



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 2 OF 2020**

**JOYCELEEN NYAREGA.....PLAINTIFF**

**VERSUS**

**PERIS KEMUMA NYAREGA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MOMANY NYARANGI.....2<sup>ND</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR NYAMIRA.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed an application dated 26<sup>th</sup> January 2020 under certificate of urgency seeking an interim order of injunction to restrain the Defendants/Respondents from alienating, selling, transferring, constructing or continuing to construct structures on, leasing or in any other way interfering with the parcel of land known as L.R NO. WEST MUGIRANGO/SIAMANI/1393 pending the hearing and determination of the suit herein.

2. The application is anchored on the grounds on the face of the Chamber Summons and the Applicant's Supporting Affidavit sworn on the 26<sup>th</sup> January 2020. In the said affidavit the Applicant depones that she is the administrator of the estate of the late Simon Nyarega Mochoge, having substituted her late mother Pauline Nyamanyi Nyarega vide a court order dated 21<sup>st</sup> March 2011 in Kisii HC Succession Cause No. 64 of 2005. She depones that by the same order, the 1<sup>st</sup> Respondent was restrained from dealing with the suit property but she violated the said order and sold the suit property to the 2<sup>nd</sup> Respondent, who has started erecting a structure thereon. She depones that even though she had earlier on lodged a caution on the suit property which the 1<sup>st</sup> Respondent had transferred to her sole name, the same was removed by the 3<sup>rd</sup> Respondent in collusion with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Applicant further depones that the preservation of the suit property is paramount in order to safeguard the interests of the beneficiaries and uphold the dignity of the court.

3. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through their Replying affidavit. In her affidavit sworn on the 9<sup>th</sup> March 2020, the 1<sup>st</sup> Respondent depones that the Applicant irregularly and fraudulently obtained a Grant of letters of administration in respect of the estate of Simon Nyarega Mochoge (deceased) and upon learning of the same she filed an application for revocation of the said grant which application is still pending for hearing in the High Court. She depones that since the Applicant's Grant is under challenge, she lacks the locus standi to institute this suit on behalf of the estate of the deceased.

4. The 1<sup>st</sup> Respondent depones that the injunction sought against her has been overtaken by events as the suit property has been sold to the 2<sup>nd</sup> Respondent. She avers that the suit property was jointly acquired by her and the deceased and constituted her matrimonial home. After the deceased's death she applied for it to be transferred to her name in her capacity as the surviving spouse. She denies that she was served with the application for revocation of Grant in HC Succession Cause No. 64 of 2005. She further avers that the caution that had been lodged on the suit property by the Applicant was lawfully removed by the 3<sup>rd</sup> Defendant after issuing a notice to the Applicant.

5. The 2<sup>nd</sup> Respondent filed his Replying Affidavit on 12<sup>th</sup> February 2020. He states that his name is Judson Momanyi Nyarango and not Joseph Momanyi Nyarangi as indicated in the pleadings. He avers that he legally purchased the suit property at a price of Kshs. 7,000,000/= after conducting due diligence establishing that the 1<sup>st</sup> Respondent was the registered owner thereof. He depones that he is an innocent purchaser who was not aware of any caution over the suit property and states that if any caution was removed then the 3<sup>rd</sup> Respondent should be held responsible. He depones that as innocent purchaser, he should not be drawn into the family dispute between the Applicant and the 1<sup>st</sup> Respondent which was not brought to his attention at the time he was buying the suit property. He prays that the application be struck out so

that the suit can be set down for hearing to enable him know his fate.

6. The application was canvassed by way of written submissions and the Applicant and 2<sup>nd</sup> Respondent filed their submissions. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not file any submissions.

#### **ISSUES FOR DETERMINATION:**

7. Having considered the pleadings, affidavits and submissions on record, the following issues fall for determination:

1. Whether the Applicant has the locus standi to institute the suit herein.
2. If the answer to (1) is in the affirmative, whether the Applicant is entitled to an order of injunction pending the hearing and determination of this suit.
3. Who should bear the costs of this suit.

#### **ANALYSIS AND DETERMINATION**

8. With regard to first issue, the 1<sup>st</sup> Respondent has challenged the Applicant's locus standi to bring this suit on behalf of the estate of the late Simon Nyarega Mochoge, as she argues that the Applicant's Grant in respect of the estate of the deceased was obtained irregularly and it is the subject of an application for revocation of Grant in Kisii HC Succession Cause No. 64 of 2005 which is still pending.

9. At the time the Applicant filed this suit, she had been issued with a Grant of letters of Administration in respect of the estate of the late Simon Nyarega Mochoge after substituting her late mother who was the initial administrator, and who had since died. Even though the 1<sup>st</sup> Respondent has applied for revocation of the said Grant, the application has not yet been heard and as at now the Grant issued to the Applicant still stands. The said Grant therefore clothed the Applicant with the locus standi to institute this suit on behalf of the estate of the deceased.

10. Turning to the second issue, it is not in dispute that on 21<sup>st</sup> March 2011 the High Court issued an injunction to restrain the 1<sup>st</sup> Respondent from interfering with the suit property among other properties of the deceased pending the hearing and determination of the Succession case. According to the 1<sup>st</sup> Respondent's affidavit, the said Succession case has not yet been determined which means that the injunction is still in force. That being the position, the suit property was considered as part of the estate of the deceased and unless the Grant has been confirmed and deceased's property distributed, this court would hesitate to issue any injunctive orders in a matter that is pending before the High Court. The question that arises is why did the Applicant not take up the issue of the 1<sup>st</sup> Respondent's disobedience of the injunction order with the High Court, instead of filing a fresh application for injunction in this suit?

11. Regarding the application for injunction against the 2<sup>nd</sup> Respondent the Applicant has to demonstrate that she has met the conditions set down in the celebrated case of **Giella V Cassman Brown & Company Limited (1973) E.A 358** which are as follows:

*“First, the Applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”*

12. Counsel for the 2<sup>nd</sup> Respondent has submitted that the 2<sup>nd</sup> Respondent is an innocent buyer or what in law is known as a bona fide purchaser for value without notice. It is his position that he purchased the suit property after conducting due diligence and establishing that the 1<sup>st</sup> Respondent was the registered owner thereof. His argument is that as a surviving spouse of the deceased, the 2<sup>nd</sup> Respondent was entitled to inherit the suit property which comprised of her matrimonial home that she had jointly acquired with her late husband. This is a valid point which can only be determined at a full hearing.

13. The role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties' cases. This was so held in the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988)KLR1**, where the court stated as follows: -

*“in an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases,”*

14. I have carefully considered the pleadings, notice of motion, affidavits, annexures and the rival submissions and from the material placed before me. I am not persuaded that the Plaintiff has established a prima facie case with a probability of success nor has she met the other conditions set out in the Giella case. The upshot is that I find no merit in the Plaintiff's application and I dismiss it.

The costs of the application shall be in the cause.

**Dated, signed and delivered via video link this 16<sup>th</sup> day of July 2020.**

**J.M ONYANGO**

**JUDGE**