



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KOOME, M'INOTI & MURGOR J.J.A)**

**CIVIL APPLICATION NO. 208 OF 2020**

**BETWEEN**

**ZEPHAN KAREITHI & CO. LTD.....1<sup>ST</sup> APPLICANT**

**TABITHA WANJIKU KAREITHI.....2<sup>ND</sup> APPLICANT**

**AND**

**JACK KAGUU GITHAE.....RESPONDENT**

*(An application for injunction against the orders of the Environment and Land Court*

*at Nyeri (Waithaka, J) delivered on 18<sup>th</sup> February 2019 in ELC Case No. 38 of 2014*

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**RULING OF THE COURT**

The Notice of Motion dated 14<sup>th</sup> September 2020 brought by **the applicants, Zephan Kareithi & Co. Ltd** and **Tabitha Wanjiku Kareithi** seek orders of injunction to restrain **the respondent, Jack Kaguu Githae**, his family members, agents or servants from burying or interring his wife Ann Wanjiru Githae (*the deceased*) on the applicants' land known as **Aguthi/Gatitu 667/101 (the subject land)** on Tuesday 15<sup>th</sup> September 2020 or any other day, pending the hearing and determination of an intended appeal against the judgment (*Waithaka, J.*) delivered on 18<sup>th</sup> February 2019. Further orders were sought to restrain the respondent from cutting down eucalyptus trees or causing any other damage to the subject land or committing any other acts of wastage or carrying out any other unlawful activities pending the hearing and determination of the appeal, and for the Officer Commanding Station, Nyeri Central Police Station to should provide security and ensure compliance. The application was supported by the sworn affidavit of **the 2<sup>nd</sup> applicant, Tabitha Wanjiku Kareithi**. A copy of an obituary indicating the date of the burial as 15<sup>th</sup> September 2020 was attached.

The respondent did not file a replying affidavit or written submissions as directed by the court in a hearing notice which was duly served electronically. The background to the application is that the respondent entered into a sale agreement with the 1<sup>st</sup> applicant for the purchase of the subject land for Kshs. 650,000. After payment of the purchase price, the respondent took over possession of the subject land and proceeded to build and develop the same. The respondent's claim is that in breach of the sale agreement, the applicants refused to transfer the subject land to him, and in the alternative, the respondent acquired the subject land through the doctrine of adverse possession. The respondent therefore prayed that the court orders the transfer of the subject land to him in terms of the sale agreement.

The applicants denied the respondent's claims and also filed a counterclaim. In determining the dispute, the trial court found that the respondent had proved that he had acquired the subject land through the doctrine of adverse possession which formed an overriding interest against the applicants' title.

The applicants were aggrieved, and filed an appeal, No. 208 of 2019 which is pending for hearing. In the motion before us, the applicants seek to stop a burial on the suit land which was scheduled for a specific date, namely Tuesday, 15<sup>th</sup> September 2020, which is now long past. The applicants were obliged to file an affidavit to update the Court on the current status of the application when they were served with a hearing notice on 25<sup>th</sup> February 2021.

In the absence of any evidence to show that the burial did not take place as scheduled, this application is academic and overtaken by events. The Court will not issue orders on the basis of speculation or guesswork. This application has no merit and is hereby dismissed. Costs in the appeal.

*It is so ordered.*

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**