



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO. 106 OF 2016

DAVIS KIUMBE M'MUREMERA.....PLAINTIFF/APPLICANT

VERSUS

EMMANUEL GATOBU KIENDE..... 1ST DEFENDANT/RESPONDENT

KARANI KIENDE.....2ND DEFENDANT/RESPONDENT

GITUMA KIENDE.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. This application is dated 20th July, 2016. It seeks an injunction restraining the Respondents whether by themselves or through their agents, assigns, employees, servants or anybody else acting at their behest from interring/burying the body of the late JUDITH KIENDE on L.R NO. KIIRUA/RUIRI/280 pending the hearing and determination of this application.

2. On 21/07/2016, an Interlocutory Injunction was granted restraining the Defendants from interring/burying the body of the late JUDITH KIENDE on L.R. NO. KIIRUA/RUIRI/280.

3. The application was slated for hearing on 27/07/2016. The parties were directed to put in Written Submissions and come back to Court for a Ruling on 03/08/2016.

4. In their Submissions, the plaintiffs state that they have satisfied the conditions for a grant of injunction in accordance with the principles set out in the case of *Giella Versus Cassman Brown & Co Ltd. [1973] EA 358*. These are:-

(a) Demonstration of a Prima Facie case with a high probability of Success.

(b) Demonstration that the Plaintiff stands to suffer irreparable loss unless the temporary injunction sought is granted.

(c) If the Court is unable to determine the application based upon the first two principles, it will decide it upon a balance of convenience.

5. The Plaintiff has submitted that his deceased father, M'MUREMERA IREA MUGUNA, is the registered owner of Land Parcel No. KIIRUA/RUIRI/280 and No. NGUSHISHI SETTLEMENT SCHEME 433, among other parcels. He says that their deceased father shared out his parcels of land to his beneficiaries and they occupied their respective portions. He says that he was allocated Land Parcel No.KIIRUA/RUIRI/280 and that the Respondents' deceased mother was allocated Parcel No. NGUSHISHI SETTLEMENT SCHEME/433. He says that the Respondents' deceased mother occupied

the respective land parcel where her family's beneficial interest lies. He further says that their deceased father M'MUREMERA IRIA MUGUNA reduced his wishes into a will which bequeathed his beneficiaries their respective parcels of land.

6. The Plaintiff takes issue with the Defendants wanting to inter the body of JUDITH KIENDE on L.R No. KIIRUA/RUIRI/280 and not on any other parcels of land owned by their deceased father.

7. The Plaintiff asserts that should the deceased Kiende be buried on Parcel No. KIIRUA/RUIRI/280 and more specifically within the compound where the Plaintiff's house is built, the Defendants will be able to stake a claim on that parcel of Land. He says that parties are bound by Kimeru customs. He says that if the intention is not to stake a future claim on the parcel of the land the Defendants intend to bury the late Judith Kiende, then they should have sought to bury her on L.R. NO. NGUSHISHI SETTLEMENT SCHEME/433 where she has a beneficial interest and where she has lived all her life. The Plaintiff submits that a grave site is meant to be cared for by the deceased person's closest kin. He also submits that the personal law of Kenyans is their customary law. He proffers the cases of *Otieno Versus Ougo & Another (No. 21) [2008], KLR (G & F) 948 cited in Mombasa Misc. C.A No. 49 of 2015- Mary Manga Ansetry & Another Versus Denis Murangiri Maina*.

8. For the above reasons, the Plaintiff submits that he has a Prima facie case.

9. Regarding his likelihood to suffer irreparable loss not compensable by way of damages, the Plaintiff submits that the emotional loss and trauma that may be occasioned upon him should the deceased JUDITH KIENDE being buried on the Plaintiff's compound on L.R. NO. KIIRUA/RUIRI /280, he this will amount to unascertainable and therefore irreparable loss.

10. The Plaintiff Submit that the balance of Convenience tilts in his favour as if the deceased JUDITH KIENDE is buried on the Plaintiff's home compound on parcel No. KIIRUA/RUIRI/280, he shall suffer immense loss not compensable through damages.

11. The Defendants submit that Parcel No. KIIRUA/RUIRI/280 is 42 acres in size and is registered in the name of M'Muremera Iria, the father of the Plaintiff and of the deceased Judith Kiende. They state that the Plaintiff does not have the proprietary rights of ownership, possession, occupation and use of the estate of Muremera Iria (deceased) and in particular Parcel NO.KIIRUA/RUIRI/280 to the exclusion of other beneficiaries of equal priority.

12. The Defendants say that the late Judith Kiende together with her siblings; Edward Muriuki, Florence Mwari, Gladys Mukuba and Julia Makena before her demise, had sought to revoke a Temporary Grant of Probate issued to the applicant herein. They aver that the Plaintiff clandestinely filed Succession Cause No. 474 of 2011 in which parcel No. KIIRUA/RUIRU/280 is part of and forms part of the estate of the late M'Muremera. They state that the Applicant annexed a fictitious will which is contested and subject to be probed by the apposite Court.

13. They say that since the will proffered in Succession Cause No 474 of 2011 is contested and the matter is pending determination, and the land is registered in the father of the Plaintiff and the deceased Judith Kiende, then the defendant's have a right to bury JUDITH KIENDE on her father's land. They assert that since a Grant of Probate has not been confirmed expressly declaring that the Plaintiff is the sole beneficiary of Parcel No. KIIRU/RUIRI/280, he has no legal mandate to exclude his siblings from utilizing his deceased father's estate. They laconically state that it is irrelevant to point out other properties he wishes his deceased sister should be buried in as he does not own any of them, and therefore, cannot purport to distribute their father's estate as he wishes.

14. The Defendants submit that the Plaintiff's averment that the intent of burying Judith Kiende on Parcel No. KIIRUA/RUIRI/280 is to enable the respondents to claim a portion of the suit land, which is part of the estate of their deceased father, depicts the Plaintiff as a person of insatiable greed with no qualms of causing ripples in the family so long as he amasses as much of the estate as he possibly can. They urge the Court to be firm and to deny the Plaintiff personal enrichment from the family estate to the exclusion

of the other members of the family.

15. The Defendants submit that there is no customary law which prioritizes a beneficiary over others and say that if such a claim is made, such custom would be redundant and in contravention of the Constitution and the Laws of Succession.

16. I have carefully considered the pleadings and the Submissions proffered by the parties. I have also considered the two authorities proffered by the Plaintiff.

17. From the pleadings, it appears that the Plaintiff is the Sister of the deceased Judith Kiende. He is also the uncle of the 2nd and 3rd Defendants.

18. It is not contested that a Grant of Probate is not confirmed with respect to the estate of the late M'Muremera Irea Muguna. Until a Grant of Probate is confirmed no one person can claim full ownership of any of the properties comprising a deceased person's estate.

19. The parties proffered diametrically opposed assertions concerning issues in Succession Cause No. 474 of 2011. The pertinent issues will be handled by the Succession Court.

It is not explained why the Defendants want to bury the deceased Judith Kiende on Parcel No. KIIRUA/RUIRI/280 and not on any other of the parcels comprising the estate. I do note from the Plaintiff's Submissions that one of his principal concerns is that the body of Judith Kiende be not buried in his compound. I also note that parcel No. KIIRUA/RUIRI/280 is 42 acres in size. I opine that should the late Judith Kiende be buried on that parcel of land, it should not be necessarily in the Plaintiff's compound. I also opine that a burial of a deceased person on a piece of land does not necessarily confer a right on a person to eventually be declared the owner of the concerned land. In the present case, the Succession Court will hear the parties and make definitive findings and a determination.

21. The authorities proffered by the Plaintiff do not persuade me that the Injunctive Orders sought by the Plaintiff should be granted. I am persuaded that Judith Kiende, the Plaintiffs sister, has a right to be buried on land registered in the name of her deceased father. Article 27 of the Constitution of Kenya at Article 27 (3) decrees that women and men have the right to equal treatment before the law. Article 24 (4) decrees that there should be no discrimination against any person including on the ground of sex. These Constitutional rights do not cease to exist upon the demise of a person. I opine that they extend even up to a person's burial.

22. I need not reinvent the wheel. The Court of Appeal eruditely pronounced itself on how Courts should proceed when considering grants of Injunctions at the Interlocutory stage in the case of *Mbuthia Versus Jimba Credit Corporation [1988] KLR1* .

“The correct approach in dealing with an application for an Interlocutory Injunction is not to decided the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower Court Judge had gone beyond his proper duties and made final findings on disputed affidavits”.

I do not wish to delve into dispute issues.

23. I find that, after weighing the weight of the relevant propositions proffered by the parties, the weight in this matter falls in favour of the Defendants. Accordingly, the following orders are issued:-

1. The Plaintiff's application dated 20th July, 2016 and filed in Court the same day is dismissed and Interim Orders granted at the Exparte Stage are vacated.

2. The Defendants may bury the body of the deceased, Judith Kiende, the Plaintiffs Sister, on L.R. NO. KIIRUA/RUIRI/280 but not in the compound of the plaintiff.

3. *The O.C.S Kiirua Police Station is ordered to ensure that law and Order prevails during the burial of the late Judith Kiende.*

4. *Costs shall be in the cause.*

5. *It is so ordered.*

DELIVERED IN OPEN COURT AT MERU THIS 3RD DAY OF AUGUST, 2016 IN THE PRESENCE OF:-

CC: Daniel/Lilian

Miss Nyaga for the Plaintiff.

Kaumbi for the Defendants.

P.M.NJOROGE

JUDGE