



1. Injunction

2. Woman-to-woman marriages

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 81 OF 2013

KAHASO SULUBU GURACHA.....PLAINTIFF

=VERSUS=

THETHE GURACHA.....DEFENDANT

R U L I N G

1. What is before me is the Plaintiff's Application dated 15th May 2013. The Application was filed under section 1A, 1B, 3A and 63 e of the Civil Procedure Act and order 40 Rule 1 of the Civil Procedure Rules. The Application seeks for the following orders:
 - a. **THAT interim injunction orders do issue against the defendant herein THETHE GURACHA, his agent or servants or anyone whomsoever action on his behalf and particularly ERICK MWADUNA, FELIX THETHE, MAXWELL THETHE, MATEO MWAYELE, DOMINIC MWAYELE, SALIM MWAYELE, KADZO MWAYELE, MASHAKA MWAYELE, KANZE THETHE KAHUNDUM MGANGA, MWALIMU ZONONEKA, restraining them from trespassing, subdividing, alienating or in any way disposing or interfering with Plot No. Gede/Dabaso/147 including harvesting or demanding proceeds of sale of the harvest from the land which forms part of the deceased's estate until hearing and disposal of the application.**
 - b. **Cost of the Application be provided for.**
2. The Application is supported by the affidavit of the Plaintiff who has deponed that she is the administrator of the Estate of John Mwambire Guracha who died on 6th March 1976 and left nine (9) dependants.
3. It is the Plaintiff's case that during his life time, the deceased acquired plot number Gede/Dabaso/147 (the suit property) which was registered in his name; that after his demise, his widow, Naomi John Mwambire, "married" the Plaintiff in accordance with the Giriama customary law who bore issues.
4. The Plaintiff further deponed that unknown to her, the Defendant took possession of the original title deed and invaded the suit property which has since been sub-divided. That the Defendant is likely to dispose of the suit property thus the current Application.
5. The Defendant filed a Notice of Preliminary Objection and a Replying Affidavit on 12th June

- 2013.
6. According to the Notice of Preliminary Objection, the Defendant has averred that in so far as the matter relates to the Estate of the deceased, this court does not have jurisdiction to deal with it and that the Application is in contravention of the provisions of section 6 of the Civil Procedure Act.
 7. The Defendant deponed in his Replying Affidavit that the current dispute had been resolved amicably by the members of the extended family; that he has no control over the other family members.
 8. The Defendant finally deponed that the Plaintiff's suit is unsustainable because it was filed without capacity as is evident from the proceedings in Succession Cause No. 8 of 2013.
 9. The parties agreed to dispose of the Application by way of written submissions. The Plaintiff's advocate filed her submissions on 16th July 2013 while the Defendant's advocate filed his submissions on 28th August 2013 which I have considered.
 10. This suit is premised on one main ground, that is whether the Plaintiff was indeed "married" to one NAOMI GURACHA MWAMBIRE, the widow of the late JOHN GURACHA MWAMBIRE who is the registered owner of the suit property.
 11. According to the Plaintiff, the deceased, John Guracha Mwambire was married to one Naomi John Mwambire, also deceased, with whom they had no issue born.
 12. After the demise of the said John Mwambire, his family resolved to "fetch" for the widow a woman to "marry" in accordance with the Giriama customary law with the sole purpose of procreation. The Plaintiff was identified as the wife of Naomi John Mwambire and she ended up "marrying" the said Naomi John Mwambire.
 13. According to the Plaintiff, she was required to identify a man within the larger family with whom she could sire children with and she settled on the Defendant's brother, one Sulubu Guracha. The Plaintiff had eight issues with the said Sulubu Guracha. The Defendant now claims that the Plaintiff was never "married" to the said Naomi John Mwambire because such a marriage is not recognised in the Giriama customary law.
 14. **Eugene Contran on the Law of Marriage and Divorce**, has analysed the special types of marriages amongst the Kisiis and Kikuyus. The author has stated as follows:

"Amongst the Kisiis and Kikuyus, a woman-to-woman marriage was acceptable in a situation where a woman who was barren or who had only female children. This arrangement could be done during the woman's husband's lifetime or after his death and the woman would appoint a man from her husband's clan to bear children with the "wife". Any children born will then belong to the woman who must have paid the consideration for marriage".

15. The book does not analyse the marriages of all the tribes of Kenya. However, it is common knowledge that most tribes in Africa recognised this kind of marriage (woman-to-woman). Whether woman-to-woman marriage is recognised under the Giriama customary law or not can only be ascertained during the trial.
16. In view of the fact that the Defendant has not preferred any evidence showing that woman-to-woman marriage was never practiced among the Giriama community, I find, prima facie, that the Plaintiff was the "wife" of the late Naomi John Mwambire who was the wife of John Guracha, the registered owner of the suit property.
17. In any event, it has not been disputed that the Plaintiff and her eight children are the ones who have been occupying the suit property. The Plaintiff and her children should therefore be allowed to continue using the suit property pending the determination of the heirs of the late John Mwambire Guracha, either in this suit or in a succession cause.
18. If the Plaintiff and her eight children are not allowed to use the suit property exclusively, as they have done, they will suffer irreparable damage that cannot be compensated by way of damages in view of the fact that the suit property is the source of their livelihood.
19. In the circumstances of this case which I have enumerated above, I allow the Plaintiff's Application dated 15th May 2013 as drawn.
20. The temporary orders of injunction shall remain in force until the suit has been heard and determined.

O. A. Angote

Judge