



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**ENVIRONMENT & LAND COURT**  
**ELC NO. 352 OF 2014**

**ELIMELDA KWAMBOKA ARERI suing on behalf of the  
family of the late CHRISTINE GESARE NYAMORE**

**and on her own behalf..... PLAINTIFF**

**VERSUS**

- 1. PROFESSOR JOHN SOLANA AKAMA )**
- 2. REV. FATHER NYAANGA )**
- 3. HON. THE ATTORNEY GENERAL ).....DEFENDANTS**
- 4. ARCH SURVEYORS )**

**RULING**

What is before me is the Plaintiffs application dated 17/9/2014 in which the plaintiff has sought the following prayers:

- i. That this application be certified urgent and be heard ex-parte in the 1<sup>st</sup> instance and service be dispensed with.
- ii. That pending the hearing and determination of this application inter-parties, there be a permanent injunction restraining the 1<sup>st</sup> Defendant by himself or through his agents, servants or anybody claiming under him from entering alienating or working on the applicants parcel of land LR No. Nyaribari Chache/B/B/Boburia/8016 formerly Kisii Nyaribari Chache B/B/Boburia/1549 belonging to Monayo Nyakundi ID No. 030282 (Deceased) annexed death certificate marked EKA004.
- iii. That title Number LR Nyaribari Chache B/B/Boburia/8061 be surrendered for safe custody to 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Defendant/Respondent till this application is heard and determined.
- iv. That in the alternative, order do issue for status quo pending determination of this application.
- v. That upon the Hon. Court granting prayers No. 1 – 4 above, the annexed plaint herein is deemed to have been filled.
- vi. That costs for this application be provided for.

The Plaintiff's application was brought on the grounds set out in the body thereof and in the affidavit of the plaintiff sworn on 17/9/2014. The Plaintiff claims to have brought this suit on her own behalf and on behalf of her siblings. She has claimed to be the daughter of one Paul Monayo Nyakundi deceased. Paul Monayo was married to one, Christine Gesare Nyamongo who is also deceased. It is not clear whether or not Christine Gesare Nyamongo is the Plaintiff's mother or not. The Plaintiff has claimed that Paul Gesare Nyamongo aforesaid had an interest in all that parcel of land known as LR No. Nyaribari Chache/B/B/Boburia/1549 (hereinafter referred to as "**Plot No. 1549**"). The plaintiff has contended that no steps have been taken to administer the estates of the said Paul Monayo and Christine Gesore Nyamongo. The plaintiff's complaint is that the interest of Paul Monayo and Christine Gesare in the said parcel of land was dealt with illegally before succession proceedings and had been undertaken. The plaintiff has contended that the transfer of a portion of the said parcel of land known as LR No. Nyaribari/Chache/8016 ("**the suit property**") to the 1<sup>st</sup> defendant is illegal since the sub-division of plot No. 1549 that gave rise to the suit property was carried out illegally and fraudulently. The plaintiff has contended that there is no way Christine Gesare Nyamongo could have sold and transferred the suit property to the 1<sup>st</sup> defendant while she was deceased. It is on account of the foregoing that the plaintiff sought the prayers set out hereinabove.

The Plaintiff's application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through grounds of opposition dated 13/4/2005. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that the plaintiff's application is incompetent and legally untenable. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the suit herein is incompetent together with the present application in that the plaintiff has no *locus standi* to maintain the same having not obtained a grant of letters of Administration in respect of the estates of the deceased persons on behalf of whose children she claims to have brought the suit. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended further that the plaintiff's suit is barred by dint of the provisions of Section 82 of the Law of Succession Act, Chapter 160 Laws of Kenya. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended further that the plaintiff has not satisfied the conditions for granting temporary injunction. Finally the 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that the injunctive relief sought by the plaintiff is of a permanent nature and as such cannot be granted at an interlocutory stage.

On 14/4/2015, the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed her submission on 24/4/2015 while the 1<sup>st</sup> and 2<sup>nd</sup> defendants did so on 30/4/2015. In her submissions the plaintiff submitted among others that; she is a sister in law to Christine Gesare Nyamongo who died intestate in the year 2007. Christine Gesare Nyamongo owned the suit property. The suit property was sold to the 1<sup>st</sup> defendant by one Benson Bungu Magwaro after the death of Christine Gesare Nyamongo. When Christine Nyamongo died, she left three (3) young children. This suit was brought after the family of Christine Gesare Nyamongo received a letter from the 1<sup>st</sup> defendant's advocates on record asking them to vacate the suit property. The Plaintiff submitted that the transfer of the suit property to the 1<sup>st</sup> Defendant was carried out unlawfully and that the transaction amounts to intermeddling with the estate of a deceased person. On the 1<sup>st</sup> and 2<sup>nd</sup> defendant's objection to the suit on account of *locus standi*, the plaintiff submitted that this is an issue which can only be determined at the trial. The plaintiff submitted that she brought this suit as a guardian ad litem of the children of Christine Gesare Nyamongo and as such she has *locus standi* to maintain the suit. The plaintiff submitted further that the 1<sup>st</sup> defendant who has claimed to have acquired the suit property lawfully has not submitted to court for scrutiny the documents detailing his acquisition of the said property. The plaintiff submitted that Article 40 of the Constitution does not protect property which has been acquired unlawfully. The plaintiff submitted that the children of Christine Gesare Nyamongo are threatened with eviction unless the orders sought are granted. On the procedural lapses pointed out by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff referred to Article 152 (2) (d) of the Constitution and Section 1A of the Civil Procedure Rules, Cap 21 Laws of Kenya and submitted that the court should strive to sustain suits rather than striking them out. The plaintiff submitted that the court should administer justice without undue regard to technical or procedural technicalities.

In their submissions in reply, the 1<sup>st</sup> and 2<sup>nd</sup> defendants (hereinafter referred to only as "**the defendants**") reiterated the contents of their grounds of opposition and submitted that the plaintiff's suit

is time barred, contrary to section 82 of the Law of Succession Act, Cap 160 Laws of Kenya, has been brought without *locus standi* and does not disclose any reasonable cause of action. The defendants submitted further that the suit is legally untenable.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants' grounds of opposition. Finally, I have considered the written submissions by the parties and the authorities cited in support thereof. This being an application for a temporary injunction, it has to be considered in light of the principles that were enunciated in the case of **Giella –Vs- Cassman Brown and Company Limited (1973) E.A 358** where it was held that an applicant for interlocutory injunction must establish a prima facie case against the respondent and must also demonstrate that unless the order is granted he will suffer irreparable injury which cannot be adequately compensated in damages. If the court is in doubt as to the above, the application would be decided on a balance of convenience. The plaintiff's suit as initially instituted was brought by the plaintiff in her own right and on behalf of **"the family of the late Monayo Nyakundi"**. In her verifying affidavit and her affidavit in support of the present application, the plaintiff described the said "Monayo Nyakundi" as her father. The plaintiff filed together with the plaint an authority to sue signed by ten (10) people who are described as **"the family of the late Monayo Nyakundi"** who are said to have authorized her to bring this suit on their behalf. In her plaint, the plaintiff contended that plot No. 1549 was at all material times registered in the name of the said Monayo Nyakundi (hereinafter referred to only as **"Monayo"**) who died intestate on 12/4/1998. The plaintiff contended that without taking out grant of letters of Administration in respect of the estate of Monayo, a group of people masquerading as his beneficiaries obtained consent of the land control board and proceeded to subdivide plot no. 1549 into four (4) portions one of which is LR No. Nyaribari Chache/B/B/Boburia/8016 (**"the suit property"**) which was registered in the name of Christine Gesare Nyamongo, deceased. The plaintiff's contention was that the sub-division of plot No. 1549 and the transfer of a portion thereof to Christine Gesare Nyamongo was unlawful on account of the fact that the succession proceedings had not been undertaken in respect of the estate of Monayo who was the registered owner of plot No. 1549. The plaintiff contended further that after the death of Christine Gesare Nyamongo, the 1<sup>st</sup> Defendant proceeded with the assistance of the 3<sup>rd</sup> defendant to acquire the suit property which acquisition has also been termed as illegal by the plaintiff the same having been carried out before grant of letters of administration in respect of the estate of Christine Gesare who was registered owner thereof was taken out. The plaintiff has sought among other reliefs, a declaration that the sub-division of plot No. 1549 and the creation of the suit property were carried out illegally and a permanent injunction to restrain the defendant from interfering with the suit property. The plaintiff's application for injunction which is the subject of this ruling was based on the plaint the contents of which I have set out above.

On or about 12/11/2014, the plaintiff amended her plaint. In the amended plaint, the suit herein has now been brought on behalf of the **"family of Christine Gesare Nyamongo"** and on the plaintiff's own behalf. The plaintiff's claim as pleaded in the amended plaint is restricted to LR No. Nyaribari Chache/B/B/Boburia/8016 (**"the suit property"**). The plaintiff has averred that at all material times, the suit property was registered in the name of Christine Gesare Nyamongo (hereinafter referred to only as **"Gesare"**) who died intestate in the year 2007. The plaintiff has averred that no succession has been undertaken in respect of the estate Gesare. The Plaintiff has contended that the 1<sup>st</sup> Defendant acquired the suit property after the death of Gesare before grant of letters of administration in respect of her estate had been taken out and without the consent of her beneficiaries who including her children who are minors. The plaintiff has contended that the 1<sup>st</sup> defendant acquired the suit property illegally. In the amended plaint, the plaintiff has sought among other reliefs; the rectification of the register of the suit property. It instructive to note that the plaint was amended while the application for injunction the subject of this ruling was pending. The application itself was filled on the basis of the original plaint. The application was not amended to accord with the amended plaint. The plaintiff annexed to the amended plaint a copy of grant of letters of administration limited to filing suit in respect of the estate of Christine Gesare Nyamongo (**"Gesare"**) dated 5/11/2014. The grant was issued to the plaintiff and one, Concepta Moraa Mosioma. The plaintiff also annexed to the said amended plaint a copy of a letter addressed to the court by the said Concepta Moraa Mosioma authorizing the plaintiff to file this suit. The letter is dated 11/11/2014.

At the centre of the dispute herein is LR No. NyaribarI Chache/B/B/Boboria/8016 (“**the suit property**”). The plaintiff has claimed that this parcel of land was at all material times registered in the names of Gesare. The Plaintiff has contended that Gesare died in the year 2007 intestate and that no Grant of Letters of Administration has been obtained in respect of her estate. The plaintiff has contended that the suit property which was registered in the name of Gesare was transferred to the 1<sup>st</sup> Defendant illegally and un-procedurally because a property of a deceased person cannot be dealt with until proper succession proceedings have been undertaken. As I have stated above, the plaintiff’s application has been opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (the defendants) only. The defendants did not file any affidavit in response to the averments contained in the plaintiff’s affidavit in support of the present application. They chose to defend the application only on points of law. That means that the facts as set out in the plaintiff’s affidavit namely, that the suit property was at all material times registered in the name of Gesare, that Gesare died intestate in the year 2007, that no grant of letters of administration has been issued in respect of her estate and that the 1<sup>st</sup> defendant acquired the suit property before the issuance of the said grant of letters of administration are not controverted. Section 45(1) of the Law of Succession Act, Cap 160, Laws of Kenya provides that no person shall for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person save as may be authorized by law or by a grant of representation issued under the said Act. It follows therefore that the suit property could not have been transferred to the 1<sup>st</sup> defendant lawfully before Grant of Letters of Administration in respect of the estate of Gesare had been issued to whoever sold and transferred the suit property to the 1<sup>st</sup> defendant. Section 45(2) provides that it is an offence to intermeddle with the property of a deceased person. Any disposal of a property of a deceased person before grant of letters of administration or probate is issued is therefore illegal. The 1<sup>st</sup> defendant has contended that the suit property is legitimately and lawfully registered in his name. As I have stated above, the 1<sup>st</sup> defendant did not file any affidavit. The 1<sup>st</sup> Defendant has therefore not explained how he acquired the suit property which belonged to a deceased person. In the case of **Munyua Maina –Vs- Hiram Gathiha Maina, Court of Appeal Civil Appeal No. 239 of 2009 (unreported)**, the court stated that,

***“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove how he acquire the title and show that the acquisition was legal.....”***

In the present case, the 1<sup>st</sup> defendant has not even dangled the instrument title. The 1<sup>st</sup> defendant has kept mum on the face of serious allegations bordering on criminality which have been made against him. Article 40 of the constitution of Kenya which guarantees a right to acquire and own property excludes property excluded properties which have been acquired illegally. On the other hand, section 26 of the Land Registration Act, 2012 provides that whereas a certificate of title issued by the land registrar upon registration or to a purchaser of land upon transfer is prima facie evidence of ownership, the same may be challenged where the same is acquired illegally, un-procedurally or through a corrupt scheme. In the face of uncontroverted claim that the suit property was registered in the name of Gesare, deceased and that the 1<sup>st</sup> defendant acquired the same before Grant of Letters of Administration in respect of the estate of Gesare had been obtained, there is only one conclusion that I can make at this stage namely, that the 1<sup>st</sup> defendant may have acquired the suit property illegally.

The defendants have opposed the application herein on a number of grounds which I wish now to consider before deciding whether or not the plaintiff has established a prima facie case against the 1<sup>st</sup> defendant against whom an injunction has been sought. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have contended that the plaintiff has *no locus standi* to maintain this suit on behalf of the estate of Gesare because she has not obtained Grant of Letters of Administration in respect of her estate. I am in agreement with the submission by the defendants that the plaintiff would have no *locus standi* to maintain this suit on behalf of the estate of Gesare is she had not obtained Grant of Letters of Administration in respect of her estate. The decision in **Kisii HCCC No. 548 of 2012 Benard Otieno Okore Vs. Rusanael Akeyo Oinga and another (unreported)** that was cited by the defendants support that position. See also the *per incuriam* holding in the case of **Virgina Edith Wambui Otieno Vs. Joash Ochieng Ougo & Another (1982 – 88)**

**I KAR 1049.** As I have stated earlier in this ruling, the plaintiff's suit before amendment was brought on behalf of the family of Monayo Nyakundi, deceased who was said to have been the owner of plot No. 1549 that was subdivided to give rise to among others the suit property. There is no evidence that the plaintiff had obtained Grant of Letters of Administration in respect of the estate of Monayo Nyakundi. She would therefore have no *locus standi* to sue with regard to a property that devolves to his estate. The mere fact that the plaintiff is a daughter of Monayo does not clothe her with the right to sue on behalf of his estate. The plaintiff seems to have appreciated this fact. On 5/11/2014, the plaintiff and one, Concepta Moraa Mosioma obtained a Grant of Letters of Administration in respect of the Estate of Gesare limited only to filing suit. Following the issuance of this Grant of Letters of Administration, the plaintiff amended the plaint on or about 12/11/2014. In the amended plaint, the plaintiff brought the suit on behalf of the family of Gesare in respect of whose estate she had obtained the aforesaid grant. I am of the view that the plaintiff has *locus standi* to maintain the suit that was brought by way of the amended plaint which was filed after she had obtained the aforesaid Grant of Letters of Administration in respect of the estate of Gesare. Through the said amendment, the defendants faced a new suit that was brought on behalf of the estate of Gesare. This is the suit that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant responded to through their joint statement of defence dated 18/11/2014 filed herein on the same date. Due to the foregoing, I am not in agreement with the defendants that the plaintiff has *no locus standi* to maintain this suit. The only valid point which the defendants could have raised and which I have mentioned above is the fact that the plaintiff's injunction application was based on the original plaint and not the amended plaint.

In my view, the defendants should have brought a new application for injunction after amending the plaint because when the application was filed, she had no *locus standi* to bring the same on behalf of the estate of Monayo or Gesare. As rightly submitted by the defendants, the limited Grant of Letters of Administration issued to the plaintiff on 5/11/2014, could not act retrospectively to validate the application which the plaintiff had filed on 18/9/15 without legal standing.

The other objection raised by the defendants to the application is that the same is barred by the provisions of Section 82 of the Law of Succession Act. Section 82 of the Laws of succession Act deals with the powers of personal representatives. It has not come out clearly from the defendants' submission how this section is relevant to the issues in contention in this suit. As I have stated earlier, the plaintiff has been issued with a limited Grant giving her the power to maintain this suit. The Grant that was issued to the plaintiff is not inconsistent with the powers of legal representatives set out in this section. I am therefore unable to appreciate the defendants' argument that this suit is barred under Section 82 of the Laws of Succession Act aforesaid.

The defendants have also contended that the injunctive orders sought which are permanent in nature cannot issue at this stage. I am entirely in agreement. This however does not stop the court from issuing the injunction sought on a temporary basis. The defendants have also submitted that the suit herein is time barred under the Limitation of Actions Act, Cap 22 Laws of Kenya. Although the defendants have cited Section 4 of the limitation of Actions Act, they have not substantiated in what respect the claim herein is caught up by that section. I find no merit therefore in the defendants' time bar argument.

From what I have set out above, I am satisfied that the plaintiff has established a prima facie case against the 1<sup>st</sup> defendant. The plaintiff has demonstrated that she is a legal representative of Gesare, that Gesare was the registered owner of the suit property, that Gesare is deceased and that the suit property was transferred to the 1<sup>st</sup> defendant after the death of Gesare before a Grant of Letters of Administration in respect of the estate of Gesare was issued by the court. As to whether the plaintiff or the estate of Gesare would suffer irreparable injury if the order sought are not granted, I am satisfied that, that would be the case. The plaintiff has demonstrated that beneficiaries of the estate of Gesare are threatened with eviction. A letter of demand that was written to them to vacate the suit property is annexed to the plaintiff's affidavit in support of the application, the contents of which the 1<sup>st</sup> defendant has not denied.

The upshot of the foregoing is that the plaintiff has satisfied the conditions for granting an interlocutory injunction. I am however for the reasons that I have given herein above unable to grant any of the orders sought in the plaintiff's application. As I have stated earlier, the application was filed when the plaintiff had *no locus standi* to maintain the suit, the plaintiff having at that time not obtained a Grant of Letters of

Administration in respect of the estate of Monayo on whose behalf the initial suit was filed. Although the plaintiff brought the suit on behalf of the estate of Monayo and on her own right, her only connection with the subject matter of the suit was her relationship with Monayo who she has claimed to be her father which does not give her legal standing to lodge a claim on behalf of his estate.

In the final analysis, I would dismiss the plaintiff's application dated 17/9/2014 with no order as to costs. In the interest of justice however, I am of the view that the suit property should be preserved pending the hearing and determination of this suit. Consequently, I hereby order that pending the hearing and determination of this suit, the status quo prevailing as of the date hereof as it relates to the title, use and occupation of all that parcel of land known as LR No. Nyaribari Chache/B/B/Boburia/8016 shall be maintained. Orders shall issue accordingly.

**Signed at Nairobi this .....day of November, 2015**

**S. OKONG'O**

**JUDGE**

**Delivered and Dated at Kisii this 4<sup>th</sup> Day of December 2015**

**J. M. MUTUNGI**

**JUDGE**

**In presence of**

.....**for Plaintiff**

.....**for Defendants**