



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT CASE NO. 414 OF 2013**

**GRACE CHEPKEMBOI ..... PLAINTIFF**

**VERSUS**

**DANIEL LEDAMA OLE SOYA ..... 1<sup>ST</sup> DEFENDANT**

**FRANCES KISAS OLE SOYA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff who claimed to be wife of one, Emmanuel Kimaiyo A. Busienei (deceased) brought the present suit claiming the defendants had unlawfully entered onto land parcel **Transmara/Ololchani/3** registered in the name of her husband claiming the land belonged to them. The plaintiff sought a permanent injunction against the defendants to restrain the defendants from evicting the plaintiff from the suit land and/or in any other manner interfering with the same. The plaintiff simultaneously with the suit filed a Notice of Motion seeking an interlocutory injunction.
2. The defendants filed a Notice of Motion arguing the suit and the application were legally untenable as the same were incurably defective. **Hon. Justice Okong'o** allowed the defendant's preliminary objection to be disposed of first when the plaintiff's application for interlocutory injunction came for hearing on 14<sup>th</sup> November 2013. The judge upon hearing the preliminary objection held the plaintiff lacked any *locus standi* to prosecute the suit having not taken out any letters of administration for her late husband's estate. In upholding the preliminary objection the judge stated:-

**“The issue of locus standi goes to substratum of the suit. It is not a technical point which this court can overlook for the sake of substantive justice pursuant to the provisions of Article 159 (2) (d) of the constitution of Kenya. It is a matter of substantive law that a suit over a cause of action that has survived a deceased person or has arisen out of his death can only be brought by the deceased's administrator. It is also a matter of substantive law that a grant of letters of administration takes effect from the date of issuance.”**

3. With that the judge proceeded to strike out the plaintiff's suit together with the application dated 9<sup>th</sup> October 2013 together with costs which were to be recovered from the plaintiff after the hearing and determination of the defendants counterclaim.
4. The defendants by their counterclaim state that the plaintiff caused damage to their trees and crops when the defendant unlawfully destroyed trees and poles on 24<sup>th</sup> September 2013 when the plaintiff caused to be defaced and interfered with the boundary features and beacons fixed and existing between parcel numbers **Transmara/Ololchani/3 and 299**. The defendants fixed the hearing of the counterclaim on 25<sup>th</sup> November 2015 and a hearing notice was served on the plaintiff's advocates on 25<sup>th</sup> February 2015 as per the affidavit of service filed on 11<sup>th</sup> March

2015. On 25<sup>th</sup> November 2015 only the defendants and their advocate attended and there was no attendance by the plaintiff and/or her advocate. The court allowed the defendants to proceed with the hearing of their counterclaim ex parte.

5. The 1<sup>st</sup> defendant, Daniel Ledama Ole Soya testified as DW1 and was the sole defence witness. As per the record the plaintiff did not file any reply to defence and/or defence to the counterclaim with the result that the counterclaim is undefended. DW1 testified that he and the 2<sup>nd</sup> defendant are the owners of land parcel **Transmara/Ololchani/299** which borders parcel number **Transmara/Ololchani/3**. The witness adopted and relied on his witness statement dated 8<sup>th</sup> November 2013 filed in court. The 1<sup>st</sup> defendant's evidence is that the plaintiff and her children encroached onto their parcel of land and that as a consequence they had the district registrar and the district surveyor visit the site and to reestablish the common boundary and to fix the beacons on 9<sup>th</sup> January 2013. The report by district surveyor dated 2<sup>nd</sup> October 2013 annexed to the 1<sup>st</sup> defendant's replying affidavit confirms that the surveyor visited the site on 9<sup>th</sup> January, 2013 and established the boundary between **Transmara/Ololchani/299** and 3 and planted beacons and it was found that parcel No. **Transmara/Ololchani/3** had encroached on parcel No. **Transmara/Ololchani/299** by about 20 metres on the ground.
6. The witness further testified that the plaintiff damaged crops and trees belonging to the defendants valued at kshs. 67,490/= as per the assessment made by the Kenya Forest Service vide their computation report dated 14<sup>th</sup> October, 2013. The defendants claim the sum of kshs. 67,490/= being the damage occasioned by the unwarranted acts of the plaintiff and further seek an order for permanent injunction against the plaintiff.
7. The defendants' evidence is uncontroverted. I accept the defendants' evidence that there had been encroachment by the plaintiff onto their Plot No. 299 as per the report by the Transmara District Surveyor and further I accept the defendants' evidence that they suffered damages as a consequence of the transgressions of the plaintiff. I accept the damage assessment report by Julius K. Langat, District Forest Officer, Transmara dated 14<sup>th</sup> October 2013.
8. In consequence I find the defendant's counterclaim proved on a balance of probabilities and I accordingly enter judgment in favour of the defendants on the counterclaim on the following terms:-
  - i. **Kshs. 67,490/= being damages together with interest at court rates from the date of judgment until payment in full.**
  - ii. **A permanent injunction restraining the plaintiff her agents, servants or any person claiming under the plaintiff from interfering with the boundary beacons and/or features as fixed by the Transmara District Surveyor between land parcel numbers Transmara/ Ololchani/3 and 299.**
  - iii. **The costs of the counter claim are awarded to the defendants as against the plaintiff.**

**Ruling dated, signed and delivered at Kisii this 26<sup>th</sup> day of February, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the 1<sup>st</sup> defendant

..... for the 2<sup>nd</sup> defendant

**J. M. MUTUNGI**

**JUDGE**