

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLC No. E015 OF 2024

**OMOKE STEPHEN NYAGWANSA (Suing on behalf of the
Estate of GESISI OKEMWA JUSTUS)**
..... PLAINTIFF

VERSUS

RICHARD ONDIEKI 1ST
DEFENDANT

DAVID M. ASIAGO
2ND DEFENDANT

BENSON ONCHONGA
3RD DEFENDANT

JUDGMENT

1. The Plaintiff moved the Court through Complaint dated 17th July 2024 wherein he averred that he was the administrator of the estate of Gesisu Okemwa Justus (deceased) and that he brought the suit on behalf of the said estate. He further averred that the deceased was the registered proprietor of the parcel of land known as Nyamira/Nyansiongo Settlement Scheme/22 (the suit property).
2. The Plaintiff averred that as of the time of his death, the deceased had not sold any portion of the suit property to any person and that the Defendants had without colour of right descended on the suit property and forcibly erected buildings and fences, acts which amounted to trespass and

intermeddling with the estate. He also averred that the Defendants were total strangers to the estate.

3. The Plaintiffs therefore prayed for judgment against the Defendants jointly and severally for:

- 1. A declaration that the action of the 1st, 2nd and 3rd Defendants of invasion of the deceased Gesis Okemwa Justus' land parcel number Nyamira/Nyansiongo Settlement Scheme/22 is unlawful, null and void and the same amounts to trespass into and intermeddling with the estate of the deceased.*
- 2. An order for damages for trespass to issue in favour of the estate of Gesis Okemwa Justus against the 1st, 2nd and 3rd Defendants.*
- 3. Eviction orders to issue against the 1st, 2nd and 3rd Defendants to remove the said Defendants' structures, houses, fences, animals and crops from the deceased Gesis Okemwa Justus suit parcel of land registration number Nyamira/Nyansiongo Settlement Scheme/22.*
- 4. A permanent injunction to issue to restrain the 1st, 2nd and 3rd Defendants from ever trespassing onto the deceased Gesis Okemwa Justus' suit parcel of land*

registration number Nyamira/Nyansiongo Settlement Scheme/22.

5. Costs of the suit and interest on costs and damages.

4. The Defendants responded by filing Statement of Defence dated 27th October 2024. They denied that the Plaintiff was the administrator of the deceased's estate or that he brought the suit on behalf of the said estate. They averred that the legal administrators of the deceased's estate were Naomi Nyamwange and Samson Gesisu who were duly appointed on 21st December 2006 through Kisii CMC Succession Cause No. 628 of 2016.
5. The Defendants further averred that the letters of administration *ad litem* were issued to the Plaintiff through concealment of material facts, hence defective and as such did not confer capacity to institute and prosecute this suit on behalf of the deceased's estate. They admitted that the deceased was the registered proprietor of the suit property and added that the suit property was subject of proceedings in Kisii CMC Succession Cause No. 628 of 2016.
6. The Defendants denied the allegation of trespass and the allegation that the deceased had not sold any portion of the suit property. They averred that there was a pending suit between the Plaintiff and the deceased's sons over the suit property being Keroka PMC ELC Case No. E002 of 2024 Omoke

Stephen Nyagwansa (Suing on behalf of Gesisi Okemwa Justus) v Samson Onderi & George Marando Nyagwansa. They averred that this suit was an abuse of the Court process and urged the Court to dismiss it with costs.

7. At the hearing, the Plaintiff testified as PW1 and adopted his witness statement which he filed on 13th November 2024. He produced copies of Title deed in respect of the suit property, Certificate of Death number 70959, Letter of Administration (Grant Ad litem) issued in Keroka Succession Misc. No. E001 of 2024, Photographs, Replying affidavit of George Marando Nyagwansa sworn on 25th March 2024 and filed in Keroka CM ELC No. E002 of 2024, Notice of withdrawal of Keroka CM ELC No. E002 of 2024 and Citation filed in Nyamira High Court, as his exhibits.
8. He stated in the statement that he is a grandson of Gesisi Okemwa Justus (deceased) and that the Defendants went to the suit property and erected permanent houses with fences around them some two years prior to the date of the statement. That the place where they erected the houses was the portion that that the deceased gave his mother and that his father had always been away at work. He also stated that the Defendants displaced them, that his mother had filed an objection in the succession cause and that he participated in criminal proceedings at Keroka. The Plaintiff went on to state that the Defendants were being used by his father to displace

the Plaintiff together with his brothers and their young families and his mother.

9. On cross-examination and re-examination, the Plaintiff stated that there was no other case pending in court as Keroka CM ELC No. E002 of 2024 was withdrawn and that he was not aware of any ongoing succession case when he filed this suit. He however conceded that jointly with his brothers, he filed an affidavit of protest in Kisii CMC Succession Cause No. 628 of 2016 and that the grant in the said succession cause was issued to Naomi Nyamwange who was his grandmother and Samson Gesisu who was a Defendant in Keroka CM ELC No. E002 of 2024.
10. Judith Wanyika Mlangai (PW2) testified that she is a retired teacher and that the Plaintiff is her son. She adopted her witness statement which she filed on 13th November 2024 and added that the suit property belonged to the deceased who was her late father-in-law pursuant to her marriage to his son George Marando Nyagwansa. She stated that the Defendants entered the suit property and constructed permanent houses on it.
11. PW2 further testified that when they filed Keroka CM ELC No. E002 of 2024, she was aware of Kisii CMC Succession Cause No. 628 of 2016. She added that the deceased gave her and her children four acres of the suit property to occupy and farm but she had never used it. She also testified that as of the date

of her testimony, she was living in a different plot at Keroka and that she had lived there with her children for the past 19 years.

12. Monica Bikeri Gesisi (PW3) adopted her witness statement which she filed on 13th November 2024 and stated that she is the deceased's daughter. She further stated that no succession had been conducted in respect of the suit property and that although the deceased did not give any land to the Plaintiff, the Plaintiff should get a portion of the suit property. She also stated that she was not aware of any succession proceedings in respect of the deceased's estate.

13. Lastly, Mellen Bosibori Gesisi (PW4) adopted her witness statement which she filed on 13th November 2024 and stated that she too was not aware of any succession proceedings in respect of the deceased's estate. She added that the suit property is registered in the name of the deceased who had five sons and four daughters and that none of the Defendants is a member of the deceased's family. She further stated that the Plaintiff's father George Nyagwansa is still alive and that there is a dispute between George Nyagwansa and the Plaintiff since the Plaintiff wants land from his father, but his father sold the land.

14. The Plaintiffs' case was thereafter closed.

15. George Marando Nyagwansa (DW1) was the only defence witness. He stated that he is the deceased's first born son and that the Plaintiff is his second son. He added that the Defendants were his friends and adopted his witness statement dated 12th November 2024. He produced copies of the documents listed as item numbers 1 to 4 in the Defendants' List of Documents dated 12th November 2024, as the Defendants' exhibits.

16. DW1 stated in the statement that the deceased passed away on 21st December 2006 and that the suit property is part of the deceased's estate. That a succession cause in respect of the deceased's estate was pending being Kisii CMC Succession Cause No. 628 of 2016 and that a grant had been issued therein to Naomi Nyamwange and Samson Gesis. He added that the grant issued to the Plaintiff in Keroka Succession Cause No. E001 of 2024 was defective since it was obtained by concealment of material facts and that the Plaintiff was not a direct beneficiary of the deceased.

17. DW1 also stated that the Plaintiff and his mother had lodged protests in Kisii CMC Succession Cause No. 628 of 2016 alleging that the deceased had allocated to them four acres and that the protests were yet to be determined. That prior to filing this suit, the Plaintiff had sued him and his siblings in Keroka CM ELC No. E002 of 2024.

18. DW1 went on to testify that the suit property is approximately 21 acres and that the nine beneficiaries are each entitled to about one acre. That, consequently, his children cannot demand four acres and that the succession cause in respect of the deceased's estate was still pending since the grant issued on 10th January 2018 had not been confirmed and Naomi who was one of the administrators passed away on 28th March 2018 without subsequently being substituted. He also stated that the deceased and his mother did not sell any land to the Defendants and the houses the Plaintiff wants demolished belonged to him. He added that he had not sold any part of the suit property but had only hired it out.

19. The defence case was then closed.

20. Directions were thereafter given that parties file and exchange written submissions. The Defendants filed submissions dated 21st July 2025, the Plaintiff filed submissions dated 21st July 2025, and the Defendants filed further submissions dated 28th July 2025.

21. I have carefully considered the pleadings, evidence, and submissions. The issues that arise for determination are whether the Plaintiff had *locus standi* to file and prosecute this case, whether the Plaintiff has established trespass and whether the reliefs sought should issue.

22. Does the Plaintiff have *locus standi* to file and prosecute this case? The Defendants submitted that the Plaintiff lacks locus standi since he claimed beneficial ownership of the suit property from the deceased's estate. They relied on Section 41 of the Law of Succession Act and submitted that under the *principle of representation*, a child or children of a child of an intestate who predecease him are entitled to the share which their parent would have taken had he not predeceased the intestate. They contended that this principle does not apply in this case since the Plaintiff's father is still alive.

23. On his part, the Plaintiff submitted that he has valid letters of administration on the basis of which he brought the suit. He contended that the allegation that the grant should not have been issued since there is another grant should be made in the succession court which is the proper forum.

24. The Court of Appeal considered the meaning and scope of *locus standi* in the case of **Rugiri v Kinuthia & 3 others [2024] KECA 1601 (KLR)** where it stated:

The Black's Law Dictionary, 9th Edition (page 1026) defines locus standi as "the right to bring an action or to be heard in a given forum". This Court in Alfred Njau and Others vs. City Council of Nairobi [1982] KAR 229 held that: "The term Locus Standi means a right to appear in Court and conversely to say that a person has

no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

Locus standi is cardinal in civil proceedings because without it, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In Amlers Precedents of Pleadings, Lexis Nexis LTC Harms et al 2018 on page 248 the following is said: “The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person’s interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.”

Locus standi concerns the sufficiency and directness of a litigant’s interest in proceedings which warrants his or her title to prosecute the claim asserted, and should be one of the first things to establish in a litigation.

25.As pleaded in the Plaintiff, the Plaintiff filed this case on behalf of the deceased’s estate. He did so on the strength of Letters of

Administration *Ad litem* issued to him on 15th January 2024 in Keroka PMC Succession Misc. No. E001 of 2024. The existence of the grant is not dispute, although there is some contestation on its validity.

26. The law is that a cause of action vested in or against the estate of a deceased person can only be validly agitated by or against the personal representative of the estate. See **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR** and **CKM v ENM & another (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR) (8 March 2024) (Judgment)**. The term “legal representative” is defined at **Section 2** of the ***Civil Procedure Act*** as meaning “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

27. In **Rugiri v Kinuthia & 3 others** (supra), the Court of Appeal held as follows regarding the consequence of filing a case in respect of a deceased’s estate without a grant of representation:

Decided cases are in agreement that where a suit is filed relating to a deceased’s estate without a grant of representation, the proceedings are null and void for want of locus standi. (See Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another

[1982-88] 1 KAR and Trouistik Union International & Another vs. Jane Mbeyu & Another Civil Appeal No. 145 of 1990). It follows, therefore, that for a party to have locus standi to institute or defend a case for and on behalf of a deceased person, he or she must first obtain a grant of letters of administration empowering him or her to administer the deceased's estate or a limited grant limited for the purpose of filing or defending the suit.

28. As noted above, the Plaintiff filed this case on the strength of Letters of Administration *Ad Litem* issued to him in respect of the deceased's estate on 15th January 2024. It has not been shown that the said grant has since been revoked. Arguments on whether the grant ought to have been issued to the Plaintiff should be addressed to the succession court. As matters stand, the Plaintiff is a legal representative of the deceased's estate as contemplated under **Section 2** of the **Civil Procedure Act**. In sum, the Plaintiff had *locus standi* to file and prosecute this case.

29. I now turn to the question of whether the Plaintiff has established trespass. The Plaintiff submitted that he produced pictures showing permanent and temporary houses constructed by the Defendants on the suit property and that all his witnesses identified those houses as belonging to the

Defendants. He contended that in an action for trespass, the duty of the Defendant is to demonstrate lawful entry and occupation and that the Defendants herein failed to demonstrate lawful entry and occupation.

30. The Defendants on the other hand argued that it is evident from the evidence on record that they never took possession of the suit property as alleged by the Plaintiff. They submitted that to maintain an action for trespass, the Plaintiff must either be in possession or have a title to land that entitles him to immediate possession, both of which he failed to establish.

31. In **Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] KECA 169 KLR**, the Court of Appeal described trespass thus:

Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury's Laws of England 3rd edition Volume 38 at pg 744.

32. The Court of Appeal recently restated the position in **Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)** as follows:

Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995]

KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land.

33. There is no dispute that the deceased remains the registered proprietor of the suit property and that the Plaintiff is a grandson of the deceased. The Plaintiff's father is still alive and testified in this matter as DW1. Succession proceedings in respect of the deceased's estate remain pending in court. The Plaintiff has based his claim on perceived right to the suit property by virtue of his relationship to the deceased and on claims that the deceased allocated some four acres to the Plaintiff's mother.

34. It is plain enough that administration and distribution of the deceased's estate, including the suit property, is the sole province of the succession court. The chips will fall in place upon the final determination the succession court. Until then,

the Plaintiff has no title to the suit property. Although he holds Letters of Administration *Ad Litem*, the Plaintiff lacks the full capacity to administer the estate. His said grant is contested and there is a full grant which was issued to other parties prior to the grant *Ad Litem*. The Plaintiff's capacity to assert the estate's rights of title and possession is, in the circumstances, severely overcast by the full grant.

35. The other aspect of trespass that the Plaintiff was required to demonstrate is to have been in possession at the time of the alleged trespass. On this too, the Plaintiff failed. He did not establish any possession. On the contrary, his own mother (PW2) testified that as of the date of her testimony, she was living in a different plot at Keroka and that she had lived there with her children for the past 19 years. He has not established that he has a right to immediate and exclusive possession of the suit property. On the contrary, there are several beneficiaries lined up in the succession proceedings, all seeking portions of the suit property.

36. In view of the foregoing, the Plaintiff has failed to establish trespass. It follows that the reliefs which he sought cannot issue in his favour.

37. I find no merit in the Plaintiff's case. I dismiss it with costs to the Defendants.

Dated, signed, and delivered at Nyamira, this 19th day of November 2025.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

Mr Nyamweya for the Plaintiff

Mr Ochoki for the Defendants

Court Assistant: B Kerubo