



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE 231 OF 2009**

**TERESA KWAMBOKA OBUTU.....PLAINTIFF**

**-VERSUS-**

**TERESA KEMUNTO ATEI ).....DEFENDANTS**

**BARNABS ATEI NYANGARA)**

**RULING**

The applicant states that she is, since 5/11/98, the registered owner of land parcel no. North Mugirango/Boisanga/2629 measuring 1.01 Hectares. She bought it from the deceased Ondari Nyangawa who was the husband of the 1st respondent and father of 2nd respondent. The deceased died on 3/11/2009 and the respondents want to bury the body on the land, and this is what has prompted this suit and application.

The applicant states that the deceased and the respondents were, at the time of the said purchase, staying on the land and have since continued staying here, but on the understanding that they were going to vacate and move to their parcels nos. North Mugirango/Boisanga/2631 and 2634. They have since refused to vacate. The suit seeks their eviction and that they be permanently restrained from the alleged wrongful and illegal occupation of the land.

In the replying affidavit, the respondents deny that the applicant is the registered owner of the land. They deny that the applicant bought this land. They also deny they had undertaken to vacate the land. They state that they have always been on this land; that the land was registered in the name of Pacifica Moraa Atei and they do not know how it passed to the deceased for the applicant to buy it from him.

The applicant annexed Certificate of Official Search (“TKO oo1”) to show that the records at the lands registry show her to be the registered owner of the land. The respondents dispute this and wondered why the applicant did not annex copy of the Title Deed or Green Card. Under *section 32(2) of the Registered Land Act (Cap.300)* a Title Deed is *prima facie* evidence that the person named therein is the

registered owner of the land and that the entries therein reflect the register.

The applicant and the respondents appear to agree that the applicant has not occupied the suit since the alleged purchase, or at all. They also agree that under Abagusii customary law the deceased's remains are supposed to be buried in the homestead of his first wife who, in this case, is the 1st respondent. Custom would therefore command the burial on the land in dispute on which the 1st respondent has a homestead.

A registered owner of land would, under *sections 27 and 28 of the Registered Land Act*, be entitled to absolute and indefeasible title. Given the contents in the replying affidavit to which the applicant did not find it fit to respond, the respondents are saying that the applicant has not demonstrated that she is the *prima facie* owner of the land. She would therefore not have fulfilled the first condition of *Giella .V. Cassman Brown And Co. Ltd [1973]EA 358* for the grant of injunction. My own view of the matter is that there are serious issues that are in contest that will only be clarified upon the hearing of the testimonies of the witnesses on either side. The fact that the applicant has apparently tolerated the respondents and the deceased since 1998 when she allegedly bought the land, the respondents were on the land even before the purchase and the applicant has never occupied this land since purchase have all gone to influence my decision that the grant of temporary injunction would be inappropriate in the circumstances of this case.

The result is that the application is dismissed with costs. The earlier injunction is vacated.

Dated, signed and delivered at Kisii this 1<sup>st</sup> day of February, 2010.

**A.O.MUCHELULE**

**JUDGE**

**1/2/2010**

Before A.O.Muchelule-J

Court clerk-Bibu

Plaintiff-present

**COURT:** Ruling in open court.

**A.O.MUCHELULE**

**JUDGE**

**1/2/2010**