



No. 274

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 189 OF 2013**

MELLEN KEMUNTO PHILIP

SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF

HELLEN MOKEIRA AYORA ..... PLAINTIFF

VERSUS

YUVINALIS ONCHURU AYORA ..... 1<sup>ST</sup> DEFENDANT

CHARLES AYORA SANGARA ..... 2<sup>ND</sup> DEFENDANT

PETER ATANDI NYABUTI ..... 3<sup>RD</sup> DEFENDANT

GEORGE M. OPANGA ..... 4<sup>TH</sup> DEFENDANT

THE LAND REGISTRAR – KISII COUNTY ..... 5<sup>TH</sup> DEFENDANT

**RULING**

1. What I have before me is the plaintiff's/applicant's Notice of Motion application dated 24<sup>th</sup> April, 2013 that was brought under Order 40 Rule 1 of the Civil Procedure Rules, sections 3, 3A and 63 ( c ) and ( e ) of the Civil Procedure Act and section 70 of the Land Registration Act, 2012 seeking orders:-
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their agents, servants or employees be restrained from in any way howsoever interfering with the applicant/plaintiff's occupation and use of the portion of land parcel No. Nyaribari Chache/B/B/Boburia/1588 now subdivided into LR Nos. Nyaribari Chache/B/B/Boburia/9508, 9509, 9510, 9511 and 9512 which is designated for and openly and notoriously being occupied and used by the applicant/plaintiff as one of the beneficiaries to the estate of Hellen Mokeira Ayora.
  - d. That an inhibition order does issue inhibiting any dealings in the properties LR Nos Nyaribari Chache/B/B/Boburia/9508, 9509, 9510, 9511 and 9512 pending the hearing and determination of this suit.

2. The plaintiff's application is supported by affidavit and further affidavit sworn by the plaintiff/applicant on 24<sup>th</sup> April, 2013 and 29<sup>th</sup> October, 2013 respectively. In her affidavit sworn on 24<sup>th</sup> April, 2013, the applicant has stated that; at all material times until the year 2010, all that parcel of land known as **LR. No. Nyaribari Chache/B/B/ Boburia/1588** (hereinafter referred to as "**Plot No. 1588**") was registered in the name of one, **Hellen Mokeira Ayora**, deceased, who passed away on 16<sup>th</sup> October 2006 (hereinafter referred to only as "**the deceased**" where the context so admits) and that any land registered in the name of a deceased person can only be subdivided, transferred and registered in the names of living persons after a succession court identifies the rightful beneficiaries of the deceased's estate and the share of each each beneficiary. The plaintiff/applicant has stated further that Plot No. 1588 which was registered in the name of the deceased has been subjected to various sub-divisions, transfers and registrations without any resort to a court of law and that the said sub-divisions, registration and transfers affecting Plot No. 1588 came about after the 4<sup>th</sup> defendant wrote a letter to the 5<sup>th</sup> defendant asking him to remove a caution that had been lodged against the title of Plot No. 1588 in which letter the 4<sup>th</sup> defendant also identified the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents as the only beneficiaries to the estate of the deceased. Plot No. 1588 was sub-divided into five (5) portions namely, LR.Nos. Nyaribari Chache/B/B/Boburia/9508, 9509, 9510, 9511 and 9512 (hereinafter referred to as "**Plot Nos. 9508, 9509, 9510, 9511 and 9512**") which were then registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly, the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant, the 1<sup>st</sup> defendant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly, respectively.
3. The plaintiff applicant has stated further that; the deceased, Hellen Mokeira Ayora had three (3) sons namely, Stephen Sangara Ayora (deceased), Yuvinalis Onchuru, the 1<sup>st</sup> defendant and Ombese Ayora. One, Agnes Getare Maosa (deceased) and the plaintiff are the widows of Stephen Sangara Ayora (deceased). Before the deceased (Hellen Mokeira Ayora) died, she had subdivided and settled her two sons, Stephen Sangara Ayora, deceased and Yuvinalis Onchuru (1<sup>st</sup> defendant) on Plot No. 1588 and clearly demarcated the boundaries of the land that belonged to each son. The plaintiff/applicant has claimed that following the said illegal sub-division, registration and transfers of portions of Plot No. 1588 to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants/respondents have trespassed into and started interfering with the portion of the original Plot No. 1588 which has all along been occupied by the plaintiff and earmarked for distribution to the plaintiff as the widow of Stephen Sangara Ayora, the deceased son of, Hellen Mokeira Ayora, deceased. The plaintiff has contended that the acts of the defendants/respondents aforesaid over Plot No. 1588 amount to intermeddling in the estate of the deceased and as a beneficiary to the deceased's estate she has been rendered landless and denied her rightful share of deceased's land aforesaid.
4. In response to the application, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a replying affidavit sworn by the 1<sup>st</sup> defendant on 7<sup>th</sup> May 2013. In his affidavit, the 1<sup>st</sup> defendant has stated that there is no property in the name of the deceased to be administered by the plaintiff because the suit land had been subdivided and the resultant titles issued to various persons. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended further that, the applicant had earlier lodged a suit namely, Kisii HCCC No. 77 of 2012 (O.S) in which she had sought reliefs similar to the ones she has sought in this suit which suit she later on withdrew. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have contended further that as provided under Order 3 rules 4(1) and 4(2) of the Civil Procedure Rules 2010, the plaintiff ought to have sued in respect of her whole claim against the defendants in the said earlier suit and having relinquished her whole claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants by withdrawing the earlier suit, the plaintiff/applicant cannot be allowed to sue in respect of the relinquished claim of fraud. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended further that the grant of letters of administration issued to the plaintiff/applicant cannot operate as leave for the plaintiff to lodge a new claim in respect of the same cause of action which was the subject of the plaintiff's claim earlier claim in, Kisii HCCC No. 77 of 2012 (OS). The 1<sup>st</sup> and 2<sup>nd</sup> respondents while admitting that the plaintiff/ applicant was formerly married to the late Stephen Sangara Ayora, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that in the year 1987, Stephen Sangara Ayora, deceased lodged a petition for divorce against the plaintiff meaning that the plaintiff was at all material times estranged from Stephen Sangara

- Ayora, deceased and as such has never resided on the suit property as claimed.
5. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that the plaintiff was divorced by Stephen Sangara Ayora deceased through the said divorce petition and as a consequence thereof the plaintiff was deprived of her status as a wife of Stephen Sangara Ayora deceased that would have entitled the plaintiff to benefit from the estate of the deceased, Hellen Mokeira Ayora who was the mother of Stephen Sangara Ayora, deceased. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that the plaintiff's application does not satisfy the conditions for granting a temporary injunction because;
    - a. **The plaintiff has never resided on the suit property having been estranged from the late Stephen Sangara Ayora.**
    - b. **The plaintiff is not a beneficiary of the estate of the late Hellen Mokeira Ayora in any event.**
    - c. **The plaintiff cannot have an injunction issued over the entire parcel of land as it is not reasonable to presume that she has interests which attach to the entire original parcel No. 1588. The plaintiff can only occupy an identifiable particular portion of land which is a derivative of the original parcel No. 1588.**
    - d. **To grant the orders sought will be tantamount to recognition of the plaintiff's interest in the entire original parcel No. 1588.**
  6. The 3<sup>rd</sup> defendant filed a replying affidavit in opposition to the plaintiff's application sworn on 19<sup>th</sup> September 2013. The 3<sup>rd</sup> defendant has contended that according to a copy of official search carried on the title of Plot No. 1588 on 3<sup>rd</sup> November, 2010, Hellen Mokeira Ayora, deceased, was merely a trustee with life interest over Plot No. 1588 which interest was extinguished upon her demise and the same passed over to the surviving beneficiaries. The 3<sup>rd</sup> defendant has denied that he has trespassed into any portion of land occupied or owned by the plaintiff/applicant since the applicant has never occupied the 3<sup>rd</sup> defendant's parcel of land namely, Plot No. 9510.
  7. The 3<sup>rd</sup> defendant has stated further in his affidavit aforesaid that he took possession of Plot No. 9510 immediately upon purchase and the same has remained in his possession for the last two years and as such the issue of trespass does not arise at all. The 3<sup>rd</sup> defendant has contended that before purchasing Plot No. 9510, he carried out an official search and established that Plot No. 9510 was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The said search revealed further that there were no restrictions/encumbrances on the title of the said property as at the time the same was sold to him and as such he is a purchaser for value without notice. The 3<sup>rd</sup> defendant has contended that the plaintiff is not residing on any of the portions of land that resulted from the sub-division of Plot No. 1588 in that if the plaintiff had resided thereon, there is no way she could have allowed surveyors to survey and subdivide Plot No. 1588 and create new titles without raising a complaint. The 3<sup>rd</sup> defendant has contended that the plaintiff has not established a prima facie case as against any of the defendants. The 3<sup>rd</sup> defendant termed the plaintiff's claim as vague, amorphous and ambiguous.
  8. The plaintiff/applicant filed a further affidavit sworn on 20<sup>th</sup> October 2013 in reply to the affidavits filed by the defendants. In the further affidavit, the plaintiff has reiterated that Stephen Sangara Ayora, deceased, was her husband although he also had another wife by the name, Agnes Gesare Maosa (deceased). The plaintiff has denied that her late husband divorced her and pointed out that the defendants have not exhibited a copy of a decree nisi or absolute in proof of the alleged divorce. The plaintiff has reiterated that Plot No. 1588 was registered in the name of Hellen Mokeira Ayora, deceased as at the date of her death and that the only known legal process through which the ownership of that parcel of land could have been transferred to the defendant was by institution of succession proceedings and obtaining of a grant of letters of administration of the estate of the deceased. Since this process was never followed, the plaintiff has reiterated that the subdivision of deceased said parcel of land was unlawfully done and all registrations arising from the said exercise must be cancelled.
  9. When the matter came up for hearing before me on 24<sup>th</sup> September 2013, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. All the parties filed their submissions and the same are on record. I have considered the plaintiff's application together with the two affidavits filed in support thereof. I have also considered the affidavits filed

by the defendants in opposition to the application. Finally, I have considered the respective written submissions filed in court by the advocates for the parties in support of and in opposition to the application. In the case of, **Giella vs. Cassman Brown & Co. Ltd. [1973] E. A 358** it was held that for a temporary injunction to issue:-

- a. **The applicant must satisfy the court that he has a prima facie case with a probability of success.**
- b. **The applicant must demonstrate that he will otherwise suffer irreparable injury which is uncompensable in damages and,**
- c. **If in doubt, the court will determine the application on a balance of convenience.**

In the case of **Mrao Ltd. –vs- First American Bank of Kenya ltd (2003) KLR. 125**, it was held as follows;

**“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

10. On the material placed before me, I am satisfied that the applicant has indeed established a prima facie case against the defendants with a probability of success. The applicant has demonstrated that she is the widow of Stephen Sangara Ayora (deceased) who was a son to Hellen Mokeira Ayora, deceased. The claims by the defendants that the plaintiff was divorced by the late, Stephen Sangara Ayora has not been proved. The defendants did not place before the court a decree nisi or decree absolute in support of that claim. On the 3<sup>rd</sup> defendant’s claim that the deceased, Hellen Mokeira Ayora held Plot No. 1588 in trust for his sons who included the 1<sup>st</sup> and 2<sup>nd</sup> defendants, I am of the view that this simply meant that the deceased, Hellen Mokeira Ayora had a life interest in Plot No. 1588 and on her death the title or ownership of Plot No. 1588 was to be transferred to her three (3) sons who included the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the applicant’s deceased husband, Stephen Sangara Ayora. The fact that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants were entitled to the ownership of Plot No. 1588 together with their deceased brother on the death of their mother did not mean that the said property could be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants directly from the name of their mother, Hellen Mokeira Ayora, deceased, without following the procedure provided for in the Law of Succession Act, Cap. 160, Laws of Kenya. That being the position, the 1<sup>st</sup> and 2<sup>nd</sup> defendants had to undertake succession proceedings before the title of Plot No. 1588 could be transferred to their names. It is thereafter, that they could deal with the property including subdividing and selling the same.
11. The plaintiff has established on a prima facie basis that she has an interest in Plot No. 1588 that was subdivided to give rise to Plot Nos. 9508, 9509, 9510, 9511 and 9512 which interest is protectable through the orders of injunction sought. The plaintiff is the widow of the deceased’s son. The plaintiff has a right therefore to a share of the deceased’s property. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not controvert the plaintiff’s contention that they transferred Plot No. 1588 into their names, sub-divided the same and transferred the sub-divided portions into their names and into the name of the 3<sup>rd</sup> defendant before obtaining grant of letters of administration in respect of the estate of the deceased, Hellen Mokeira Ayora. If the 1<sup>st</sup> and 2<sup>nd</sup> defendants dealt with Plot No. 1588 without first obtaining a grant of letters of administration as aforesaid, their action amounted to intermeddling with the estate of the deceased, Hellen Mokeira Ayora which is not only a civil wrong but also a criminal offence. If the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired their titles to Plot Nos. 9508-9512 through an illegal process, it follows that they had no valid title that they could confer upon the 3<sup>rd</sup> defendant. Section 45 (a) of the Law of Succession Act, Cap. 160, Laws of Kenya provides that:

**“Except so far as expressly authorized by this Act or by any written law, or by a grant**

**of representation under this Act no person shall for any purpose take possession of or dispose of, or otherwise intermeddle with any free property of a deceased person”.**

Section 55 of the said Act provides that:-

**“No grant of representation, whether or not limited in its terms shall confer power to distribute any capital assets constituting a net estate or to make any division of property unless and until a grant has been confirmed as provided by section 71”.**

In the case of, **Gitau and two Others –vs- Wandai and 5 Others [1989] KLR 231**, Tanui J. held that entering into an agreement to sell estate property before getting a grant or without such a grant amounts to intermeddling. In **Re Estate of NdibaMande (deceased) [2013] eKLR** my brother, Musyoka J held that;

**“It is fallacious for a spouse or child to imagine that they cannot be guilty of intermeddling when they handle property belonging to their dead spouse or parent without a grant of representation. Intermeddling can be committed by any person so long as the handler has no grant of representation.”**

12.I am entirely in agreement with the two decisions that I have cited above. I have said enough to show that the plaintiff’s application dated 24<sup>th</sup> April, 2013 is for granting. The application is allowed in terms of prayers 3 and 4 thereof. For the avoidance of doubt, the injunction granted herein shall not entitle the plaintiff to occupation and use of the entire parcel of land that was previously comprised in **LR. No. Nyaribari Chache/ B/ B/ Boburia/ 1588**. The injunction shall be limited only to the portion of land if any that was in actual use and occupation of the plaintiff as at the date of institution of the application herein. The plaintiff shall have the costs of the application.

**Delivered, signed and dated at KISII this 6<sup>th</sup> day of June, 2014.**

**S. OKONG’O**

**JUDGE**

**In the presence of:-**

N/A for plaintiff

Mr. Okenye h/b for Nyamurongi for 1<sup>st</sup> and 2<sup>nd</sup> defendants

N/A for the 3<sup>rd</sup> defendant

N/A for the 4<sup>th</sup> defendant

N/A for the 5<sup>th</sup> defendant

Mr. Mobisa Court Clerk.

**S. OKONG’O**

**JUDGE**