016

HELLEN JEMURGOR BETT........................APPELLANT

VERSUS

JOHN KIBET ROTICH.................................RESPONDENT

RULING

Hellen Jemurgor Bett ***(hereinafter referred to as the appellant)*** has come to this court on appeal against ***John Kibet Rotich (hereinafter referred to as the respondent)*** praying that the Judgment and Decree issued by Honourable N. Moseti, Resident Magistrate in Eldoret Chief Magistrate's Court Civil Case No. 806 of 2016 on 24.8.2016 be set aside and in its place, there be an order dismissing the Respondent's suit with costs to the appellant. The respondent had filed a suit in the Lower Court claiming that he was the son to the deceased herein, ***Elena Jesum Rotuk*** and that the appellant is a daughter in-law of the said Elena Jesum Rotuk.

I have discerned the pleadings wherein the respondent stated in the plaint that the deceased, Elena Jesum Rotuk died on 23.7.2016 at Moi Teaching & Referral Hospital within Uasin Gishu County and the body is being preserved in the same hospital. The respondent contended that the deceased had acquired her own land by the time she died and hailed from Kapkaron village, Lemoo sub-location in Lemook location in Uasin Gishu County. It was the respondent's desire that the body of the deceased person be buried on her lawful piece of land as is the norm culturally. The respondents contention was that the appellant jointly with others have connived to arbitrarily bury the deceased in an unknown piece of land but not on her legally acquired land.

In the Lower Court, the respondent prayed for a permanent injunction restraining the defendant, her agents and/or any other person acting under her directions and/or instructions from burying the body of the deceased on 29.7.2016 at unknown piece of land and a declaration that the body of the deceased be buried on her lawful piece of land but not anywhere else.

The appellant in her defence stated that the acquisition of the said land at Kapkagaron in Uasin Gishu County was not voluntary as the deceased was sickly and was tricked by her daughter Annah Chepchirchir Kebenei who sold off a portion of her parcel known as Nandi/Ndalat/83 measuring 9 acres and purported to purchase a portion of land measuring 3 acres on the pretext of caring for the deceased.

That contrary to the respondent's averments, the deceased had not made any wish of where she would be buried. Indeed, her father, mother and last born son have all been buried on her aforesaid parcel of land and that is the same place the entire family including the husband to the deceased ***William Ruru Leley*** who is the respondent's father have chosen for her burial. The respondent had no legal capacity to dictate to the rest of the family where the deceased was to be buried as he is not the one who paid her hospital bills as well as arrangements to clear mortuary charges which was done by the appellant and the rest of

the family members in unison save for the respondent and Annah Chepchirchir Kebenei who seemed to be pushing a different agenda. According to the appellant, the deceased had all along lived with her as the appellant was the wife of her last born son Paul Kiplimo Bett until his death in 2013 when Annah Chepchirchir Kebenei started raising issues over the use of the land parcel Nandi/Ndalat/83 which was bequeathed to the deceased by the parents. She subsequently tricked the deceased into selling a portion thereof without the knowledge of the rest of the family and purported to relocate her against her will. It was thus, the appellants case that the respondent was simply being used by the said Annah Chepchirchir Kebenei to drive her own agenda as he had never lived with the deceased at all. She claimed to have had the blessings of the entire family being the widow of the last-born son who had been living with the deceased for most of her adult life to bury her mother-in-law in the same site her husband and her mother-in-law's parents were buried as per the customs of the Nandi people.

After considering the pleadings and submissions of parties, the court found the issues for determination as being whether the deceased was married woman and where she should be buried. Dealing with the first issue, the trial magistrate found that DW2 alleged that the deceased was his wife. He considered that he released her to go and assist her parents. DW4 acknowledged that DW2 did not explain why he did not take back the deceased after the demise of her parents. The children of the deceased grew up at their grandfather's land to wit; Nandi/Ndalat/83. They have even inherited part of that parcel of land from the deceased. Even after the alleged disagreement with her daughter in law, the deceased opted to buy an alternative parcel of land at Kapsarut, the same being Uasin Gishu/Kaormaet/203. If indeed she was married, she could have gone back to her husband according to the learned Magistrate. Considering all the evidence before him, he found that DW2 was not a husband of the deceased but a boyfriend of the deceased and therefore follows as a corollary that he does not have the right to decide the burial site for the deceased.

Dealing with the second issue, he noted that the burial site that is alleged to have been agreed upon by family members with the exception of PW1 and PW2 was at Nandi/Ndalat/83 and that was not in dispute that the deceased sold part of her land measuring 9 acres. The learned Magistrate found that Nandi Customary requirement that the parents should live with their youngest son does not in any way grant them the right to bury them in their land in the event of their demise. Pexh 1(b) shows that the deceased bought LR No. Uasin Gishu/Kormaet/203. Pexh 2(a) and Pexh 2(b) shows an established home of the deceased. The home has houses and a toilet. There is no dispute that the houses in Pexh 1(b) belongs to the deceased. I therefore find that the suitable place where the deceased should be buried is Uasin Gishu/Kormaet/203.

What is before me is the application dated 29.8.2016 wherein the applicants pray that there be temporary orders of stay of execution of the orders issued by Hon. N. Moseti (Resident Magistrate) on 24th August, 2016 and all consequential orders in Eldoret CMCC No. 806 of 2016 on 24th August, 2016 and in particular the body of Elena Jesum Rotuk (deceased) be preserved at the Moi Teaching and Referral Hospital Mortuary pending the hearing and determination of the appeal. That the costs of this application be borne by the respondent.

The application is based on grounds that the subordinate court in Eldoret CMCC No. 806 of 2016 delivered a judgment and Decree on 24th August, 2016 allowing the respondent's case with no orders as to costs, however the appellant has filed an appeal against the whole of the said judgment. The court at the time of delivering the judgment gave orders of stay of execution thereof for 4 days which lapsed on 29th August, 2016. According to the appellant, the appeal has high chances of success and that the appellant stands to suffer irreparable loss as the body is likely to be collected and buried by respondent to her detriment before her appeal is heard and determined. The appellant is willing to abide by any conditions to be set by the court for the grant of the orders sought. The appellant believes that the application has been made in good faith and without undue delay and therefore It is only just and expedient that the orders sought herein be granted. She believes that no prejudice will be occasioned on any party should the orders sought herein be granted.

The gist of the supporting affidavit is that the court directed that the deceased be buried on Uasin Gishu/Kormaet/203 and gave a stay of execution of 4 days. The said 4 days have lapsed hence this

application is for stay of execution pending appeal. The appellant is apprehensive that the respondent may collect the body and bury the same on the said parcel of land despite the pending appeal an believes that the appeal has high chances. That the entire family except the respondent and one of her sisters have agreed to have the deceased buried in her homestead. That it is thus fair and expedient that the orders be stayed and the body be kept at the mortuary to enable her prosecute her appeal before this honourable court. That she stands to suffer substantial and irreparable loss unless the orders are stayed as her father-in-law is the only person with the authority to determine the burial site of her deceased mother-in-law yet his wishes were not taken into account by the subordinate court. That she is willing, able and ready to abide by any such terms as the court may impose for the due performance of such decree or order as may ultimately be binding on her.

The respondent opposes the application on grounds that the trial Magistrate's finding on evidence was founded entirely on the credibility of the witnesses, the documents produced in court, the law and the Nandi customs and traditions as explained by the independent witness who was procured by the court and extensively and/or thoroughly cross-examined by the counsel for both parties herein. The appellant/applicant through her supporting affidavit has not demonstrated to this Honourable court what loss and damage she will suffer if the deceased's body is buried as ordered by the court. That in response to paragraphs 2 and 9 of the applicant's affidavit, she seeks to bury the deceased on her parcel of land wherein the judgment being appealed against was categorical that the deceased be buried on her parcel of land being Uasin Gishu/Koramaet/203.

According to the respondent, the prayers and orders sought herein do not meet the requirements for the grant of temporary injunctive orders as stated in the case of ***Giella Vs Cassman Brown & Co. Ltd (1973) EA 358 and t***hat stay of execution is a matter of discretion. The applicant has not demonstrated what loss or damage she will suffer and as such, no good cause has been shown why the orders sought herein should be granted in its favour.

That this application offends the provisions of Article 162(2)(b) of the Constitution of Kenya, 2010, Section 13 of the Environment and Land Court Act and Section 128 and 150 of the Land Act, 2012. That the applicant's application is therefore frivolous, vexatious, misconceived, bad in law and an abuse of the court process hence should be dismissed with costs.

The respondent prays that the applicant be given mandatory conditions to comply with precedent thereto if stay is to be granted thus, to deposit security of Kshs.500,000/= in court as the order being stayed against the burial of the deceased will definitely increase the morgue/mortuary fees which the respondent herein had not foreseen. In the premises, if the applicant does not furnish such security, then this application ought to fail.

The application was canversed by way of written submissions. The gravamen of the appellant's submissions is that the issues the court ought to consider are:

(a) Whether the appellant's appeal has any chances of success.

(b) Whether substantial loss may result to the applicant unless the order is made.

(c) Whether the application has been made without undue delay.

(d) Security should be provided.

(e) Whether this court has the prerequisite jurisdiction.

The respondent submits that the issue herein is a burial dispute between a daughter in law to the deceased and a son to the deceased. The respondent raises the issue of jurisdiction and argues that the appeal and application do not fall within the jurisdiction of this court as provided for by Articles 162(2)(b) and 165(5) (b) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act, 2011 and Section 150 of the Land Act.

The respondent further argues that the test in ***Giella Vs Cassman Brown*** has not been met to enable the court grant a temporary injunction. The respondent contends that the applicant has not demonstrated any prejudice or substantial loss likely to be suffered is stay of execution or temporary injunction is not granted.

On security, the respondent prays that the applicant do deposit security of Kshs.500,000/= within seven days to insulate the respondents in case the applicant loses the appeal.

This court is opined that the issue of jurisdiction should be dealt with first before the other issues are considered as in ***Owners of Motor Vessel "Lilians" Vs Caltex Oil (Kenya) Limited, 1989 KLR***, where Justice Nyarangi, JA (as he then was) stated at page 14;

> ***"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court service of the matter is then obliged to decide the issue right away on material before it. Jurisdiction is everything without it, a court has no power to make one more step."***

This court's jurisdiction is derived from Article 162(2) of the Constitution which gives Parliament the power to establish courts with the status of the High Court to hear and determine disputes relating to environment and land .This Article provides that:-

162. (1) The superior courts are the Supreme Court, the Court of System of courts. Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High

Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title

to, land.

(3) Parliament shall determine the jurisdiction and functions of

the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article

169, or by Parliament ....

Parliament has already enacted the Environment and Land Court Act of 2011. The jurisdiction of the court is derived from section 13(2) of the Act which provides that;

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in

land; and

(e) any other dispute relating to environment and land.

Both parties agree that the dispute is the burial site of the deceased. There is no dispute relating to environment and the use and occupation of, and title to, land and to be precise, environmental planning and protection trade, land use planning, land administration and management. Indeed if the dispute was in relation to the aforementioned, then it should have been filed in the Environment and land court as opposed to he lower court. Conversely the appellant should have raised the issue of jurisdiction in the lower court. The appellant has not demonstrated that there *is any* other dispute relating to environment and land. The dispute herein is precisely who to bury the deceased and where to bury the deceased. I do find that the court lacks jurisdiction to determine a burial dispute **per se** unless there is dispute in ownership of the land where the burial site is intended to be established. The upshot of the above is that the application is dismissed with no order as to costs this being a family dispute.

DATED AND DELIVERED AT ELDORET ON 14TH DAY OF SEPTEMBER, 2016.

ANTONY OMBWAYO

JUDGE