



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO.459 OF 2013**

**PETER JUNIOR GWARO.....PLAINTIFF**

**VERSUS**

**1. WILFRED MONYENYE YOGE**

**2. JOHN GWARO**

**3. ROSE MORAA NYANGAU.....DEFENDANTS**

**RULING**

1. I have before me an application brought by the Plaintiff by way of Notice of Motion dated 15<sup>th</sup> November, 2013. The application is seeking two principal prayers namely; a mandatory injunction to restrain the defendants from entering upon, re-entering, trespassing onto, demarcating, building structures on, burying the remains of one, **Samuel Gwaro**, deceased, interfering with and/or in any other manner dealing with all that parcel of land known as **LR. No. Nyaribari Chache/B/B/Boburia/7751**(hereinafter referred to as “**the suit property**”) or any portion thereof pending the hearing and determination of this suit and, an order that the O.C.S, Kisii Police Station do enforce and/or ensure compliance with the order if issued. The application was brought on the grounds set out on the face thereof and on the affidavit of the Plaintiff sworn on 15<sup>th</sup> November, 2013. In summary, the Plaintiff’s application has been brought on the grounds that; the Plaintiff is the registered proprietor of the suit property. On or about 9<sup>th</sup> November, 2013 one, **Samuel Gwaro**, deceased (hereinafter referred to as “**the deceased**”) died and in the course of making his funeral arrangements, the defendants entered the suit property without the Plaintiff’s consent on 14<sup>th</sup> November, 2013 and demarcated a portion thereof for the purposes of constructing a house and burying the remains of the deceased. The Plaintiff has contended that the construction of a house and burial of the deceased on the suit property would interfere with his proprietary rights and planned developments on the suit property. The Plaintiff’s application was opposed by the defendants, who filed separate affidavits all sworn on 22<sup>nd</sup> November, 2013. The 2<sup>nd</sup> defendant is a step brother to the Plaintiff and the deceased. He has deposed in his affidavit that, the Plaintiff, the deceased and himself are sons of one, Joseph Lucas Gwaro who is also deceased (hereinafter referred to as “Gwaro”). Gwaro had three (3) wives, Eunice Catherine Bina, the 3<sup>rd</sup> defendant’s mother, Aska Moraa, the deceased’s mother and Grace Nyanchama Gwaro, the Plaintiff’s mother. He deposed further that Gwaro had two parcels of land namely, **LR. No. Nyaribari Chache/B/B/Boburia/2029** on which he settled, the 2<sup>nd</sup> defendant’s mother and her children during his lifetime and **LR. No. Nyaribari Chache/B/B/Boburia/2904** (hereinafter

referred to as “**Plot No. 2904**”) on which he settled the Plaintiff’s mother and the deceased’s mother and their children. The 2<sup>nd</sup> defendant has deposed further that after the death of Gwaro, the Plaintiff’s mother applied for and obtained letters of administration in respect of the estate of Gwaro in which application, the Plaintiff and the deceased were named as beneficiaries of the estate of Gwaro. Upon obtaining the said grant of letters of administration, the Plaintiff’s said mother proceeded to subdivide **Plot No. 2904** into five portions of which one portion, namely, the suit property was registered in the name of the Plaintiff, the second portion was registered in the name of the Plaintiff’s said mother and three remaining portions were registered in the names of third parties to whom the Plaintiff’s mother had sold portions of **Plot No. 2904**. The deceased who a son of Gwaro and who was named as one of his beneficiaries was not allocated any portion of **Plot No. 2904** where he can now be buried although he has a homestead on one of the portions of the said Plot namely, **LR No. Nyaribari Chache/B/B/Boburia/7753**. The 2<sup>nd</sup> defendant has claimed that the deceased had before his death moved the court seeking an order for the revocation of the grant of letters of administration that was issued to the Plaintiff’s mother. The 2<sup>nd</sup> defendant claims further that the intention of the Plaintiff’s mother was to disinherit the deceased and render him landless. The 2<sup>nd</sup> defendant contended that in the circumstances, their entry into the suit property for the purposes of making burial arrangements for the deceased does not amount to trespass. The 3<sup>rd</sup> defendant is the wife of the deceased. She has reiterated most of what is deposed in the 2<sup>nd</sup> defendant’s affidavit. She has deposed that when she got married to the deceased, the deceased with the consent of Gwaro settled her on Plot No. 2904 on which she and the deceased have a homestead and have been carrying out farming activities. The 3<sup>rd</sup> defendant deposed that she has two children with the deceased, aged 11 and 5 years old. She has denied that her entry into Plot No. 2904 which has now been subdivided amounted to an act of trespass. She contended that the deceased was the son of Gwaro who was the original proprietor of Plot No. 2904, the (the deceased) was born on the said plot where also he married and settled with her (the 3<sup>rd</sup> defendant). The 3<sup>rd</sup> defendant has deposed further that she has already sought a limited grant of representation to enable her to be substituted as an objector in the Succession Cause where the deceased had challenged the grant that was issued to the Plaintiff’s mother and on the strength of which the Plaintiff obtained title to the suit property. The 3<sup>rd</sup> defendant contended that the 3<sup>rd</sup> defendant and the deceased have been in occupation of the portion of Plot No. 2904 where their homestead is situated and no prejudice or loss would be suffered by the Plaintiff by her continued occupation and use of that portion. The 1<sup>st</sup> defendant is not a member of Gwaro family. He is however said to be related to the deceased and is the one who has been financing the objection proceedings that were instituted by the deceased against the grant of letters of administration in respect of the estate of Gwaro that was issued to the Plaintiff’s mother. The 1<sup>st</sup> defendant termed the Plaintiff’s suit herein as an abuse of the process of the court. He contended that the Plaintiff had sued him in an earlier case concerning the suit property herein in which suit the Plaintiff had also sought an injunction against him which suit is still pending. He denied trespassing on the suit property as alleged by the Plaintiff. He has deposed that upon the death of the deceased the community elders went to the former Plot. No. 2904 and sub-divided the same into two equal parts in recognition of the deceased rights to a portion of the said Plot. The 1<sup>st</sup> defendant contended that the deceased had all along resided on and occupied the suit property and as such the suit property would be the right place to bury the deceased. The 1<sup>st</sup> defendant deposed that he has not been involved in the deceased funeral arrangements and as such this suit has been brought against him with ill motive.

2. When the application came up for hearing on 25<sup>th</sup> November, 2013, Mr. Oguttu, advocate appeared for the Plaintiff while Mr. Minda, advocate appeared for the defendants. In his submission in support of the application, Mr. Oguttu argued that it is not in dispute that the suit property is lawfully registered in the name of the plaintiff. He submitted that by virtue of that registration, the Plaintiff has absolute and exclusive rights over the same. In support of this submission, he referred the court to the provisions of **sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012**. He also cited the case of, **George Orango Orago vs. George Liewa Jagalo & 3 Others, Court of Appeal Civil Appeal, No. 62 of 2009(unreported)**. Mr. Oguttu submitted further that the fact that the defendants entered the suit property in abid to bury the remains of the deceased thereon is admitted. Mr. Oguttu referred the court to paragraph 11 of

the affidavit of the 2<sup>nd</sup> defendant in which he deposed that their entry into the suit property did not connote trespass since the deceased had beneficial right over the suit property. Counsel submitted that the 1<sup>st</sup> and 3<sup>rd</sup> defendants also made a similar claim in paragraph 10 of the 1<sup>st</sup> defendant's affidavit and paragraph 11 and 13 of the 3<sup>rd</sup> defendant's affidavit. Counsel submitted that the deceased did not have any beneficial interest to any portion of the suit property neither did he have a homestead on the suit property. He submitted that the deceased had his homestead on **LR No. 7753** a fact which is admitted in paragraph 8 of the affidavit of the 2<sup>nd</sup> defendant. Counsel also referred the court to annexure "**RMN3**" (Summons for Revocation of Grant – See the Supporting Affidavit at paragraph 9) in which the deceased had stated that the parcels of land that had been awarded to him out of Plot No. 2904 were LR Nos. **Nyaribari Chache/B/B/Boburia 7753** and **7754**. He submitted that the suit property and LR. No. 7753 are distinct and as such the deceased can be buried on Plot No. 7753 where he has a homestead and with respect to which no injunction was being sought by the Plaintiff.

3. Mr. Oguttu submitted further that so long as the plaintiff remains the registered proprietor of the suit property, the defendants have no right to employ self-help measures to dispose of the property. He submitted that the only way out for the defendants if they feel that the deceased has a right over the suit property is for them to obtain a court order for such a declaration. He submitted that the plaintiff has established a prima facie case against the defendants with a probability of success. In support of this submission, counsel referred the court to the case of, **Mrao Ltd –vs- First American Bank Ltd & 2 Others [2003] KLR 125**. He submitted that if the orders sought are not granted the court would have sanctioned the defendants' criminal activities.
4. In his submissions in reply, Mr. Minda relied on the defendant's replying affidavits that were sworn on 22<sup>nd</sup> January, 2013 to which I have referred to hereinabove. Mr. Minda submitted that the Plaintiff's application is an abuse of the court process as the plaintiff had filed a similar suit in this court concerning the suit property seeking similar reliefs and in which interim orders were granted and later vacated. He submitted that the plaintiff ought to have moved the court in the said suit instead of filing this new suit over the same subject matter. On the merit of the application, the Mr. Minda submitted that the Plaintiff has not demonstrated that the defendants did trespass on the suit property. He submitted that apart from the allegation that the defendants intended to bury the deceased on the suit property no material was placed before the court as the basis for this apprehension. He submitted that, the 2<sup>nd</sup> defendant does not reside with the deceased and only came to the home of the deceased to console the relatives. Mr. Minda refuted the Plaintiff's submission that the defendants had admitted that they had trespassed on the suit property. According to counsel, the defendants had only explained the genesis of the suit property and other related parcels of land. He submitted that the 2<sup>nd</sup> defendant had stated clearly at paragraph 8 of his affidavit that the deceased has a homestead on Plot No. 7753. Mr. Minda submitted that the defendants had no intention whatsoever of burying the deceased on the suit property where he has no homestead. He submitted that local traditions don't allow such burial and that the defendants have no intention of going against the tradition by burying the deceased on the suit property. In the circumstances, counsel submitted that if the court was to issue the injunction sought, the same would be in vain.
5. Counsel submitted that this suit was filed by the Plaintiff for collateral purposes and not for seeking the injunction sought per se. He submitted that as the son of Gwaro the deceased was entitled to inherit the property of Gwaro from which the suit land emanated, namely, Plot No. 2904. He reiterated the contents of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' affidavits that, although the name of the deceased was set out among the beneficiaries of Gwaro by the Plaintiff's mother, the Plaintiff's mother did the distribution of the estate of Gwaro in exclusion of the deceased his beneficiary status notwithstanding. Counsel submitted that there is an application to revoke the grant that was issued to the Plaintiff's mother pursuant to which the plaintiff got the suit property.
6. Mr. Minda submitted further that this suit is intended to cover up issues which are emerging from the succession cause which is pending determination and that the court has been misled to believe otherwise. Counsel maintained that the 3<sup>rd</sup> defendant's activities are restricted to Plot No. 7753 where her home is situated and where the 3<sup>rd</sup> defendant came to by virtue of her marriage to the

deceased. He submitted that the 3rd defendant has a homestead on Plot No. 7753 where her two children were born and as such she cannot bury her husband elsewhere.

7. Counsel submitted that **sections 24, 25 and 26** of the **Land Registration Act, 2011** that were cited by the Plaintiff are not applicable as the acts of trespass complained of have not been shown or demonstrated. He submitted that the 3<sup>rd</sup> defendant is keen on pursuing her rights in the succession cause and has no reason whatsoever of taking the suit property from the plaintiff and that her only plea is to be allowed to bury her husband where her home is situated.
8. I have considered the Plaintiff's application, the affidavits filed in opposition thereto, the submissions made by the parties and the statute and case law cited in support thereof. The principles to be applied when considering an application for interlocutory injunction are well settled. As was stated in the case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the injunction is granted he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. In the case of, **Mrao Ltd. vs. First American Bank of Kenya Ltd. & 2 Others (supra)** that was cited by the Plaintiff, it was held that a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It was said to be a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. The question that I then need to answer is whether the Plaintiff has demonstrated on the material placed before me that the defendants or any of them have infringed on any of his rights. From my analysis of the contents of the party's respective affidavits and submissions above, there is no dispute that the Plaintiff is the registered proprietor of the suit property. The Plaintiff was registered as such proprietor on 29<sup>th</sup> August, 2006 which is more than 7 years ago. I am fully in agreement with the submission by the advocates for the Plaintiff that as the registered proprietor of the suit property, the Plaintiff is accorded protection by law and is entitled to enjoy certain rights and privileges associated with such proprietorship which includes a right to exclusive possession and use. **Section 28** of the **Registered Land Act, Cap. 300, Laws of Kenya** (now repealed) and **section 25** of the **Land Registration Act, No. 3 of 2011** provides that the rights of a proprietor of land are not liable to be defeated save as provided in the two acts. The Plaintiff has claimed that the defendants intend to bury the deceased on a portion of the suit property without his permission. If this claim is true, then, the defendants would be infringing on the Plaintiff's right to exclusive enjoyment of the suit property. In proof of the defendant's intention aforesaid, the Plaintiff has exhibited copies of photographs showing what is said to be a portion of the suit property which was cleared by the defendants in preparation for putting up a house for the deceased which was to be followed by the burial of the deceased. In his affidavit, the 2<sup>nd</sup> defendant has admitted in paragraph 11 that the defendants entered the suit property to make arrangement for the burial of the deceased. He however denied that such entry amounted to trespass since he only entered the suit property as a result of the death of the deceased who is his step brother. On her part, the 3<sup>rd</sup> defendant contended that she had entered into a portion of Plot No. 2904 on which she has her homestead and which she has over the years occupied together with the deceased. She contended that her entry into that portion of Plot No. 2904 could not be termed an act of trespass as the deceased who is the son of the previous owner had married her and settled with her on that portion of Plot No. 2904 with said previous owner's permission. She maintained that the deceased was entitled to inherit a portion of Plot No. 2904 and that her occupation of a portion of Plot No. 2904 was by virtue of her position as a beneficiary of the estate of the previous owner of Plot No. 2904 who was the deceased's father. On his part, the 1<sup>st</sup> defendant denied trespassing on the suit property. He claimed that after the death of the deceased, it is the community elders who went to Plot No. 2904 and divided it equally in recognition of the deceased right over the said plot. The 1<sup>st</sup> defendant contended that the deceased has his homestead on the suit property where he has lived with the 3<sup>rd</sup> defendant over the years and as such the suit property is the right place for his burial. All the defendants contended that the process through which the Plaintiff acquired title to the suit property was irregular and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have taken steps to challenge the same in the High Court. In their advocates submissions that I have highlighted above, the defendants denied trespassing on the suit property.

The defendants' advocate submitted that the defendants would have no reason at all for trespassing on the suit property where they have no intention of burying the deceased. The defendants' advocate submitted that the defendants have restricted the deceased's funeral arrangements on Plot No. 7753 where the deceased has his homestead which is the place where the deceased would be buried. As I have stated above, the Plaintiff's apprehension that the defendants intended to bury the deceased on the suit property came about as he puts it in paragraph 10 of his affidavit, when the defendants allegedly entered the suit property, demarcated the same and started preparations for house construction thereon. The Plaintiff annexed to his affidavit photographs showing such preparation and the alleged demarcation. The 1<sup>st</sup> defendant has admitted that the said demarcation took place soon after the death of the deceased. He has however claimed that the same was carried out by community elders so as to recognize the interest of the deceased on Plot No. 2904. The 1<sup>st</sup> defendant has not stated how he came about this information. He has also not given the full particulars of the said community elders who carried out the said demarcation exercise. It is worth noting that the purported demarcation on Plot No. 2904 was being carried out more than 8 years after the said Plot had been officially subdivided a fact which all the parties to this suit have admitted. The purported sub-division Plot No. 2904 into two equal portions was in the circumstances bound to affect the suit property which arose from the earlier subdivision of Plot No. 2904. Since the purported demarcation was being carried out after the death of the deceased and for the deceased and the same extended to the suit property, the Plaintiff had every reason to be apprehensive that the persons who were carrying out the said demarcation had the intention of burying the deceased on the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not commented on the said demarcation and have not denied the Plaintiff's contention that they were part of the group who carried out the same. I am satisfied that the Plaintiff has demonstrated that there was an act of trespass on the suit property by the defendants. Whether the said act of trespass was aimed at securing a portion of Plot No. 2904 which is none existent for the estate of the deceased or was for the purpose of securing a burial place may not become clear until after the trial. I am in agreement with the submission by the Plaintiff's advocate that until the title of the suit property is cancelled by the court, the Plaintiff as the registered proprietor of the suit property is entitled to the protection of law of his rights associated with such ownership. I have noted that the deceased's application seeking to revoke the grant that was issued to the Plaintiff's mother pursuant to which the Plaintiff acquired the suit property has been pending in court since the year, 2009. It is not clear and no reason was given as to why the same has never proceeded. The defendants are better advised to pursue the rights of the deceased through lawful means in that application rather than employing self- help measures. I believe that if the defendants had nowhere to bury the deceased, it was open to them to move the court in, **Kisii High Court Succession Cause No. 302 of 1995** where the deceased had lodged the said application for the revocation of the grant that was issued to the Plaintiff's mother for appropriate relief. I have no doubt that the succession court would have provided some form of remedy to them in the circumstances.

9. Due to the forgoing, I am satisfied that the Plaintiff has established a prima facie case against the defendants with a probability of success. In the case of, **George Orango Orago vs. George Liewa Jagalo & 3 others (supra)** that was cited by the Plaintiff, the court of appeal stated that, **"The appellant was in possession. Prima facie, he is the owner of the land and until his title is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land"**. That decision is appropriate here. I am of the view that if I was to deny the Plaintiff the injunction sought, it would be tantamount to dispossessing him of his land. As admitted by the 1<sup>st</sup> defendant, the land has been demarcated by "community elders" and what may be remaining is for the defendants to take possession. I am also convinced that the Plaintiff stands to suffer irreparable harm unless the orders sought are granted. The Plaintiff being the registered proprietor of the suit property who is in possession thereof, denial of injunction would as I have stated above dispossess him of the suit property. This would lead to irreparable loss which cannot be compensated in damages.
10. The upshot of the foregoing is that the Plaintiff's application dated 15<sup>th</sup> November, 2013 is well merited. The same is allowed in terms of prayer 3 thereof. The injunction shall last until the hearing and determination of this suit or until further orders by this court or the High Court in **Kisii High Court Succession Cause No. 302 of 1995** to the contrary whichever comes earlier.

Prayer 4 is granted but the same shall be limited only to the enforcement of the order herein as it relates to the prohibition of the burial of the deceased, **Samuel Gwaro** on the suit property. The Plaintiff shall have the costs of the application.

**Delivered, dated and signed at KISII** this 3<sup>rd</sup> day of December 2013.

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Ochwangi for the plaintiff

Mr. Minda for the defendants

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**