



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MISC. APPLICATION 84 OF 2005**

STELLA WANJIRU &

JANE WANGUI..... APPLICANTS

*VERSUS*

ANGELIA MUTHONI KAGAI.....RESPONDENT

**RULING**

This is a ruling on the application dated 14/1/2015 seeking inter alia for orders;

- 1. That the court do lift prohibitory orders issued on 21/6/2015 and vacate all encumbrances over land parcel number Kabare/Nyangati/555.*
- 2. That the costs of this application be provided for.*

The application is supported by the affidavit of Stella Wanjiru sworn on the 14<sup>th</sup> January 2015.

The applicant depones that Kabare/Nyangati/555 was originally registered in the name of her late father, one Karoboti Ngumi. The respondent filed Kerugoya Succession Cause No. 32 of 2002 without the knowledge of the family of the deceased and obtained a certificate of confirmation of grant. The grant was later revoked on the motion of the applicants. Interim orders restraining the respondent from any dealings with the land pending hearing and determination of the application for revocation of grant were obtained by the applicant and have been filed at the Land's office, Kerugoya.

The applicant applied and obtained fresh grant in Kerugoya CM Succession cause No. 32 of 2002. The estate has been distributed and there are no pending proceedings. The applicant was unable to register the fresh certificate of confirmation of grant as the prohibitory order she had obtained is still registered. It is in the interest of justice that the orders be lifted.

In the replying affidavit, the respondent stated he was never heard in Kerugoya PMCC NO 32 OF 2002. She has applied to have the grant issued to the applicant by the Kerugoya court revoked in that case. It is only just that the status quo be maintained pending finalization of the said application.

Counsel for the applicant Ms. Thungu basically restated what is contained in the applicants affidavit. She added that the case filed in Kerugoya by the respondent does not affect this case. They have not been served with any papers to transfer the case.

Counsel for the respondent Ms. Muthoni submitted that the orders should not be granted as there was another case in Kerugoya and that it was important that it should be determined first.

The record shows that the applicant in her affidavit has explained that she registered the prohibitory orders at the land office after she was granted interim orders prohibiting the respondents from interfering with the land pending hearing and determination of the application for revocation of grant. The applicant explains that the grant was revoked and that a fresh grant was issued and the estate has already been distributed. She claims that there is no pending issue regarding the estate of the deceased and as such the prohibitory orders should be lifted.

The respondent opposes the application on grounds that he has filed another application for revocation of grant at the Kerugoya court and that it is in the interest of justice that the prohibitory order remains in place.

Section 107 of the evidence act provides that ;

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

This position was explained by the court of appeal in the case of **DANIEL TOROITICH ARAP MOI V MWANGI STEPHEN MURIITHI & ANOTHER [2014] eKLR** where the court held:-

*"to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act"*

It is worth noting that the respondent has not attached any proof that there is a pending case at Kerugoya law courts. Even if there was a pending case, the respondent should have attached the application he refers to assist the court in determining whether the issues in the alleged matter are related to this cause. The applicant through her counsel argues that the issues in the Kerugoya matter do not affect the present case. The onus was on the respondent to show that indeed the said issues affect the present case. In absence of such proof, the allegations in the replying affidavit are baseless.

If the respondent has a pending case concerning LR. No. Kabare/Nyangati/555 in Kerugoya as he claims, it is his responsibility to obtain an order in that case to protect her interests. The prohibitory order in issue was registered in favour of the applicant on 2/6/2005 in Misc. Succession No. 84 of 2005.

it is not in dispute that there are no pending issues since the deceased's estate has been distributed. The prohibitory order has now outlived its purpose and the applicant has shown good cause why it should be removed.

I find the application merited and I allow it as prayed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2015.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Applicant**

**Mr. Mogusu for Muthoni Respondent**

**Respondent**