



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

**AT KISII**

**SUCCESSION 230 OF 2007**

**THOMAS KENYATTA GICHWA.....DECEASED**

**AND**

**JACKLINE KEMUMA ORIOKI.....OBJECTOR**

**VERSUS**

**JACKLINE NYABOKE GICHANA**

**BOCHABERI NYAKUNDI.....PETITIONERS**

**RULING**

1. **THOMAS KENYATTA GICHWA**, (hereinafter “the deceased”), died on 14<sup>th</sup> December, 2005. The deceased was, prior to his death the registered owner of LR NO. EAST KITUTU MWAMOSIOMA/2746 (“hereinafter “the suit property”). Representation of the deceased’s estate was obtained on 10<sup>th</sup> April, 2008 by Jackline Nyaboke Gichana and Bochaberi Nyakundi the petitioner’s widow and sister in law respectively. The said grant of letters of administration was subsequently confirmed on 25<sup>th</sup> February 2009 in the following terms:

<u>Name</u>	<u>Description of property</u>	<u>Shares</u>
<b>Jackline nyaboke Gichana</b>	<b>EAST KITUTU/MWAMISIOMA/2746</b>	<b>Be registered in the joint names of the petitioners herein in trust for the children of the deceased</b>

**Bochaberi Nyakundi**

2. In form P & A5 filed by the petitioners on 13<sup>th</sup> December 2007, the children of the deceased were listed as;

- a. **BAK, son aged 11 years and**
- b. **ENK – daughter aged 8 years.**

3. On 18<sup>th</sup> June 2009 the certificate of confirmation of grant issued on 25<sup>th</sup> February 2009 was rectified to show the registration number of the suit land as East Kitutu/Mwamangera/2746 and not East Kitutu/Mwamosioma/2746.

4. On 6<sup>th</sup> July 2009, the objector herein Jackline Kemuma Orioki filed an application for revocation/annulment of grant claiming that she was the widow of the deceased and therefore a beneficiary of the estate of the deceased who had been excluded from the succession proceedings filed by the petitioners.

5. On 9<sup>th</sup> March 2010, one Fridah Moraa Nyakundi filed yet another application for revocation of grant dated 1<sup>st</sup> March 2009 while also claiming to be a beneficiary of the estate of the deceased.

6. On 23<sup>rd</sup> April, 2010, directions were taken that the two applications for revocation of grant be argued by way of written submissions. On 12<sup>th</sup> November 2010, the parties to the case intimated to the court that they wished to canvass the two applications by way of viva voce evidence on a date to be fixed at the registry.

7. On 25<sup>th</sup> April, 2016, Mr. Ayienda, counsel for the objector informed this court that the suit property, the subject of the objection proceedings had been transferred to a third party thereby prompting the objector to file the application dated 15<sup>th</sup> June 2016 which is now the subject of this ruling.

### **Application dated 15<sup>th</sup> June 2016**

8. The application dated 15<sup>th</sup> June 2016 is brought under **Sections 45, 47, and 82 of the Law of Succession Act** (hereinafter “the Act”) and **Rules 44, 49, 59, 63 and 73 of the Probate and Administration Rules**. The applicant seeks the following orders:

1. **Spent**

2. **Pending the hearing and determination of this Application, the Honourable court be pleased to issue a prohibitory order of injunction and/or conservatory order restraining the respondents from disposing off, alienating and/or selling all that land known as EAST KITUTU/MWAMANGERA/2746.**

3. **The register in respect of LR. NO. EAST KITUTU/MWAMANGERA/2746 be rectified and name of LINET KEMUNTO NYARIKI be deleted therefrom and same to revert to the name THOMAS KENYATTA GICHWA the deceased person herein.**

4. **Costs of this application be borne by the Respondents.**

9. The application is supported by objector’s affidavit dated 15<sup>th</sup> June 2016 in which she states that she is the widow of the deceased, a fact which the petitioners did not disclose to the court at the time they applied for the grant of letters of administration thereby prompting her to institute objection proceedings herein, but that while the objection proceedings were still pending in court, the petitioners went ahead to transfer the suit property to a third party, one Linet Kemunto Nyariki as shown in the green card a copy of which she attached to her affidavit as annexure “JKO1.”

10. It is the applicant’s case that the said transfer of the suit land to a third party in the face of the pending objection proceedings was intended to defeat the said objection proceedings and render them nugatory. She attached a copy of the certificate of official search of the suit property as annexure “JKO-2” to her affidavit.

11. The applicant adds that the petitioners’ conduct of transferring the suit property was illegal and was intended to deny her and her children their rightful entitlement to the deceased’s estate. The applicant further avers that it is only fair and just that the register in respect to the suit property be rectified so that the suit property can revert back to the name of the deceased pending the hearing and disposal of the objection proceedings.

12. The application was opposed through the replying affidavit sworn by the 1st petitioner on 13<sup>th</sup> July 2016 in which she admits that one Linet Kemunto Nyariki purchased the suit property and is therefore the current registered owner whose ownership rights cannot be challenged in this succession cause. The 1<sup>st</sup> petitioner reiterates that the name of Linet Nyariki cannot be removed from the register as she has not been enjoined in the instant proceedings.

13. When the application came up for hearing on 16<sup>th</sup> August 2016, parties agreed to canvass their arguments on it by way of written submissions.

### **Analysis and determination**

14. Upon considering the application dated 25<sup>th</sup> June 2016, the replying affidavit thereto and the parties respective written submission, I note that the issues which require this court's determination are;

a. **Whether the orders of injunction restraining the respondents from disposing off the suit land can be granted.**

b. **Whether the name of Linet Kemutno Nyariki ought to be deleted from the register in respect to the suit land so that the same can revert back to the name of the deceased.**

### **Injunction**

15. An interim injunction is essentially a provisional order geared towards restraining the doing of a particular act or to require a certain state of affairs to be halted temporarily either until the trial of the suit or until further orders- (See **Richard Kuloba- Principles of injunctions” Oxford University Press 1987**). By its very nature therefore, an order of injunction is intended to restrain/prevent an event or an action from taking place. In the case of **George Orango Orago vs George Liewa Jagalo and 3 others [2010] eKLR** the Court of Appeal held that the purpose of an interim injunction is to conserve or preserve the subject matter/property pending determination of a suit concerning the property.

16. In the instant case, the applicant seeks an order of injunction to restrain the respondents herein from disposing off, alienating and/or selling the suit land. In the same breath, the applicant depones in her affidavit in support of the application that the suit land had already been sold to the a third party one Linet Kemunto Nyariki in whose name the suit land is currently registered as shown in the attached copies of the green card and certificate of official search marked as annexure “JKO-1” and “JKO-2” respectively.

17. Clearly therefore, the act of selling, alienating or disposing of the suit land has already taken place. I have perused the copy of the certificate of official search (“JKO-2”) and I note that Linet Kemunto Nyariki got registered as the owner of the suit land on 19<sup>th</sup> October 2015 on which date she was also issued with the title deed. It is therefore my finding that it would be an exercise in futility to issue orders of injunction to restrain the respondents from doing what they had already done way back in October 2015. Needless to say, the suit land is no longer in the hands of the respondents but that of a third party.

18. I however wish to reiterate that notwithstanding my findings on the viability of orders of interim injunction sought in light of changes that have already taken place in the ownership of the suit land, I also find that the sale was carried out by the respondents in a move calculated to steal the match from the applicant in this case considering the fact that the respondents were fully aware that objection proceedings challenging the grant of letters of administration issued to them were still pending before this court. I hasten to add that it is not very clear to this court under what circumstances the respondents disposed of the suit land which this court mandated them, upon the confirmation of grant, to hold in trust for the deceased's minor children. This subject of the legality of the sale of the suit land is one that can only be fully ventilated and determined at another forum and upon the purchaser being enjoined in the suit as a party should the applicant opt to pursue the matter further.

### **Rectification of the register**

19. Turning to the issue of rectification of the register, I am in total agreement with the respondent's submissions that this is a prayer that cannot be issued in the absence of the third party, Linet Kemunto Nyariki, in whose name the suit property is currently registered. The applicant did not enjoin the said third party to these proceedings and indeed it is a cardinal principle of natural justice that no party should be condemned unheard. Needless to say, failure to enjoin the third party to these proceedings was a fatal omission on the part of the applicant. It is therefore my finding that granting orders to delete the third party's name from the register in respect to the suit property would be tantamount to condemning the said third party unheard.

20. In sum, I find that the prayers sought by the applicant cannot be granted for the reasons stated hereinabove. Consequently the order that commends itself to me is the order to dismiss the application with no orders as to costs.

21. It is so ordered

**Dated, signed and delivered in open court this 8<sup>th</sup> day of February, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Ayienda for the Applicant
- Mr. Bosire for the Respondent
- Omwoyo: court clerk