



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 87 OF 2011

**EMMA KAGENDO NJIRU (As administrator of the estate of the late
RENISON KATHOIRI NJIRU).....PLAINTIFF**

VERSUS

**CONSOLIDATED BANK OF KENYA LIMITED.....1ST RESPONDENT
RICHARD MUIRURI T/A LEAKEY'S AUCTIONEERS....2ND RESPONDENT**

RULING

This is the Notice of Motion dated 22nd July 2010. It is brought under Order 40 Rule 1 of the Civil Procedure Rules, Section 1A, 3A and 63(e) of the Civil Procedure Act. The Applicant seeks injunctive orders in terms of prayer 2 and 3 of the said application. It is premised on the following grounds;

- The deceased Renison Kathiori Njiru is the registered owner of L.R. GATURI/WERU/1514
- The property has been put up for sale without the Plaintiff being notified yet she is the legal representative.
- A redemptive Notice and Notification of sale both dated 18/5/2011 were addressed to the deceased.
- That the Plaintiff and her siblings are unaware of the alleged loan owed by their father.
- There is collusion to deny them of their only inheritance.

The Plaintiff/Applicant has also filed a Supporting Affidavit in which she says their mother died on 14/2/2011. She took out letters of administration to her estate. She continues to explain that the family has never been served with Statutory Notices of sale. In her Supplementary Affidavit she raises an issue about the relationship between the 1st Defendant/Respondent and Home Savings & Mortgages Ltd.

The 1st Respondent filed a Replying Affidavit giving a history of this matter. The annexed copy of the change over land parcel NO. GATURI/WERU/1514. He has also annexed detailed communication between the late Renison Kathoiri Njiru and the 1st Respondent. He has also annexed communication between the late Margaret Giciku Njiru and the 1st Respondent. He further says a Statutory Notice was issued to the late Mrs. Njiru dated 24/6/2008 (JMG24) and the sale even took place on 17/7/2009 (JMG25) but there were no serious bidders.

He says once a statutory notice has been issued it does not matter that the deceased dies thereafter. Another notice need not issue. He also says the Applicant lacks *locus standi*. The Plaintiff herein states she was/is unaware of any change over the property in question. The Respondent in the Replying Affidavit says he is very surprised. Both counsels took time to highlight their submissions. They talk of a letter by the Plaintiff dated 18/7/2011. I have not seen that letter among the annexures so I will not refer to it.

An issue has arisen concerning the locus standing of the Plaintiff and even the 1st Defendant. From the annexures it is clear there was a change registered over the suit property in favour of HOMES SAVINGS & MORTGAGE LIMITED (Replying affidavit (pg 9-25). The loan taken was only Shs.200,000/=. There is an annexure which is a certificate of search dated 22/7/2011 showing that on the suit land was registered a change in favour of Home Savings & Mortgage Limited.

However the communication in the annexures to the Replying affidavit (pg 45-67) shows the late parents of the Plaintiff herein were communicating with the 1st Defendant. Whatever may have transpired between the 1st Defendant and Loans Savings & Mortgages to bring matters where they are is a matter of evidence which will be tackled during the hearing.

We now come to the *locus standi* of the Plaintiff. Her mother the late Margaret Njiru was given a grant to her fathers' estate on 14/1/2000. (EKN3). there is no evidence that there was any confirmation of the same before the death of Mrs. Njiru. And following her death the Plaintiff was granted letters ad litem to gather the deceased's estate.

Here is a case where we have a sole administrator dying before distributing the estate. What happens? Section 81 of the Law of Succession Act only makes provision when we have several executors or administrators and one or several of them die. The law did not envisage a situation where ALL of them would die and so no provision was made.

The same goes for the sole administrator. There is no provision or direction what should happen. I am almost sure that when the first deceased died he left his wife with minor children. And that is why the court has always insisted on having more than one administrator where the deceased is survived by minor children. If the above had been complied with we would not be having an issue concerning the late Renison's estate.

When Mrs. Njiru got letters of administration, she took charge of the late Njiru's estate and started administering it. Now that she has died and Section 81 Cap 160 is silent on what should happen, this court should provide a way forward. Since the Plaintiff now has the *locus standi* over the mother's estate, she has stepped into her mother's shoes.

And considering that she was/is a beneficiary of her late father's estate, there should be no better placed person as the mother's legal representative (since she has the consent of her siblings) to also take care of her father's estate. I would therefore expect her to make an application on Embu Chief Magistrate's Succession Cause no. 260/99 for substitution, immediately to regularize the position.

The Registered Land Act sets down what should be done when there is default in repayment of money borrowed from the documents annexed to the Replying affidavit. The communication of the 1st Defendant and the parents of the deceased show there was clear default of payment of the amount owing. We are not at Section 74 of the Registered Land Act. The 1st Defendant here elected to sell the changed property. In fact in the year 2009 this property is said to have been sold but the alleged highest bidder never came back to pay the 25% deposit.

The issue then is after such an unsuccessful sale does the changee issue a fresh statutory notice or does he/she proceed to sell under the first notice?

Annexure JMG12 is the 1st Statutory Notice sent by registered post to the late Mrs. Njiru. It is dated 13/6/94. Annexure JMG23 dated 24/6/08 is the next one sent by Registered and ordinary post. It was sent to Mrs. Njiru.

On 25/3/2011 the 1st Defendant herein gave instructions to the 2nd Defendant to sell the suit property hence this matter before court.

There is no dispute that NO NOTICE has been issued since the one of 24/6/2008. The deceased persons are not here to tell us whether they were ever served with the Statutory Notices. The plaintiff

denies receiving any notices. Issue is whether there was any statutory Notice served on the deceased persons in the first place. I ask this because the Respondents are relying on those two (2) Notices to sell the suit property now.

In the case of **GICHORA VS FAMILY FINANCE BUILDING SOCIETY [2002] 2KLR 489**, it was held that once the change or alleged non-receipt of the Statutory Notice it was for the changee to prove that such notice was in fact sent.

In the case of **JOSEPHINE NJOKI MWANGI VS HOUSING CORPORATION OF KENYA LIMITED [2008] eKLR**. Hon. Lady Justice Lessit in confirming the above said:

“Since the receipt of that notice was denied, it was incumbent upon the Defendant to prove service. The easiest way to prove this was to annex a certificate of posting as proof that the letter had been sent by registered mail”.

The Respondents have not annexed any certificate to confirm the sending of those notices. I find that the Notices were not served. Even if the Statutory Notices were sent and received, did that bar the Respondents from issuing a fresh Statutory Notice to the Legal Representative of the estate of Renison Njiru? The 1st Defendant has all along known that ‘borrower’ of the money died. Now they are aware his legal representative has also died.

In the case of **KYANGORO VS KENYA COMMERCIAL BANK LIMITED & ANOTHER [2004] 1KLR 126** it was confirmed that **“Upon receipt of a letter of instruction, the Auctioneer should, among other things, write to the owners of the property giving such owner not less than 45 days notice within which to redeem the property by payment of the amount due as set out in the letter of instruction”.**

If the 45 days expire and the owner has not paid, then the Auctioneer should give at least 14 days notice for the sale of the property. In total therefore, the earliest period within which the property may be sold would appear to be 60 days.

Did the 2nd Defendant herein give the Notification of sale to the owner of the property as is required? If he did who is this owner that he wrote to and sent to or gave the letter? These are not in the Replying Affidavit. Who is it that was served? From the annexures herein I see no Notice addressed to the Legal Representative of the estate of the late Renison Njiru. There are many case where it has been held that NO Notice can be served on a deceased person.

Ref: **1. RAGUI VS BARCLAYS BANK OF KENYA LIMITED [2002] 1 KLR 647;**
2. JOSEPHINE NJOKI MWANGI (SUPRA)
3. CALEB KOSITANY (Suing or and on behalf of SIMON SAWE KOSITANY Deceased & ANOTHER VS ICDC & ANOTHER.

Now having made the findings above and bearing in mind the principles laid down in the **GIELLA VS CASSMAN BROWN [1973] EA 358** case and the **AMERICAN CYANAMID VS ETHICON** case; I do find that there is present a serious question to be tried on merit.

The Applicant has satisfied this court that he cause has substance and reality. She merits the orders prayed for. I therefore issue temporary injunction in terms o f prayer 2 & 3 in respect of Land parcel GATURI/WERU/1514.

The plaintiff is ordered to fast track the hearing of the case as the orders granted are temporary. The Plaintiff should work at sorting out the payments in an amicable way with the bank things being the way they are. Costs in cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF NOVEMBER 2011.

H.I. ONG'UDI
JUDGE