



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**ENVIRONMENT AND LAND COURT PETITION NO. 4 OF 2013**

**GRACE MORAA MOGOI.....PETITIONER**

**VERSUS**

**OGAMBA GICHANA.....RESPONDENT**

**JUDGMENT**

1. The petitioner, Grace Moraa Mogoi filed the petition dated 14<sup>th</sup> January 2013 supported by the supporting affidavit sworn by her on the same date. The petition was filed on 21<sup>st</sup> January 2013 and the petitioner's principal prayer in the petition is that:-

**i. That the honourable court be pleased to declare that LR No. Nyamira Nyansiongo Scheme/887 belongs to the estate of the late Peter Mogoi and the respondent by himself, his agents, heirs, employees, or any other person acting on his behalf howsoever be and is hereby restrained from trespassing, wasting, or in any other manner, whatsoever, interfering with the same.**

2. The petition is premised on the ground that the petitioner and her deceased husband on or about 31<sup>st</sup> October 2000 purchased the suit land from one Charles Gichana Angwenyi and paid the full purchase price of kshs. 3.5 Million. The petitioner states they were issued with a title deed and settled on the suit land whereat they effected extensive developments. The petitioner states that the deceased died on 6<sup>th</sup> March 2010 and that he was buried on the suit land although the respondent's mother objected to the burial and filed a civil suit vide **Keroka SRMCC No. 104 of 2010** which the petitioner avers was still pending. The petitioner avers that the respondent on 6<sup>th</sup> January 2013 forcibly invaded and ploughed a portion of the suit land measuring about 1.5 acres and planted maize thereon.

3. The petitioner states the respondent's acts were in violation of the constitutional provisions Article 40 (2) (a) and (b) which guarantees the right to property and the enjoyment of property rights. The petitioner simultaneously with the petition filed a Notice of Motion seeking a conservatory order pending the hearing and determination of the petition.

4. The respondent upon being served with the petition and the Notice of Motion filed a detailed replying affidavit in opposition to the application sworn by the respondent on 10<sup>th</sup> April 2013. The respondent on the same day filed grounds of opposition to the petitioner's application thus:-

**1. The application is incompetent and otherwise an abuse of the court process.**

2. **The application is bad in law.**

3. **The application lacks merit and the same does not lie.**

4. **The petitioner/applicant lacks the locus standi to commence proceedings on behalf of the deceased person.**

5. The respondent additionally on 10<sup>th</sup> May 2013 filed a replying affidavit in opposition to the petition raising virtually the same issues he had raised in the replying affidavit in opposition to the Notice of Motion by the petitioner for conservatory orders. The respondent further on 16<sup>th</sup> July 2013 filed a notice of preliminary objection to the petition and application in which he raised the following grounds:-

1. **The petition is an abuse of the court machinery.**

2. **The petitioner has not purged the disobedience of the court order she was convicted of.**

3. **The petitioner lacks the locus standi to bring this petition.**

4. **The petition does not lie and lacks merit.**

5. **The petition is bad in law.**

6. The Notice of Motion by the petitioner was heard inter partes before **Hon. Justice Okong'o** and a ruling on the same was delivered on 24<sup>th</sup> January 2014 with the court holding that the petitioner had not demonstrated she had a prima facie case against the respondent. The court also faulted the petitioner for failing to make full disclosure of all relevant information which of itself would disentitle the petitioner of the court's discretion to grant the equitable remedy of injunction/conservatory order that the petitioner sought. The court further was of the view that it was doubtful whether the petitioner had locus to bring the petition but left the issue for trial.

7. Although Hon. Justice Okong'o had on 17<sup>th</sup> November 2014 given direction that the petition be heard by way of viva voce evidence, when the parties appeared before me for the hearing of the petition on 16<sup>th</sup> November 2015 their respective counsels agreed that the petition be argued by way of written submissions and the court acceded to the request and directed the parties to file their written submissions. The petitioner was to file her submissions within 30 days and the respondents within 30 days of being served with the petitioner's submissions. The matter was fixed for mention on 15<sup>th</sup> February 2016 to take a date for judgment. On 15<sup>th</sup> February 2016 the petitioner or her counsel did not appear. Mr. Bosire Advocate appeared for the respondent and stated that the petitioner did not serve him with any submissions and that after the expiry of the period allowed to the petitioner to file her submissions lapsed he elected to prepare and file the respondent's submissions which he filed and served on the firm of Mokuia & Company Advocates on 29<sup>th</sup> January 2016 which the firm duly acknowledged. The respondent requested for a date for judgment, and in the absence of the petitioner's advocate who duly had notice of the mention date, the court fixed the date for judgment on 15<sup>th</sup> April 2016.

8. From the evidence adduced through the filed affidavits it is evident that one Charles Gichana Angwenyi was the registered owner of land parcel **LR No. Nyansiongo Settlement Scheme/107** out of which he agreed to sell a portion of 5 ½ acres or thereabouts to the petitioner's late husband, Peter Mogoi (deceased) as per the agreement dated 31<sup>st</sup> October 2000 annexed as "**GM3**". The petitioner avers that she and her late husband paid the full purchase price of kshs. 3.5 Million and land parcel **LR No. Nyamira/Nyansiongo Scheme/887** was transferred to her late husband and a title deed was issued to him. The petitioner states they took possession of the suit premises and settled thereon until 6<sup>th</sup> March 2010 when her husband died. The petitioner claims the respondents entry onto the suit property in January, 2013 was in violation of her constitutional rights to property.

9. The respondent in his replying affidavit denies the petitioner's allegations contained in the supporting affidavit and sets out in detail the background to the alleged acquisition of the suit property by the petitioner's deceased husband. The respondent averred that the petitioner had deliberately concealed relevant facts and information with a view of misleading the court. In particular the respondent stated that the petitioner failed to disclose that the transfer of the suit land to her deceased husband was made illegally and in breach of a court order and that the title was subsequently annulled by the High Court and the deceased was required by the land registrar, Nyamira to surrender the title for cancellation.

10. The respondent avers that the decision of the Borabu Land Disputes Tribunal which was adopted by the Keroka Magistrate's Court and pursuant to which the suit land was transferred to Mogoi was quashed and set aside by the High Court in Misc. Civil Application No. 12 of 2001 with the result that the transfer was rendered ineffectual. The petitioner was restrained from burying the remains of Mogoi on the suit property and defiance of the court order led to the petitioner's father, one Francis Nyagaka Onchoka to be found guilty of disobedience of the court order and to be convicted and sentenced to pay a fine of kshs. 10,000/= or serve 3 months imprisonment in default. Warrants of arrest against the petitioner for the same contempt remain unexecuted to date.

11. The annexures attached to the respondent's replying affidavit show that the orders pursuant to which Peter Mogoi was registered as owner of **land parcel No. Nyansiongo Settlement Scheme/887** were reversed by the High Court and the orders of the High Court were not reviewed and/or set aside on appeal.

**1. The Borabu Land Disputes Tribunal on 15<sup>th</sup> February 2001 awarded 5.5 acres to Charles Gichana which he sold to Peter Mogoi.**

**2. The High Court vide Misc. Application No. 12 of 2001 made an order on 24<sup>th</sup> July 2002 quashing the proceedings and decision of Borabu Land Disputes Tribunal made on 15<sup>th</sup> February 2001 in their Tribunal case No. 9 of 2001 and all consequential orders resultant from the Tribunal decision were ordered vacated.**

**3. That an order of injunction issued in SRMCC No. 104 Keroka on 15<sup>th</sup> March 2010 restrained the respondent from burying her husband in the suit land but the respondent ignored the order and proceeded to have the deceased buried on the suit land.**

**4. The land registrar Nyamira vide letter dated 21<sup>st</sup> December 2012 called for the surrender of title issued to Peter Mogoi in respect of land parcel No. Nyamira/Nyansiongo Settlement Scheme/887 for cancellation pursuant to orders issued in HC Misc. Civil Application No. 12 of 2001 (Kisii) but there was no compliance.**

12. The petitioner did not file any further response to the respondent's replying affidavit and the annexures thereto and the respondent argues that in view of the High Court order that quashed the decision of the Land Disputes Tribunal the root of the title held by the respondent's husband held was faulted and was therefore ineffectual as the same was obtained through a faulty process. The petitioner's rights cannot therefore be said to have crystallized as to deserve the protection of the law. The constitution can only protect those rights that have been properly and legally acquired. I agree with the respondent's submissions that the petitioner has no rights to the suit property that deserve any protection.

13. The respondent has further argued that the defendant has no **locus standi** to bring this petition on behalf of the deceased estate. The petitioner states in her petition that she brings the petition on her own behalf and on behalf of the estate of Peter Mogoi who was her husband. The property the subject of the suit was registered in the name of Peter Mogoi (deceased) on 14<sup>th</sup> March 2001. The agreement of sale in respect of the property dated 31<sup>st</sup> October 2000 does not show the petitioner and the deceased were purchasing the property jointly as alleged by the petitioner. The copy of the registered title also shows the property to have been registered in the sole name of the deceased. The property could therefore only devolve to the estate of the deceased upon his death and not otherwise.

14. The interest in the property that the petitioner is claiming relates to a deceased person and the law provides that a deceased person can only be represented by a person who has been appointed as a personal legal representative to represent the deceased estate under the provisions of Section 82 of the **Law of Succession Act**, Cap 160 Laws of Kenya. The court in the case of **Trouistik Union International & Another –vs- Mbeyu & Another [1993] eKLR** held that the estate of a deceased person is vested in the legal representative and it is only the legal representative who has capacity to represent the estate.

15. In the case of **Omari Kaburi –vs- Industrial & Commercial Development Corporation [2007] eKLR**, Lady Justice Karanja (as she then was) held that:-

**“The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased...”.**

**Okong’o J.** in the case of **Kennedy Odoyo Okello –vs- District Registrar Migori & 2 Others [Kisii ELC Petition No. 37 of 2012]** observed thus:-

**“Under the Law of Succession Act, Cap 160 Laws of Kenya, the property of a deceased person belongs to his estate and the only person who has a right over the same is the legal representative of such estate.”**

16. I am in agreement with the observations of my colleague judges. The petitioner did not take out any letters of administration to represent the estate of the deceased and as a consequence she lacks the **locus standi** to sustain this suit on behalf of the deceased estate. Under Section 80 (2) of Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Section 82 (a) gives power to a personal representative to sue.

**82. Personal representative shall, subject only to any limitation imposed by the grant have the following powers:-**

**(a) To enforce, by suit or otherwise all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative.**

**(b) .....**

**(c) .....**

17. Having come to the conclusion that the petitioner did not in fact demonstrate that the respondent had infringed or violated any of her constitutional rights and that she had no **locus standi** to represent the estate of the deceased, I do not consider that anything turns on the other ground argued by the respondent that the petitioner had not purged her contempt and did not therefore deserve to be heard by the court. I have in fact considered her petition and it is my view it is devoid of any merit and the same is for dismissal.

18. The petition is ordered dismissed with costs to the respondent.

**Judgment dated, signed and delivered at Kisii this 15<sup>th</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the petitioner

..... for the respondent

**J. M. MUTUNGI**

**JUDGE**