



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 206 OF 2004**

JOHN BARTINGA TONJE.....1ST PLAINTIFF

MATHEW KOLGAT TONJE.....2ND PLAINTIFF

DORCAS KIUNGA.....3RD PLAINTIFF

VERSUS

RETIRED GENERAL DAUDI TONJE.....1ST DEFENDANT

CHEPKONGA TONJE.....2ND DEFENDANT

RULING

The Plaintiffs, John Bartinga Tonje, Mathew Kolgat Tonje and Dorcas Kiunga filed suit against the Defendants, Retired General Daudi Tonje and Chepkonga Tonje seeking the orders of this Court to permanently restrain the 1st Defendant from evicting them from *LR No. Ravine Scheme Number 102/182* which they claimed was a family property. Contemporaneous with filing the said suit, the Plaintiffs made an application for injunction under the provisions of **Order XXXIX Rule 1, 2 Civil Procedure Rules, Section 3A and Section 63(e) of the Civil Procedure Act** to restrain the Defendants by themselves, their servants or agents from threatening and or evicting the Plaintiffs from *LR No. Ravine Scheme Number 102/182*. The grounds in support of the application were that the Plaintiffs were in quiet and uninterrupted occupation of the suit land since 1963. The Plaintiffs further stated that they had been threatened with eviction ever since the 1st Defendant illegally obtained credit from Kshs. 500,000/= from the Standard Chartered Bank without the Plaintiff's consent. The Application is opposed. The Defendants have filed grounds of opposition and a replying affidavit in opposition to the Plaintiff's application. When this application came up for hearing on the 27th of July 2004, Justice Musinga, ordered that the status quo be maintained pending the hearing and determination of the Application on the 4th of October 2004.

Before the said Application was heard by the Court, several developments took place. The 2nd Defendant Chepkonga Tonje died. The Plaintiff's made an application to have the suit against the 2nd Defendant to be discontinued. The said Application was allowed. The 3rd Plaintiff applied withdraw as a party to the suit. The Application was allowed. The Plaintiffs filed another application on the 21st of September 2004 under the provisions of **Order XXXIX Rule 2 of the Civil Procedure Rules, Section 3A and Section 63(e) of the Civil Procedure Act** for orders that pending the hearing and determination of the Application dated the 9th of July 2004 this Court issues a mandatory interlocutory injunction reinstating the Plaintiffs to the suit land. The Plaintiffs further prayed for further orders of this Court restraining the 1st Defendant from interfering with the Plaintiffs peaceful occupation of the suit land. The 1st Defendant, as expected, opposed the application. He filed a replying affidavit in opposition to the application. Annexed to his affidavit was the affidavit of Shadrack Kiptui Tonje.

Both parties agreed that the two applications be heard at the same time and one ruling be given for said

two applications. Mr Odhiambo, Learned Counsel for the Plaintiffs submitted that the Plaintiffs had resided on the suit land from 1963. The Plaintiffs annexed a certificate of search confirming that the suit land was registered in the name Chepkonga Tonje, the deceased. The certificate of search was annexed to the affidavit and marked as "JBT 1". The suit land in question was registered as *L.R. Ravine Scheme No. 102/182*. The Plaintiffs submitted that the Defendant had sought for the Plaintiffs to be summoned before the District Officer, Eldama Ravine for the purposes of discussing the issues related to the land. Learned Counsel submitted that the Plaintiffs were apprehensive that the suit land would be transferred to third parties and therefore deny the Plaintiffs the right of occupation over the suit land, which their deceased father held in trust for them. The Plaintiffs submitted that they had established a *prima facie* case as they had proved that they were entitled to occupy the suit land. The Plaintiffs further submitted that they were men of straw and the only source for their livelihood was suit land which they were occupying. The Plaintiffs further submitted that the suit land was family land and should they be evicted therefrom they would suffer irreparable loss which was unlikely to be compensated by damages. The Plaintiffs further submitted that the Defendant did not reside on the suit land but had another property in Kitale where he had set up residence. It was the Plaintiff's further submission that the balance of convenience tilted in their favour as they were in occupation of the said suit land. The Plaintiffs prayed for the said Application to be allowed.

In respect of the Application dated the 21st of September 2004, the Plaintiff's submitted that after this Court had ordered that the status quo on the ground be maintained, the son of the Defendant known as Rerimoi Tonje, on the 24th of August 2004, in disobedience of the said Court order issued, attacked one Shadrack Kiptui Tonje, a brother of the Plaintiffs, destroyed his house built on the said parcel of land and chased him together with his family from the said parcel of land. The Plaintiffs submitted that as a result of the said action by the son of the Defendant, the said Shadrack Kiptui Tonje had been rendered homeless. The Plaintiffs urged this Court to order that the said Shadrack Kiptui Tonje be reinstated to the suit land. The Plaintiffs further prayed for the Defendant to be restrained from interfering with their occupation of the suit land until the hearing and determination of the suit filed. The Plaintiffs further submitted that it is only right that the *status quo ante* be restored so that the parties may be settled as they were before the eviction pending the hearing and determination of the suit.

The Defendant opposed the Application. Mr Gatumu, Learned Counsel for the Defendant submitted that the Applications filed were an abuse of the due process of the Court. The Defendant submitted that the Plaintiffs were busy bodies and had no right or claim known in law over the suit land. The Defendant denied that the Plaintiffs ever occupied the suit land, let alone developed it. The Defendant submitted that the Plaintiff had not demonstrated that they were in occupation of the suit land to be entitled to the orders of injunction sought. The Defendant further submitted that the Plaintiffs were in occupation of a nearby parcel of land known as *Baringo/Sabatia 103/101*. The Defendant submitted that he acquired the suit land in 1963 but had the said parcel of land registered in his late father's land. The Defendant submitted that he has always been in occupation of the suit land.

The Defendant denied that he borrowed the money using the title of the said parcel of land. The Defendant further submitted that he went to the District Officer, Eldama Ravine to seek his assistance when the Plaintiffs sought to illegally occupy the suit land. The Defendant further submitted that he has always been in occupation of the suit land. The Defendant submitted that his deceased father held the suit land in trust for him. The Defendant further submitted that the Plaintiffs started laying claim of the suit land when their deceased father started becoming ill. He further submitted that the *status quo* on the ground has been that he is in occupation of the suit land. The Defendant submitted that the Plaintiffs filed the application dated the 21st of September 2004 for the purposes of seeking to entrench their occupation on the suit land. The Defendant submitted that the Plaintiffs had infact categorically stated that they were not in occupation of the suit land but it was one Shadrack Kiptui Tonje who was in occupation of the said suit land. The Defendant submitted that the Plaintiffs had not demonstrated in what capacity they had brought the suit on behalf of the said Shadrack Kiptui Tonje.

The Defendant further submitted that the Plaintiffs had not proved that indeed the Defendant has disobeyed the Court order by allegedly destroying a house built by the said Shadrack Kiptui Tonje. The Defendant submitted that no report was made to the Police. The Defendant submitted that the Plaintiffs

had not established a *prima facie* case to entitle them to the orders of injunction sought. The Defendant urged this Court to dismiss both Applications.

I have considered the rival arguments made by Counsel for the Plaintiffs and Counsel for the Defendant. The issue for determination by this Court is whether the Plaintiffs have established the requisite conditions to be granted the orders of interlocutory prohibitory injunction and interlocutory mandatory injunction sought respectively. It is not disputed that the parcel of land in dispute known as *L.R. Ravine Scheme Number 102/182 (Baringo/Ravine 102/182)* is registered in the name of Chepkonga Tonje who is now deceased. The said Chepkonga Tonje (*hereinafter referred to as the deceased*) was sued together with the remaining Defendant in this case until his death when the case against him was withdrawn. The Plaintiffs contend that the suit land is family land. They further contend that they had resided on the said suit land since 1963. In particular, it was the Plaintiffs case that one of their brothers called Shadrack Kiptui Tonje resided on the said parcel of land until he was allegedly forcefully evicted therefrom by the son of the Defendant called Rerimoi Tonje. The Defendant argues that the suit land, although registered in the name of the deceased, was actually his. It is the Defendant's case that he purchased the said parcel of land from the Settlement Fund Trustees in 1963 but had the land registered in the name of his father. The Defendant further stated that he has been in occupation of the said parcel of land since 1963. It was the Defendant's case that the Plaintiffs, who are his half brothers, reside in a nearby parcel of land known as *L.R. Sabatia Scheme/103/101 (now known as Baringo/Sabatia 103/101)*. The Defendant further argued that at no time during the material time did the Plaintiff or their brother Shadrack Kiptui Tonje reside or occupy the suit land.

I have considered the arguments made by the Plaintiffs and the Defendants. What emerges from the arguments made by the opposing parties in this suit is that the Plaintiffs are claiming the suit land as family land. While the Defendant on his part is arguing that the suit land, though registered in his late father's name, is his. I find both arguments to be misplaced. Both parties have conceded that the suit land is registered in the name of the deceased. This Court cannot make a decision in respect of the said parcel of land registered in the name of a deceased person in the absence of letters of administration being issued to the administrator of the estate of the said deceased person. In **Trouistik Union International & Anor –versus- Mrs Alice Mbeyu & Anor C. A. Civil Appeal No. 145 of 1990 (Nrb) (unreported)** the Court of Appeal held that the Court cannot make a decision concerning a deceased's estate, where no letters of administration has been issued to the administrators of the deceased estate. In fact nobody has capacity to bring suit concerning a deceased's estate without first applying for letters of administration.

In the instant case, it is immaterial that both the Plaintiffs and Defendant have vocally put forward their case to try and persuade this Court that they are entitled to occupy and reside in the suit land. The letters of administration to the estate of the deceased has first to be obtained before any of the parties to this suit can lay claim on the suit land. Once the registered owner of the suit land died, the arguments by the parties to the Applications became moot.

In the circumstances of this case, I do find that the Plaintiffs could not possibly establish a *prima facie* case where the property they laying claim to is registered in the name of a deceased person where letters of administration to his estate has not been obtained. Further from the evidence before me, it appears that the Plaintiffs in their effort to have a foot hold on the said parcel of land before the demise of their father, attempted to have their brother Shadrack Kiptui Tonje installed on the said parcel of land. The Plaintiffs themselves do not reside on the said parcel of land. It is the considered opinion of this Court that the Plaintiffs intention in filing suit against the Defendant was actually for the purposes of laying ground for the battle for the succession of the said parcel of land. This Court cannot help but observe that it is very unfortunate that the parties to this suit have used Shadrack Kiptui Tonje, who from affidavit evidence appears to be mentally unstable, as a pawn in their quest to have a head start in the Succession race.

Having found that the parties herein, and particularly the Plaintiffs, did not have *locus standi* to bring a suit whose subject matter was a property registered in the name of the deceased, where no letters of administration has been obtained, the Applications filed by the Plaintiffs lack merit. The two Applications are consequently dismissed with costs to the Defendant. The parties to this suit may ventilate the matters in dispute in the Succession Cause to be filed in respect of the deceased's estate.

DATED at NAKURU this 2nd day of November 2004.

L. KIMARU

AG. JUDGE