



No. 209

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 209 OF 2011**

**ALICE BITUTU MAKORI (Suing as personal representative**

**of the estate of MAKORI OBARA (Deceased).....PLAINTIFF**

**VERSUS**

**JOSEPH MARANGA.....1<sup>ST</sup> DEFENDANT**

**GEORGE MORARA MARANGA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed this suit on 3<sup>rd</sup> October, 2011 seeking; an order of a permanent injunction to restrain the defendants from constructing on, trespassing, cultivating and doing any other act on all that parcel of land known as **LR. No. Central Kitutu/Daraja Mbili/627** (hereinafter referred to only as “**the suit property**”) and an order of a mandatory injunction to compel the defendants to stop placing construction materials on the suit property. The Plaintiff brought this suit in her capacity as the personal representative of the estate of the late **MakoriObara** (hereinafter referred to only as “**the deceased**”). The fact that the Plaintiff brought this suit as a personal representative of the deceased is apparent on the heading of the suit and in paragraph 1 of the plaint. The Plaintiff claimed that the deceased was one of the registered proprietors of the suit property and that on or about 10<sup>th</sup> September, 2011 the defendants trespassed on the suit property and commenced the construction thereon of a perimeter wall. The Plaintiff claimed that the said acts of trespass on the part of the defendants on the suit property amounted to intermeddling in the estate of the deceased. It is on account of the foregoing that the Plaintiff brought these proceedings with a view to protect the estate of the deceased.
2. Together with the plaint, the Plaintiff filed a Notice of Motion application dated 3<sup>rd</sup> October, 2011 for interlocutory injunction to restrain the defendants from constructing, trespassing, and/or cultivating on the suit property pending the hearing and determination of this suit. The injunction application was brought on the same grounds as those set out in the plaint which I have already highlighted above. In her affidavit in support of the application, the Plaintiff reiterated that she is the personal representative of the deceased and that she had been issued with grant of letters of administration in Kisii High Court Succession Cause No. 427 of 2011. The Plaintiff annexed to her affidavit in support of the application among other documents; copies of photographs of the activities that the defendants were alleged to be carrying out on the suit property and a certificate of official search on the title of the suit property which showed that the deceased was one of the

- registered proprietors thereof.
3. The defendants were served with Summons to enter appearance together with the injunction application. They entered appearance, filed their statement of defence and a replying affidavit in response to the injunction application. In their defence and reply to the injunction application, the defendants contended that the construction works complained of by the Plaintiff were being undertaken on the 2<sup>nd</sup> defendant's parcel of land known as **LR. No. Central Kitutu/Daraja Mbili/1001**(hereinafter referred to as "**Plot No. 1001**"). The defendants contended further that the Plaintiff has no *locus standi* to institute these proceedings as she is not the legal representative of the estate of the deceased.
  4. The Plaintiff's application for injunction was listed for hearing on 25<sup>th</sup> October, 2011. When the application came up for hearing on that day before R. Lagat-Korir J., the defendants advocate Mr. Oguttu notified the court that he wished to argue a preliminary objection which if upheld would dispose of the entire suit. In the absence of any objection from the advocate for the Plaintiff, the defendants' advocate was allowed to argue the preliminary objection. The defendants' advocate raised many issues in the course of urging the defendants' preliminary objection. The issue which is important for the purposes of the application before me was the defendants' objection that the Plaintiff lacked the *locus standi* to maintain this suit. The defendants' advocate argued that although the Plaintiff had claimed to be the legal representative of the deceased and had brought this suit as such, the Plaintiff had failed to exhibit a copy of the grant of letters of administration that had been issued to her either in her list of documents or affidavit in support of the injunction application. In the absence of legal standing, the defendants' advocate argued that the Plaintiff's suit had no leg to stand and urged the court to strike out the same. In a ruling delivered on 31<sup>st</sup> July, 2012, the court upheld the defendants' preliminary objection only on the ground that the Plaintiff lacked the *locus standi* to institute this suit. The court reached this decision upon taking into account the fact that the Plaintiff had "**not displayed to the court the grant of letters of administration in order to meet the provisions of section 79 of the Law of Succession Act**". Upon upholding the defendant's preliminary objection, the court proceeded to strike out both the Plaintiff's injunction application and the suit.
  5. On 18<sup>th</sup> September, 2012, the Plaintiff filed an application by way of Notice of Motion of the same date under among others, Order 45 of the Civil Procedure Rules seeking a review and setting aside of the court order made on 31<sup>st</sup> July, 2011 pursuant to which this suit was struck out. The Plaintiff's application was brought on the grounds that when the Plaintiff filed this suit, she had already obtained letters of administration and that there was an apparent error on the face of the record in that the court did not call for the probate file the details of which the Plaintiff had furnished to confirm whether or not the Plaintiff had been issued with a grant of letters of administration. The Plaintiff contended that the said grant of letters of administration was not annexed to her affidavit in support of the injunction application on account of a mistake which occurred during the preparation of the suit for filing which mistake should not be visited upon her. The Plaintiff annexed to her affidavit in support of the application among others, a copy of the Limited Grant of Letters of Administration of the estate of Makori Obara (deceased) issued on 21<sup>st</sup> September, 2011 and a copy of the ruling of the court sought to be reviewed.
  6. The Plaintiff's application for review was opposed by the defendants, through grounds of opposition dated 24<sup>th</sup> September, 2012. The defendants opposed the Plaintiff's application on several grounds. The defendants contended that the court lacked jurisdiction to entertain the Plaintiff's application as the issues raised could only be ventilated and/ or canvassed on appeal. The defendants contended further that the Plaintiff's application is bad in law and that the same has been brought after unreasonable delay which has not been explained.
  7. When the application came up for hearing on 9<sup>th</sup> May, 2013, the parties agreed to argue the application by way of written submissions. The Plaintiff filed her submissions on 9<sup>th</sup> October, 2013 while the defendants filed their submissions on 10<sup>th</sup> October, 2013. I have considered the Plaintiff's application and the grounds of opposition filed by the defendants in opposition thereto. I have also considered the respective submissions filed by the advocates for the parties and the case law cited. Order 45 (1) under which the Plaintiff's application has been brought provides that; **any person considering himself aggrieved by a decree or order for which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no**

**appeal is allowed and who from the discovery of any new and important matter or evidence which after the exercise of due diligence was not within its knowledge or could not be produced by him at the time when the decree was passed or order made or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.** As I have already stated hereinabove, the Plaintiff's application for review was brought on the ground that there is apparent error on the face of record of the court's decision in that the court failed to call for the probate file in which the Plaintiff had alleged to have applied for agrant of letters of administration to confirm whether such grant had been issued to the Plaintiff or not. I am in agreement with the submission by the defendants that there is no error apparent in the face of this court's ruling delivered on 31<sup>st</sup> July, 2012. The court was not under any duty in law or otherwise to call for the probate file in which the Plaintiff claimed to have filed and obtained a grant of letters of administration to confirm whether the Plaintiff's contention was correct or not. Failure on the part of the court to do so cannot therefore amount to or create an error apparent on the face of record. I have considered the Plaintiff's application on other grounds on which an application for review can be allowed although the Plaintiff's application seems to have been limited only to an apparent error on the face of the record which I have overruled. I have considered whether the application can be allowed on account of discovery of new and important matter or evidence in the form of grant which has now been exhibited. This ground, I have noted would not stand in the circumstances of this case since the Plaintiff has claimed that she obtained the grant of letters of administration before the suit was filed. The grant was therefore in her possession and she could have exhibited the same if she had exercised due diligence. I have also considered whether the Plaintiff has shown any other sufficient cause to warrant the review of the court order made on 31<sup>st</sup> July, 2012. I have found none. I have noted that all is not lost for the Plaintiff. The Plaintiff's suit was not dismissed. It was merely struck out. This means that the Plaintiff can still file a fresh suit. I don't think therefore that there are compelling or other sufficient reasons to warrant the review of this court's order aforesaid. The defendants had argued that even the grant which has been exhibited by the Plaintiff in support of the present application does not bestow on the Plaintiff the necessary *locus standi* to maintain this suit. I have perused the decision in the case of, **Morjaria vs. Abdalla [1984] KLR 490** which the defendants cited in support of this submission. Since I have already held that there are no good grounds to review the order of 31<sup>st</sup> July, 2012, it is not necessary to determine this issue. It can wait for another day. If I was to determine it however, I would have held as the court of appeal had held in the case cited by the defendants that I have mentioned above that although the form of the grant that was issued to the Plaintiff was wrong, the fact that the grant was "**limited only for the purposes of protecting the estate and without power of distribution**" could enable the holder thereof to file a suit to stop intermeddling with the estate of the deceased. The defendants had raised other issues such as the delay in the filing of the present application and the failure on the part of the Plaintiff to exhibit a copy of the order sought to be reviewed. On the issue of delay, I am of the view that the application was filed timeously. The order was issued on 31<sup>st</sup> July, 2012 and the present application was filed on 18<sup>th</sup> September, 2012. I don't think that a delay of 1 ½ months is inordinate. As regards the issue of the Plaintiff's failure to annex a copy of the order sought to be reviewed, again, I have looked at the case law cited by the defendants in support of their submission on this issue. To me, this is a mere procedural technicality which I would have ignored for the sake of substantive justice if the Plaintiff had satisfied me that she is entitled to the review sought.

8. The upshot of the foregoing is that the Plaintiff's application dated 18<sup>th</sup> September, 2012 lacks merit. The same is hereby dismissed with costs to the defendants.

**Delivered, dated and signed at KISII this 31<sup>st</sup> day of January 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

**Mrs. Asati h/b for Nyambati for the plaintiff**

**Mr. Ochwang'i for the defendants**

**Mobisa Court clerk**

**S. OKONG'O**

**JUDGE**