



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L MISC. NO. 7 OF 2014

SUMBEIYWO PRIMARY SCHOOL.....1ST APPLICANT

PAUL CHEBIEGO.....2ND APPLICANT

JACOB BARMAO.....3RD APPLICANT

MICHAEL MAIYO.....4TH APPLICANT

VERSUS

KANGOGO CHEBIATOR.....RESPONDENT

RULING

This matter was commenced by way of a Miscellaneous Notice of Motion application said to have been brought under the provisions of Section 3, 3A and 63(e) of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. In the application, the applicants are seeking the following orders :-

- (a) That this application be certified as urgent and service thereof be dispensed with.***
- (b) That a temporary injunction do issue restraining the respondent Kangogo Chebiator from burying his deceased son Samuel Kangogo on land parcels Plateau/Chepkongony Block 2 (Sumbeiyo)/72 and 73 pending hearing and determination of this application.***
- (c) That a temporary injunction do issue restraining the respondent Kangogo Chebiator from burying his deceased son Samuel Kangogo on land parcels Plateau/Chepkongony Block 2 (Sumbeiyo)/72 and 73 pending determination of appeal against judgment delivered by this court in Civil Appeal No. 80 of 2010.***
- (d) That other further orders and/or directions to issue as the court may deem fit and proper to grant in the interest of justice and fairness.***
- (e) That costs of this application be in the cause.***

The application is based on various grounds and is supported by the affidavit of Paul Chepyego a Committee Member of Sumbeiyo Primary School. It is averred that there was a suit namely Eldoret HCCC No. 48 of 1998 between Sumbeiyo Primary School, as plaintiff, and Kipsat Ayabei and Kangogo Chebiator (the respondent herein), as defendants. The School was claiming to be entitled to the land

parcels Plateau/Chepkogony Block 2 (Sumbeiyo)/ 72 and 73 (the suit lands) which they alleged were fraudulently registered in the names of the defendants. The matter was heard and judgement delivered by Nambuye J (as she then was) on 27 April 2004. The plaintiffs failed in the suit and they preferred an appeal which was registered as Civil Appeal No. 80 of 2010. The plaintiffs also applied for a stay of execution of the judgment and decree pending appeal. Through a ruling dated 15 February 2011, the court (Mwilu J as she then was), allowed the application for stay pending appeal and ordered the status quo to be maintained. She also made an order that there should be no further dealings with the suit land until the appeal is heard and determined.

This matter was first presented before me on 1 April 2014. Counsel for the applicant urged me to grant the interim orders of injunction sought as it was argued that the respondent threatened to bury his son on the suit land in violation of the order of stay pending appeal. I granted the interim order of injunction as prayed. When the matter came up for inter-partes hearing on 10 April 2014, counsel for the applicant, stated that the respondent in violation of the interim order of injunction went ahead and buried his son on the suit land. He stated that he would file an application for contempt which was filed on 7 May 2014. On 2 July 2014 when the application came up, I raised the issue whether this suit was competent and whether the correct avenue ought not to file an application within the existing suit Eldoret HCCC No. 48 of 1998 or Civil Appeal No. 80 of 2010 since the matters raised in this application touch on the interpretation of the order of stay pending appeal that was issued in those suits. I asked counsels to make submissions on that point.

It is that preliminary issue which is the subject matter of this ruling.

Mr. Aseo for the applicant argued that the burial of the respondent's son was not an issue either in the High Court or Court of Appeal and that this matter was instituted by way of application because time was of essence. He stated that the application only sought interlocutory orders and that if final orders were being sought, then a proper suit would have been filed.

Mr. Magut for the respondent was of the opinion that the application touches on the interpretation of the order of stay pending appeal and that this application ought to have been filed in that cause or in the appeal. He was of the view that this application is an abuse of the process of court.

I have considered the matter. It will be seen that the applicant in this matter wanted the respondent stopped from burying his deceased son on the suit parcels of land. The complaint of the applicants is that if the burial proceeds (or if it has proceeded), then this would be in violation of the order of stay pending appeal that was issued on 15 February 2011.

In my view, if this is the case, then the application ought to have been filed in the existing matter, which is Eldoret HCCC No. 48 of 1998 or in Civil Appeal No. 80 of 2010 since what is being argued touches directly on the interpretation of the order of stay pending appeal which is an order issued in an existing suit. I do not think that it was proper for the applicants to institute a fresh matter through a Miscellaneous Application and seek orders of injunction. Whether or not the burial of the son of the respondent went against the order of stay pending appeal is a matter to be addressed by the court which issued the order of stay pending appeal, which court is best placed to interpret the import of its own order. It is not a new matter for which one would be entitled to commence a suit by way of application.

For the above reasons, I find this Miscellaneous Application to be incompetent and I proceed to strike it out. I however, in my discretion make no orders as to costs.

For the avoidance of doubt, the applicant is free to seek redress in either Eldoret HCCC No. 80 of 1998 or Civil Appeal No. 80 of 2010 as the case may be.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. Mukabane for applicant.

Mr. Magut for respondent.