



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. ELC 607 OF 2010**

**NJUGUNA NGARUIYA  
MARGARET KABURA NYAGA  
(Suing as the Legal Representatives of the Estate of  
Naomi Kabura Ngaruiya (deceased) ..... PLAINTIFF**

**VERSUS**

**VICTOR KATANA & 36 OTHERS .....DEFENDANT**

**RULING**

The plaintiffs filed this suit against the defendants in respect of parcels of land known as LR. NO. 209/2389/72 and LR. No. 209/2389/63. Their cause of action is that of trespass committed by the defendants on the two parcels of land as a result they now claim vacant possession and eviction orders against all the defendants and damages for trespass.

The defendants have filed defences herein and now there is an application by way of Notice of Motion seeking orders that the defendants' defences filed herein be struck out and judgment be entered in favour of the plaintiffs against the defendants for vacant possession and eviction orders. The grounds upon which the said application is premised are set out on the face of the application. There is also an affidavit in support thereof sworn by Njuguna Ngarunya and Margaret Kabura Nyaga. Following the said application there is a replying affidavit by Margaret Waruiru Kimani the 25<sup>th</sup> defendant, opposing the same. She has also filed a Notice of Preliminary Objection on a point of law to the said application. That is the basis of this ruling.

It is the position of the 25<sup>th</sup> defendant that the application dated 23<sup>th</sup> May, 2011 should have been filed in High Court Succession case No. 275 of 2007. It has now transpired that, judgment in the said suit was delivered by Nambuye J, on 21<sup>st</sup> April, 2011 in her absence. However the 25<sup>th</sup> defendant says she has filed an appeal against that decision. She bases her present position on section 58(2) of the Law of Succession Act Cap 160 Laws of Kenya which reads in part as follows,

**“where at the time of making an application relating to the will, or to the devolution of property on the intestacy, of a deceased person there are pending or have previously been proceedings under the Act relating to that or any other will or the property of such person, the application shall be made in and bear the cause number of those proceedings”.**

As at the time the application was made, the judgment in succession cause No. 275 of 2007 had been delivered. That is not the only issue. The 25<sup>th</sup> defendant had a duty to show that she is a beneficiary of the estate of the late Naomi Kabura Ngaruiya to fall under the ambit of the said cause.

The learned Judge in her judgment aforesaid made a specific finding that the 25<sup>th</sup> defendant Margaret

Wairuri Kimani was declared not to be an adopted daughter of the deceased. I know that the 25<sup>th</sup> defendant has stated that she is appealing the said judgment and I say no more. *Prima facie* therefore, the present application rightly falls within the present case for the following reasons. The 25<sup>th</sup> defendant is a party in these proceedings. The capacity of all defendants is that of tenants and no sufficient reasons have been advanced to exclude the name of the 25<sup>th</sup> defendant from the said proceedings. In any case, she can conveniently plead her capacity in these same proceedings and in that regard I see no prejudice against her and none has been alleged shall be befall her if the present application is argued under the present suit. Accordingly, the preliminary objection is hereby dismissed with costs to the plaintiffs. The application dated 23<sup>rd</sup> May, 2011 shall proceed for hearing on merit.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of July, 2011.***

**A. MBOGHOLI MSAGHA  
JUDGE**