



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL CASE NO. 116 OF 2009**

**BEATRICE MGHAMBA ONYONKA**

**ELIZABETH KWAMBOKA ONYONKA**

**Both suing as personal and legal representatives of the Estate of the**

**late**

**DR. ZACHARY THEODORE ONYONKA**

**OERI.....PLAINTIFFS**

**-VERSUS-**

- 1. THE LAND REGISTRAR –KISII.....1<sup>ST</sup> DEFENDANT**
- 2. COUNTY COUNCIL OF GUSII.....2<sup>ND</sup> DEFENDANT**
- 3. JOHN BOSCO MBOGA )**
- 4. HELLEN ONDIEKI )**
- 5. AMBROSE OMBATI )**
- 6. PAULINE BOSIRE MAKORI ).....3<sup>RD</sup> DEFENDANTS**
- 7. ROSE NYAMWEYA )**
- 8. HELLEN RIVERTON )**

**RULING**

The plaintiffs are the administrators of the estate of the late **Zachary Theodore Onyonka Oeri**, hereinafter **“the deceased”**. The deceased was the registered proprietor of all that piece or parcel of land known as **West Kitutu/Bogusero/657**, hereinafter **“the suit premises”**. Apparently, the plaintiffs are the widow and daughter of the deceased respectively.

Sometimes in August, 2007 according to the plaintiffs, the 3<sup>rd</sup> to 8<sup>th</sup> Defendants trespassed onto the suit premises and begun depositing building materials thereon with the intention of putting up permanent structures in the nature of a health centre. Perplexed by the turn of events the 1<sup>st</sup> plaintiff visited the land registry, Kisii to establish the position of the register with regard to the suit premises. She conducted a search and ascertained that the suit premises had been transferred and registered in the name of Mosocho community health Centre, represented by the 3<sup>rd</sup> to 8<sup>th</sup> defendants respectively. To the plaintiffs the transfer and subsequent registration of the suit premises as aforesaid was fraudulent. Upon making inquiries from the land registrar how the register was altered without following the proper laid down procedure, he responded by a letter stating that the deceased was truly the registered proprietor of the suit premises. In spite of the foregoing the defendants had with impunity continued with the construction to the detriment of the estate of the deceased. It was then that the plaintiffs decided to mount this suit. Contemporaneously with the filing of the suit, the plaintiffs took out an application for temporary injunction.

However when the application for temporary injunction came up for interpartes hearing on 23<sup>rd</sup> September, 2009 before **Muchelule J**, the 3<sup>rd</sup> to 8<sup>th</sup> defendants raised a Preliminary Objection to the suit and application. The same was canvassed and in reserved ruling delivered on 4<sup>th</sup> November, 2009, the Preliminary Objection was upheld. However, the judge declined to strike out the suit. Instead he granted leave to the plaintiffs to amend their plaint within 14 days. Pursuant to that leave the plaintiffs amended their plaint as well as the Chamber Summons application on 20<sup>th</sup> November, 2009. The amendment had the effect of bringing on board the Land Registrar, Kisii as the 1<sup>st</sup> defendant.

In response to the amended Chamber Summons application, the 3<sup>rd</sup> to 8<sup>th</sup> defendants filed grounds of opposition. They stated that the application was misconceived, mischievous and otherwise bad in law, the amended Chamber Summons was invalid and made in vacuum as no leave of court was sought and obtained, contravened the mandatory provisions of **Order VIA rules 1&7 of the civil Procedure rules** and indeed the application and the entire suit did not disclose any reasonable cause of action and contravened the provisions of **Section 2(3) and 13A of Government Proceedings Act**. In so far as the suit premises were registered in the name of the 3<sup>rd</sup> defendant Orders of Injunction cannot issue. The application did not capture the requisite condition for granting a Temporary Injunction and finally that the application was devoid of merits whatsoever.

As for the 2<sup>nd</sup> Defendant, through one, **Isaac Githu**, county clerk, it swore a replying affidavit. Where pertinent it swore that it was not in dispute that the deceased was allotted the suit premises with conditions which he was required to adhere to. The deceased did not comply with the conditions and the 2<sup>nd</sup> defendant was prompted to consider the alternative. It repossessed the suit premises and gave it to Mosocho Health Centre as a gift with a view to developing it. On 22<sup>nd</sup> December, 2000 the 2<sup>nd</sup> defendant approved application for title deeds and change of use to construct a health centre. Mosocho Health Centre therefore is on the ground by right and the 2<sup>nd</sup> defendant being the Lessor recognizes Mosocho health centre as its Lessee.

Alongside the replying affidavit, the 2<sup>nd</sup> defendant also filed Notice of Preliminary Objection. It was to the effect that the amendment to the Chamber summons was without leave of court nor was there endorsement of the date and order allowing the amendment and or the number of the rule in pursuant of which the amendment was made. There was also a misdescription of the 2<sup>nd</sup> defendant and finally that the plaintiffs have contravened the Provisions of Government Proceedings Act by failing to issue the Mandatory Statutory Notice to the Attorney General before commencing these proceedings. No papers in opposition to or in support of the application were filed by the 1<sup>st</sup> defendant. However this may be understandable since the orders in the application are only directed against the 2 to 8 defendants.

When the application came before me for interpartes hearing on 17<sup>th</sup> November, 2010, parties agreed to canvass the same by way of written submissions. Subsequently they both filed and exchanged written submissions which I have carefully read and considered alongside respective authorities cited.

The application seeks an injunction in terms that the defendants, their agents and or servants be restrained from in any way interfering with the Deceased's parcel of land **West Kitutu/Bogusero/657** until the final determination of this suit. This being an application for Interlocutory Injunction, the plaintiffs must meet the conditions set out in the celebrated case of **Giella .v. Casman Brown & Co. Ltd (1973) E.A. 358**. However, I do not think that they we will ever get there.

When the initial Chamber Summons application came up for hearing before Muchelule J, a Preliminary Objection was successfully taken resulting in an order allowing the plaintiffs to amend their pleadings. The amendment was to be effected within fourteen (14) days of the order. The amendments were thus required to be in place on or before the 19<sup>th</sup> November, 2009. However this was not to be since the purported amendments were effected on 20<sup>th</sup> November, 2009. The plaintiffs in their submissions have admitted that they did not effect the amendments within the stipulated time. However they hasten to add that this court has power and discretion to deem as duly filed in time that which has been filed out of time, especially so if the lateness in filing is by a mere day. I am not aware of such proposition of law. Orders of court are not made in vain and particularly where they are clear and ambiguous. It cannot be right for a party to ignore the specific provisions of a court order and then come to court on the basis that the same court had discretion to deem that filed out of time as filed in time. Of what use then will be for the court to given orders with time lines which time lines are ignored willy nilly. The plaintiffs have not even proffered any reason why they could not amend their pleadings within the time frame given by the Judge. They did not even bother to seek for and or obtain extension of time within which to lodge the amended plaint, having been caught up with the time line given by the judge. That being the case, the amended plaint is invalid. The original plaint was found deficient and hence the need for amendment. Since the purported amended plaint has also been deemed to be invalid, I cannot see how the plaintiffs can claim to have established a prima facie case with probability of success. The same arguments and reasoning applies equally with regard to the amended Chamber Summons application. Of course the plaintiffs have argued that this court is enjoined by the current Constitution to ensure that justice is served without undue regard to procedural technicalities. That is all fine. However, I do not think that, article in the Constitution was aimed at assisting the indoent and those who brazenly disobey

the terms of a clear and unambiguous court order.

Further from pleadings, it is apparent that the suit premises are currently registered in the names of Mosoch Community Health Centre represented in this suit by the cluster of defendants 3 to 8. That title despite the misgivings of the plaintiffs has yet to be cancelled. I do not therefore see how a registered owner can be enjoined. In any event it cannot be said that if the injunction is not granted the plaintiffs will suffer irreparable damages that is uncompensable by an award of damages. From the averments of the 2<sup>nd</sup> defendant, they are the Lessor and the 3<sup>rd</sup> to 8<sup>th</sup> defendants are lessees. It is not suggested that the suit premises will be sold and therefore put it beyond the recovery of the plaintiffs in the event that they succeed in their suit. Their loss can be computed and paid for as damages.

The application lacks merit for the foregoing reasons and is accordingly dismissed with costs to the 2<sup>nd</sup> to 8<sup>th</sup> defendants.

**Judgment dated, signed and delivered** at Kisii this 31<sup>st</sup>, January, 2011.

**ASIKE -MAKHANDIA**

**JUDGE.**