



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**PROBATE & ADMINISTRATION**  
**SUCCESSION CAUSE NO.451 OF 1996**  
  
**IN THE MATTER OF THE ESTATE OF**  
**JAMES NYAMWEYA – DECEASED**

AND

JOYCE BOCHERE NYAMWEYA (*Suing as the legal rep. of the Estate of*

TABITHA MOIGE NYAMWEYA)

-

APPLICANT

VERSUS

CHARLES RATEMO NYAMWEYA

-

1<sup>ST</sup> RESPONDENT

JEMIMA NYABOKE NYAMWEYA

-

2<sup>ND</sup> RESPONDENT

REBECCA MORAA MASESE

-

3<sup>RD</sup> RESPONDENT

GEORGE OMARI NYAMWEYA

-

4<sup>TH</sup> RESPONDENT

KENYALYN MONYENCHE MAKONE

-

5<sup>TH</sup> RESPONDENT

MARY NYABOKE KIMORO

-

6<sup>TH</sup> RESPONDENT

JAMES OGENDI NYAMWEYA

-

7<sup>TH</sup> RESPONDENT

CHRISTOPHER NYAMBANE NYAMWEYA

-

8<sup>TH</sup> RESPONDENT

PAUL NYAMWEYA

-

9<sup>TH</sup> RESPONDENT

**RULING**

On the 5<sup>th</sup> of June 2015 Dr. G.K. Kuria asked the court to give direction on disposal of three applications

in this file that are pending.

These applications are as listed here below:

### **1<sup>st</sup> Application**

Notice of Motion dated 28<sup>th</sup> January 2015 filed by M/S Onyinkwa & Co. Advocates for Charles Ratemo Nyamweya.

This application SEEKS, inter alia, for the following orders:

1. **Spent**
2. **A temporary stay of the Proceeding herein pending the hearing and determination of this application.**
3. **The ex-parte proceeding and other consequential orders arising and delivered on (17<sup>th</sup>?) 14<sup>th</sup> December 2014 be set aside.**
4. **The matter be listed down for hearing afresh and on merit.**
5. **The costs of the application be provided for.**

### **2<sup>nd</sup> Application**

Summons dated 10<sup>th</sup> April 2015 by George Omari Nyamweya – the 4<sup>th</sup> Respondent – prosecuting on his own behalf – as the applicant.

This application SEEKS for the following orders:

1. **To annul/revoke the grant issued to the two respondents, namely, Charles Ratemo Nyamweya, the 1<sup>st</sup> Respondent herein, and Jemima Nyaboke Nyamweya, the 2<sup>nd</sup> respondent herein. In other words, the application seeks to remove, the executor and executrix as appointed so in the Will.**
2. **To appoint the applicant as an executor of this Will in replacement of the two executor and executrix above.**
3. **The costs of this application be provided for.**

### **3<sup>rd</sup> Application**

Summons for security of costs dated 9<sup>th</sup> February 2015 by Dr. G.K.Kuria.

This application SEEKS for the following orders:

1. **That the 1<sup>st</sup> Respondent herein, namely, Charles Ratemo Nyamweya, do deposit in court Ksh.10,000,000/= as security for costs of the applicant.**
2. **That in default of the said deposit, the 1<sup>st</sup> Respondent's application herein dated 28<sup>th</sup> January 2015, shall stand dismissed with costs.**
3. **That the costs of this application be provided for.**

It was Dr. G. K. Kuria's submission that the three applications, as listed above, be disposed off at the

same time by way of written submissions. However, Mr. Ayieko, submitted that the three applications be dealt with one by one, or one at a time, beginning from the first application. He advanced three reasons:

**First**, the first application was due for hearing but was interrupted by advocate's negotiations.

**Second**, the first application has a bearing of the two subsequent applications. That resolving the issues in the first application will resolve the issues in the last two.

**Third**, on issue of written submission, the need for cross-examination will have been locked out. The way to proceed is by way of viva voce evidence.

Mr. Naeku, holding brief for Judy Thiongori for the 2<sup>nd</sup> respondent, namely, Jemimah Nyaboke Nyamweya and he himself appearing for the 9<sup>th</sup> respondent. He took a position similar to Mr. Ayieko. He argued that the 1<sup>st</sup> application has ramification on the rest of the applications.

Naeku pointed out that there is an application by Judy Thiongori for Jemima Nyamweya, through the firm of Gitonga Mureithi & Co., advocates, there is an application in case No.37 of 2015 in EL court, she seeks to stay further hearing of the matter in EL court, as this case seeks to enforce the judgment of Hon. Lady Justice R. N. Sitati, which is the subject of annulment application in the application dated 28<sup>th</sup> January 2015. Therefore, he argues that it is convenient to deal with the 1<sup>st</sup> application first.

Naeku, also pointed out, that there is a Notice of Appeal on record for the 2<sup>nd</sup> and 9<sup>th</sup> respondent. Accordingly, he urged the court to prosecute the 1<sup>st</sup> application herein, the one dated 28<sup>th</sup> January 2015.

George Omari Nyamweya favoured the position held by Dr. G. K. Kuria, that the three applications be dealt with simultaneously. He however, added that if the application were to be heard separately, his application for removal of the executor and executrix, should even come first.

In response to the submissions of the two counsels with divergent views, Dr. Kuria was of the view that the first application is not necessarily tied to the last two applications.

The court is also aware of ELC court Case No.37 of 2015. This suit was filed on 23<sup>rd</sup> February 2015 in which the plaintiff therein is **Joyce Bochere Nyamweya** against ten (10) defendants. The essence of this suit is to enforce the judgment of Hon. Lady Justice R. N. Sitati delivered on 14<sup>th</sup> December 2014. The suit relates to various plots as follows:

- a. **Kisii Municipality/Block III/98**
- b. **Kisii Municipality/Block III/156**
- c. **Kisii Municipality/Block III/508**
- d. **Kisii Municipality/Block III/509**
- e. **Kisii Municipality/Block III/510**

There are also several applications in that suit, No.37 of 2015, pending hearing and determination.

### **1<sup>st</sup> Application**

Notice of Motion dated 9<sup>th</sup> February 2015 by Dr. G. K. Kuria for the plaintiff/applicant – Joyce Bochere Nyamweya. This application, seeks, inter alia, to restrain the executor and executrix (first and second defendant/respondent) from alienating parcels of land named in that application.

### **2<sup>nd</sup> Application**

Notice of Motion dated 19<sup>th</sup> March 2015 by M/S Gitonga Mureithi for Jemimah Nyamweya. This application seeks to stay the hearing of the Civil Case number 37 of 2015 pending the hearing and

determination of Succession Cause No.451 of 1996.

### **3<sup>rd</sup> Application**

Notice of Motion dated 9<sup>th</sup> April 2015 by Dr. G. K. Kuria for the plaintiff/applicant – Joyce Bochere Nyamweya. This application seeks defendant/respondent, Jemimah to furnish security for costs in Ksh.5,000,000.00 in default thereof that her application dated 9<sup>th</sup> March 2015 to stand dismissed with costs.

### **ISSUES FOR DETERMINATION**

These are three, in my view:

1. Should this court, in giving directions, also include the three other applications ELC Court, No.37 of 2015?
2. In respect of three applications in Succession Cause No.451 of 2015, what directions will this court adopt as it appertains to the three applications herein: Is it:
  - a. *Joint disposal of all the three applications? Or*
  - b. *Deal with each separately, commencing with the application dated 28<sup>th</sup> January 2015?*
3. Should the applications be canvassed by written submissions or by *viva voce* evidence?

### **ANALYSIS AND FINDINGS**

#### **On the first issue above,**

Civil Case No.37 of 2015 is filed in the Land Court. The Land Court is a specialized Court, along with the Labour Court. The two are courts of equal status with the High Court. In **Article 167 (2) (a) and (b)**, the Constitution sets the parameters between the specialized courts and the High Court. The parameters set are ones of jurisdiction.

**Article 162(3)** says:

“Parliament shall determine the jurisdiction and the functions of the courts contemplated in clause (2) thereof. The **Environment and Land Court Act, 2011** set out the jurisdiction and the functions of this court. Therefore a Puisne Judge sworn to be a judge in the Environment and Land Court is precluded from performing the functions of the judge in the High Court and vice – versa. This is so because the legislation so enacted confers specific jurisdiction to a judge sworn as a judge in the land court. The same goes for Labour Court. See **HCCC No.515 of 2003, Benson Ndwiga Njue & 108 others vs Central Glass Industries Ltd.** This was a three bench court, comprising the High Court Judge, Hon. Hatari Waweru and Nduma and Makau J,J (*both of the Industrial Court*). Preliminary objection was raised in light of **Article 162(2)**. **Article 165 (5) (b)** the constitution decreed that the High Court shall not have jurisdiction in respect of matters falling within the Environment and Land. The latest case in this matter is referred to as the Malindi case, It is the court of Appeal decision, this court has confirmed this view. The case - a consolidated case, **cases Nos.44, 45 and 76 of Karisa Chengo (1<sup>st</sup> Appellant), Jefferson Kalama Kengha (2<sup>nd</sup> Appellant), Kitsao Charo Ghati ( 3<sup>rd</sup> Appellant) –vs- Republic (Respondent).**

In view therefore, on this issue of applications in Civil Case No.37 of 2015, this court is precluded from dealing with this matter for want of jurisdiction for reasons advanced here above.

It is true that the issues raised in this case emanated from Succession Cause No.451 of 1996. However, as soon as those issues touching on land *per se* were filed in the Land Court, the High court is suddenly precluded from dealing with the same.

**On second issue above,**

It is my task to determine what directions to give in the light of the application made by Dr. G. K. Kuria and the submissions of the counsels on record.

There are three applications. The first application seeks to set aside the judgment of Hon. Justice R. N. Sitati delivered on 14<sup>th</sup> December 2014. In an extensive affidavit of support sworn on the same date, the applicant raises several issues, the lack of fair trial in the matter, a trial in which he did not participate due to non agreement on the hearing date.

The other two applications are brief, the orders they seek are, *inter alia*, the deposit of Ksh.10,000,000.00 against the executor for security for costs of the applicant. And the order that if the deposit is not forthcoming, his application dated 28<sup>th</sup> January 2015 will stand dismissed.

Equally the second application dated 10<sup>th</sup> April 2015, seeks the removal of both the executor and executrix as legal representative of the estate of James Nyamweya.

The two last applications are radical, if they are upheld the application of 28<sup>th</sup> January 2014 will not be prosecuted, as the applicant may lose his right to prosecute his application should he be unable to raise a deposit of Ksh.10,000,000.00. And equally will be unable to prosecute his application if he is successfully removed as an executor. The two applications seek to lock the applicant from prosecuting his application.

The court has therefore made finding that the first application must be heard first and determined before the other two are heard and determined.

Therefore this court directs that the first application be heard and determined before the other two applications are heard and determined.

**On third issue above**

This matter to be canvassed by way of written submissions. This would be the best route to take, considering the number of parties involved herein.

It is so ordered.

**Dated, signed and delivered at Kisii this 25<sup>th</sup> day of June, 2015**

**HON. C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

- **Ndungu holding brief for Dr. Kuria for applicant**
- **Ms. Sagwa holding brief for Judy Thiongori for Jemimah**
- **Ms. Sagwa holding brief for Bowry & Co. for Paul Nyamunga**
- **George Omari for himself – 4<sup>th</sup> Respondent**

**- Anyikwa & Co. for Charles Ratemo Nyamweya (absent)**

**- Firm of Nyamironge for 8<sup>th</sup> Respondent (absent)**

**- Samuel Omuga - Court clerk**