



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT PETITION NO. 4 OF 2013

GRACE MORAA MOGOI..... PETITIONER

VERSUS

OGAMBA GICHANA.....RESPONDENT

RULING

1. This petition was brought by the petitioner on 21st January, 2013. The main prayers sought in the petition are; a declaration that all that parcel of land known as **LR. No. Nyamira/ Nyansiongo Scheme/887**(hereinafter referred to only as “**the suit property**”) belongs to the estate of the late Peter Mogoi (hereinafter referred to only as “**Mogoi**”) and an injunction restraining the respondent from trespassing, wasting or in any manner whatsoever interfering with the suit property. The petition was brought on the grounds that, the petitioner is the widow of Mogoi and that on or about 31st October, 2000, the Petitioner and Mogoi purchased the suit property from one, Charles Gichana Angwenyi (hereinafter referred to only as “**Gichana**”) at a consideration of Ksh. 3.5 Million which a mount the petitioner and Mogoi paid in full. Thereafter, Gichana transferred the suit property to the petitioner and Mogoi and they were issued with a title deed for the same. Gichana also granted them vacant possession which they took immediately. The petitioner has claimed that the petitioner and Mogoi settled on and occupied the suit property until 6th March, 2010 when Mogoi died and left the petitioner and other members of her family still staying on the suit property. The petitioner has claimed that on 6th January, 2013, the respondent entered the suit property with a group of people and started planting maize on a portion of the suit property that the petitioner had prepared for the purposes of planting her own crops. The petitioner has claimed that the portion of the suit property on which the respondent has planted maize is approximately 1.5 acres. It is the petitioner’s contention that the acts of the respondent aforesaid have violated her constitutional right to property. It is on account of the foregoing that this petition has been brought and the reliefs set out therein sought.
2. Together with the petition, the petitioner brought an application by way of Notice of Motion dated 14th January, 2013 for interim relief under rules 20 and 21 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules (now repealed) pending the hearing and determination of the petition. This is the application which is the subject of this ruling. In the application, the petitioner sought an order restraining the respondent by himself or through his agents from trespassing, wasting, or in any other manner interfering with the suit property pending the hearing and determination of this petition. The application was supported by the affidavit of the petitioner sworn on 14th January, 2013 in which she reiterated the contents of her petition which I have already highlighted herein above. The petitioner claimed that the respondent’s forceful entry into the suit property and planting of maize thereon on a portion that had been prepared by the petitioner for her own planting has caused a lot of animosity between the petitioner and the

respondent who has now threatened to evict her from the suit property. The petitioner claimed that unless the orders sought are granted there is a likelihood of a breach of the peace ensuing since the respondent has decided to take the law into his own hands instead of following the due process in settling whatever dispute he may have with the petitioner. The petitioner has claimed that the petitioner and members of her family are in occupation of the suit property on which she has carried out extensive development and that it is unconstitutional and against the rules of natural justice for the respondent to take a portion of the suit property which belongs to her and Mogoi by force. The petitioner has contended that the actions of the respondent aforesaid are in breach of the provisions of Articles 28, 42 and 47 of the Constitution of Kenya. The petitioner contended further that the application meets the threshold for granting the orders sought. The petitioner annexed to her affidavit in support of the application, a copy of the title deed for the suit property dated 14th March, 2001 in the name of Mogoi, a copy of a certificate of official search dated 8th January, 2013 in respect of the suit property which shows that as at that date the suit property was still registered in the name of Mogoi, a copy of the agreement for sale between Gichana and Mogoi with respect to the suit property and a copy of the certificate of death for Mogoi.

3. The petitioner's application was opposed by the respondent. The respondent filed grounds of opposition dated 10th April, 2013 and a replying affidavit sworn on the same date in response to the application. In summary, the respondent has denied all the allegations contained in the petitioner's affidavit in support of the petition including the allegation that he entered the suit property and forcefully planted maize thereon. The respondent has contended further that the petitioner does not deserve the orders sought in view of her previous conduct in relation to the suit property. The respondent has contended that the petitioner has come to court with unclean hands and has concealed from the court material facts surrounding the acquisition of the title of the suit property by Mogoi. The respondent has contended that the suit property was transferred by Gichana to Mogoi illegally in breach of a court order. The respondent contended that the title of the suit property in the name of Mogoi was subsequently quashed by the High Court and Mogoi was required to surrender the same to the Land Registrar for cancellation. The respondent contended that Mogoi gained entry into the suit property forcefully through a court order that was subsequently set aside. The respondent claimed that even after the order that allowed him to enter the suit property was set aside and the court order from Borabu Land Disputes Tribunal through which the suit property was transferred to him was quashed by the High Court through judicial review, Mogoi remained in possession of the suit property illegally until his death sometimes on 6th March, 2010. The respondent contended that an order was issued restraining the Petitioner from burying the remains of Mogoi on the suit property which order the petitioner defied and went ahead to bury the body of Mogoi on the suit property. This incident led to an application for contempt of court against the petitioner and her father in law one, Francis Nyagaka Onchoka. The two were found guilty of contempt of court. While the petitioner's said father in law was arrested and sentenced to pay a fine of Ksh. 10,000.00 and in default to serve 3 months imprisonment, the petitioner who has been residing in Nairobi has been evading arrest and has to date not been arrested for sentencing after being found guilty for contempt. It is the respondent's contention that these are facts which the petitioner was under a duty to disclose to the court and failure to do so disentitles the petitioner to the relief sought. The respondent has contended that the petitioner's application has not met the conditions for granting the temporary injunction sought. The respondent has annexed to his replying affidavit, a copy of the court order issued in Kisii High Court Misc. Civil Appl. No. 12 of 2001 through which the respondent's mother one, Agnes Moraa Gichana was granted leave on 13th March, 2001 to file an application for judicial review to quash the decision of Borabu Land Disputes Tribunal which ordered the removal of a caution that had been registered by the respondent's said mother against the title of LR. No. Nyansiongo Settlement Scheme/ 107 from which the suit property originated restraining Gichana from dealing with the same. The court made a further order that the grant of that leave was to operate as a stay of the proceedings and implementation of the said decision of the tribunal. The petitioner also annexed a copy of an order made by the High Court in the same miscellaneous application on 24th July, 2012 quashing the said decision of the tribunal. In the same order, the court also vacated all consequent proceedings and decisions that had been taken pursuant to the said order from the tribunal. The respondent also annexed a copy of the decision of the tribunal that was made on 15th

February, 2001 and which was quashed by the High Court order aforesaid. Also annexed to the respondent's affidavit was a copy of the court order given on 15th March, 2010 in Keroka SRMCC No. 104 of 2010 restraining the petitioner from burying the remains of Mogoi on the suit property. The respondent also annexed a copy of the Mutation form through which **LR. No. Nyansiongo Settlement Scheme/ 107**(hereinafter referred to as "**Plot No.107**") was subdivided to give rise to among others the suit property. The petitioner did not file a reply to the issues that were raised in respondent's affidavit in reply.

4. When the application came up for hearing on 16th July, 2013, Mr.Moracha advocate appeared for the petitioner while Mr. Bosire advocate appeared for the respondent. In his submission in support of the application, petitioner's advocate reiterated the contents of the application, the affidavit filed in support thereof and the annexures thereto. The petitioner's advocate submitted that the petitioner is the administrator of the estate of Mogoi who is the registered proprietor of the suit property and that the respondent has trespassed on the suit property. He submitted that the application is well merited and should be granted. In his submission in reply, the respondent's advocate relied on the respondent's replying affidavit and submitted that the petitioner had failed to demonstrate that she has a prima facie case against the respondent and that she would suffer irreparable loss unless the orders sought are granted. The respondent's advocate submitted that the petitioner has not demonstrated that she has been appointed the legal representative of the estate of the late Mogoi. He submitted therefore that the petitioner's *locus standi* to mount the instant petition is in doubt. The respondent's advocate submitted further that the respondent has demonstrated that the whole process of sale and transfer of the suit property to Mogoi was illegal in that it was done in breach of express court order that had stopped the same. The respondent's advocate submitted further that the title to the suit property is no longer in existence the High Court having quashed the proceedings that led to the issuance of the same. The respondent's advocate submitted further that the petitioner stands to suffer no loss if the orders sought are declined as the petitioner has no title to the suit property. In conclusion, the respondent's advocate submitted that the petitioner's concealment of material facts to this court should also disentitle her to the orders sought.
5. I have considered the petitioners application and the opposition thereto by the respondent. I have also considered the submissions by the advocates for both parties. As I have mentioned above, what is before me is an application for a conservatory order and/or interim relief pending the hearing and determination of the petition herein. Like in applications for stay of proceedings pending the hearing and determination of judicial review applications or applications for interlocutory injunction pending the hearing and determination of civil suits, an applicant for a conservatory order or an interim relief pending the hearing and determination of a petition must demonstrate that he has a prima facie arguable case against the respondent. He must also show that unless the order is granted he will suffer harm. The petitioner has contended that her constitutional rights have been infringed by the respondent who she has accused of forcefully entering and making use of the suit property which the petitioner owns together with her late husband Mogoi. The petitioner has complained that her constitutional right to own property has been violated. The interim relief sought should be aimed therefore in restraining the respondent from continuing with the violation of the petitioner's said rights pending the determination of the petition herein. I am of the opinion that the claim herein by petitioner against the respondent should not have been brought by way of a constitutional petition. The facts of the case as presented in the petition and the present application discloses a purely civil dispute which should have been brought through a normal civil suit. That said, the petitioner has come to court through a constitutional petition and it would be a violation of her right under Articles 48 and 50(1) of the Constitution of Kenya if the court was to decline to consider her case on account of the manner in which it has been brought. The question that I then need to answer is whether the petitioner has demonstrated on a prima facie basis that her petition is arguable and that she stands to suffer harm if the order sought is not granted. The relief sought by the petitioner is discretionary. It follows that the petitioner must also satisfy the court that she deserves the exercise of the court's discretion.
6. On the material before me, I am not persuaded that the petitioner has an arguable case against the respondent. I am also convinced that from the conduct of the petitioner she does not deserve the exercise of this court's discretion. It is clear from the material presented to court by the respondent that the respondent's father, Gichana owned Plot No. 107. When Gichana expressed an intention

of selling a portion of this plot to Mogoi, the respondent's mother, one, Agnes Moraa Gichana (hereinafter referred to as "**Moraa**") who was Gichana's wife objected to the intended sale claiming that Plot No. 107 had been given to her by Gichana as a gift. In order to forestall the intended sale, Moraa registered a caution against the title of Plot No. 107. Gichana who wanted to proceed with the sale of a portion of the said plot to Mogoi at any cost lodged a complaint against Moraa at Borabu Land Disputes Tribunal ("**the tribunal**") seeking the removal of the caution that had been lodged against the title of Plot No. 107 by Moraa so that he could sell a portion thereof measuring 5.5 acres to Mogoi. The tribunal assumed jurisdiction which it did not have at all over Gichana's complaint against Moraa, heard it and in a decision made on 15th February, 2001 purported to "grant" Gichana a portion measuring 5.5 acres of Plot No. 107 and ordered for the removal of the caution that Moraa had registered on the title of the said property. Aggrieved with this decision, Moraa filed a judicial review application seeking to quash the same. On 13th March, 2001, the High Court granted leave to Moraa to institute an application for judicial review for an order of certiorari to quash the said decision of the tribunal. The court also made a further order that the leave would operate as a stay of the proceedings and implementation of the said decision of the tribunal. Gichana was made an interested party in the judicial review proceedings. Despite this court order, Gichana moved with speed had the caution removed, sub-divided Plot No. 107 and transferred a portion thereof measuring 2.225 ha. which is the suit property herein to Mogoi on 14th March, 2001, a day after the said High Court order. The judicial review application by Moraa against Gichana was heard by P.K.K. Arap Birech, Commissioner of Assize who in a ruling delivered on 24th July, 2002 quashed the proceedings and decision of the tribunal which had purported to grant Gichana 5.5 acres of Plot No. 107 and to remove the caution that had been registered against the title of the said property. The court made a further order that all consequential orders that resulted from the said decision of the tribunal stood vacated. Following this order, the District Land Registrar, Nyamira District wrote to Mogoi on 21st December, 2012 (see annexure "JOG-5" to the respondent's replying affidavit) asking him to surrender his title over the suit property for cancellation. Mogoi seems not to have done so as he had passed on earlier on 6th March, 2010. It is clear from the foregoing that the validity of the title held in the name of Mogoi over the suit property is seriously in doubt as the proceedings leading to the acquisition thereof had been set aside by a court of law whose decision from the record before me seems not to have been appealed. Another issue that has arisen in these proceedings is the *locus standi* of the petitioner to bring the petition herein. The suit property according to the certificate of official search annexed to the petitioner's affidavit in support of the application herein is registered in the name of Mogoi. The main relief sought in the petition herein is a declaration that the suit property belongs to the estate of Mogoi. This means that the petition has been brought by the Petitioner on behalf of the estate of Mogoi. I am in agreement with the submissions by the respondent's advocate that the petitioner can only bring legal proceedings on behalf of the estate of Mogoi if she has been appointed an administrator of the estate of Mogoi. In the Court of Appeal case of **Virginia Edith Wambui Otieno –vs- Joash Ochieng Ougo & Another (1982-88) 1 KAR 1049**, it was held per incuriam that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration and if he does so, the action is incompetent from the date it was instituted. In the text, Law of Succession by **W.M. Musyoka** published by Law Africa, he has stated as follows at page 205 with regard to suits by administrators;

“Case law shows that no person has a right to enforce any cause of action, or defend any suit which survives the deceased or arises out of his death without a grant of letters of administration”.

7. The petitioner has described herself in the petition as the widow of Mogoi and not as the administrator of his estate. In her affidavit in support of the present application, the petitioner has only annexed a copy of the death certificate of Mogoi. I am of the opinion that if the petitioner was an administrator of the estate of Mogoi, she would not have had any difficulty in stating as much in the petition and also annexing a copy of the grant of probate or letters of administration as proof of her status. It follows from the foregoing that the petitioner's *locus standi* to bring these

proceedings is also doubtful. The much I have said so far is enough to show that the petitioner has not demonstrated that she has an arguable case against the respondent and that she is entitled to the orders sought. Assuming that I am wrong in my appreciation of the petitioner's case, I would still not have allowed the petitioner's application for other reasons. The material placed before me shows that the petitioner was served with a court order restraining her from burying the body of Mogoi on the suit property. In defiance of that order, the petitioner proceeded to bury the body of Mogoi on the suit property. A person who conducts himself or herself in that manner does not deserve to have the court's discretion exercised in his or her favour. Secondly, a part from the case that was filed to restrain her from burying the body of Mogoi on the suit property which she disclosed in a rather veiled manner, the petitioner failed completely to disclose the previous proceedings relating to the suit property which from the material before me seems to have been within her knowledge. Again, a court of law cannot exercise its discretion in favour of a party who knowingly conceals material facts from the court.

8. The upshot of the foregoing is that the petitioner's Notice of Motion application dated 14th January, 2013 is not for granting. I have noted however that the petitioner is in possession of the suit property and the dismissal her application herein may lead to a breakdown of law and order in that an attempt may be made to evict her from the suit property. This court has a duty to maintain law and order and to promote the rule of law. To avoid a situation that I have mentioned, I will dismiss, which I hereby do the petitioner's application dated 14th January, 2013 but make a further order that until the hearing and determination of the petition herein or further orders of this court, the parties shall maintain the status quo prevailing as of the date hereof as concerns possession, use and occupation of the suit property. The respondent shall have the costs of this application.

Delivered, dated and signed at KISII this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Okenya h/b for Mokuia for the Petitioner

N/A for the Respondent

Mobisa Court Clerk.

S. OKONG'O

JUDGE