



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT OF KENYA AT MERU**

**E & L 127 OF 2012**

**GEOFFREY MWORIA MWARI .....PLAINTIFF**

**VS**

**M'NGARUNI M'LIMINGI .....DEFENDANT**

**RULING**

In this application dated 12/10/12, the plaintiff seeks orders;

1. ***That, this Honourable court be pleased to certify this application as urgent and have the same heard expeditiously.***
2. ***That, this Honourable court be pleased to order the defendant/respondent herein to remove and or EXHUME the remains of NTOMBURA (deceased) same being child/grandchild of the defendant herein buried on the Land Parcel Number New Kiarie Adjudication Section No. 2646 which body remains were buried herein without the consent, permission, consultation with the applicant/plaintiff and the same remains to be buried upon Land Parcel belonging to the defendant.***
3. ***That, the court do order that at the time of exhumation, the OCS Ngundune/Tigania Police station do provide security and the area Chief and or Assistance (sic) Chief do supervise the exercise.***
4. ***That, an order of permanent injunction be issued restraining the defendant by himself, his agents and or assignees from burying any other person or interfering in any way with the quite possession of the plaintiff's Land Parcel, New Kiare ADJUDICATION SECTION Number 2646 till this matter is heard and determined.***
5. ***That, costs incidental to this applications be provided for by the defendant/respondent.***

*Prayer 1 is spent*

The plaintiff's case is that the defendant buried the remains of his grandson on Land Parcel Number New Kiare Adjudication Section 2646 which land belongs to the plaintiff. The plaintiff avers that this was done secretly and without his permission.

The plaintiff argues that the defendants action amounts to grave provocation that had rendered the situation on the ground volatile and had spawned palpable high tension . He further averred that it was untraditional among Ameru Culture to bury one on another's parcel of land when one has his own land. I am not sure whether the plaintiff is suggesting that it would be alright to bury a person on another's parcel

of land if the person doing so did not have his own parcel of land. The plaintiff postulates that the action by the defendant of burying a body on his parcel of land would bring curses to the plaintiff family.

The defendant has not denied that he buried his grandson's body on the suit land. He, however claims that he is in possession of the suit land which claim he says the defendant has not disputed. He proffers that the remains of his grandson were buried on the suit land openly and with the participation of members of the public after he had obtained the requisite burial permit. He also claims that registration of the suit land in the name of the defendant was fraudulent. As he had filed a defence in this suit, he argues that the defendant should not be granted the orders he seeks as if this happened there would be no need to proceed with the hearing of the main suit as the applicant would have got the prayers he is seeking in the main suit.

I note that in his plaint the plaintiff prays for judgment against the defendant for:

**(a) A declaration that land parcel No. 2646 New Kiare Adjudication Section solely belongs to the plaintiff.**

**(b) A permanent mandatory injunction restraining the defendant his agents (sic) from trespassing or interfering with the quiet possession of the plaintiffs land No. 2646 New Kiare Adjudication Section.**

**(c) Costs of the suit.**

I agree with the defendant that granting the order of exhumation prayed for by the plaintiff would have substantial bearing on the hearing and determination of the main suit. Granting an order of permanent injunction would have similar effects. In interlocutory applications, one can not determine facts and issues which deserve to be determined at the conclusion of the suit after all parties have been heard. Should a judge do so, he or she will be accused of going “ far beyond my duties” as the Court of Appeal opined in **JIMBA CREDIT CORPORATION & ANOTHER (1988) KLR I.**

**“ The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of facts but rather to weigh up the relevant strength of each side's propositions. The lower Court Judge in this case had gone far beyond his proper duties and made final finding of fact on disputed affidavits”**

I opine that this is the proper approach even when other interlocutory applications are being considered.

I note that the plaintiff in his witness statement has said the following.

**(a) “In our traditional setting, this (burial) is considered to be an act of grave provocation and it may lead to shedding of blood.”**

**(b) “ That I have managed to control my family and sympathizers but I don't know for how long I would be able to do it.”**

**(c) “I urge the court to intervene on my behalf before it is too late.”**

When parties come to court, they place themselves before the hallowed ground of the law. By filing a suit a party veritably eschews himself from contemplating extra-judicial action. In any case such actions would be criminal in nature. Parties must allow the course of justice to take its parameters. I direct the plaintiff's Advocates, Messers Leonard K. Ondari & Co. to advise their client accordingly.

In the circumstances, **I dismiss the application.** Costs shall be in the cause.

**Dated signed and delivered in open court at Meru this 27th day of February 2014 in the presence of**

:

Cc Daniel

Kaimenyi for Respondent

Ondari for Applicant

**P.M. NJORGE**

**JUDGE**