



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC MISC. APPLICATION NO. 5 OF 2012**

**STEPHEN MUYA GIITA .....PLAINTIFF**

**-VERSUS-**

**MARGERET KAHUMBU MWAHU.....1<sup>ST</sup> DEFENDANT**

**WINNIE WANJIKU KAMANDE .....2<sup>ND</sup> DEFENDANT.**

**RULING**

The Plaintiff has moved this court by way of a Notice of Motion dated 31<sup>st</sup> October 2012 brought under Order XXXII Rules 1, 2 and 8 of the Civil Procedure Rules. The Plaintiff is seeking leave to sue in the form of pauperism, and orders that his particulars of claim be adopted as the Plaint in this suit. The Notice of Motion is supported by a supporting affidavit sworn by the Plaintiff on 31<sup>st</sup> October 2012, as well as a statement of pauperism of the same date.

The Plaintiff has stated therein that he is a pauper who is not possessed of any sufficient means to enable him pay court filing fees. Further, that he is unemployed and has no source of livelihood, and that he relies on charity from friends and well-wishers for his sustenance and that of his family of 3 children. The Plaintiff has further stated that he does not own any movable or immovable property and has annexed as evidence a letter dated 29<sup>th</sup> October 2012 from the chief, Nturukuma Location, Laikipia District to this effect.

The Plaintiff proposes to sue Margeret Kahumbu Mwahu, and and Winnie Wanjiku Kamande, the Administrators of the estate of Eleneta Njeri Giita, in the particulars of claim that he asks to be adopted by this court as a Plaint. He is seeking therein restitution of his late mother's property namely Nairobi Block/61/255 which he claims was fraudulently registered in the name of Eleneta Njeri Giita, and that the title of the said property be cancelled and registered in his name.

During the course of hearing the Notice of Motion, the Plaintiff disclosed that the said property was also the subject of the Succession Cause No 19 of 2010 at the Kangema Principal Magistrate's Court, whereupon I directed that the file for the said succession cause be brought up for perusal .

I have carefully considered the Plaintiff's Notice of Motion and supporting evidence, and the issues for determination are whether the application for leave to sue as a pauper should be allowed, and whether the Plaintiff should be allowed to proceed with his claim in this court. Order 33 of the Civil Procedure Rules provides for the procedure for filing of suits by paupers as follows:

**“1. (1) Subject to the following rules, any suit may be instituted by a pauper.**

**(2) For the purposes of this Order a person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the institutions of such suit.**

**2. Every application for permission to sue as a pauper shall contain the particulars required in regard pleadings, together with a statement that the pauper is unable to pay the fee prescribed in such suit, and the whole shall be signed in the manner prescribed for the signing of pleadings.**

**3. Notwithstanding anything contained in these Rules, the application shall be presented to the court by the applicant in person unless the applicant is exempted from appearance in court by section 82 of the Act, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.**

**4. Where the application is in proper form and duly presented the court may, if it deems fit, examine the applicant or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.**

**5. The court shall reject an application for permission to sue as a pauper—**

**(a ) where it is not framed and presented in the manner prescribed in rules 2 and 3;**

**(b) where the applicant is not a pauper;**

**(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper;**

**(d) where his allegations do not show a cause of action; or**

**(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.”**

In the case of **Ali Suleman Mandevia -vs- Rungwe African Co-operative Union Ltd (1958)EA 524**, the court held that permission to sue as a pauper is subject to the terms of Order XXXIII Rule 5, which entitles the court to reject such an application *inter alia*, where it does not show a cause of action. Similarly, in the case of **Harraiah -vs- Coast Professional Freighters Ltd Mombasa HCCC No. 63 of 2002**, the court refused the application seeking leave to institute suit as a pauper where the applicant failed to state or describe how the cause of action arose. In the case of **Richard Akwesera Onditi -vs- Kenya Commercial Finance Co. Ltd (2005) eKLR**, the court rejected an application by the applicant seeking to file the appeal as a pauper on grounds that the intended appeal lacked merit.

This court is satisfied from the evidence produced that the Plaintiff is not possessed of sufficient means to pay the fees prescribed for the institution of such a suit. However the difficulty that is presented to the court is the ongoing succession cause No. 19 of 2010 at Kangema Senior Resident Magistrate's Court. On 28<sup>th</sup> November 2012, the said court directed the Plaintiff herein to file a protest to the confirmation of grant in the estate of Eleneta Njeri Giita (deceased) with respect to his claim over Nairobi Block/61/255. The Plaintiff duly filed an Affidavit of Protest therein dated 8<sup>th</sup> February 2013 and filed on the same date.

This court is in this regard obligated by section 6 of the Civil Procedure Act not to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a

previously instituted suit or proceeding between the same parties, and must stay its proceedings pending the determination of the prior suit. It is therefore the finding of this court that it cannot proceed with the Plaintiff's claim and must stay it pending the outcome of Succession Cause No 19 of 2010 at the Kangema Principal Magistrate's Court. Further, that the Plaintiff should pursue his application for leave to sue in the form of pauperism and his claim over Nairobi Block/61/255 in the said succession proceedings.

The Plaintiff's Notice of Motion dated 31<sup>st</sup> October 2012 is accordingly denied, and there shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_18<sup>th</sup>\_\_\_\_ day of \_\_\_\_July\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**