



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 77 OF 2016**

**PACIFIKA KEMUNTO NYAMONGO.....1<sup>ST</sup> PLAINTIFF**

**ESTHER BOCHABERI NYAMONGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AGNES MORAA KINYOSI.....DEFENDANT**

**R U L I N G**

1. On 22<sup>nd</sup> June 2018 I delivered a ruling in this matter where I ordered a stay of proceedings pending the determination of Kisii HC Succ Cause No. 508 of 2014 that had been brought to my attention and related to the land which was the subject matter in the suit. I also granted an injunction in favour of the Plaintiffs restraining the Defendant from in any manner interfering with the suit property.

2. On 24<sup>th</sup> October 2018 the Plaintiffs filed a Notice of Motion application dated 23<sup>rd</sup> October 2018 seeking order for punishment of the Defendant for disobeying the Courts order dated 22<sup>nd</sup> June 2018. On 4<sup>th</sup> March 2019 when the contempt application was scheduled for hearing, Mr. Bosire advocate informed the Court from the bar that the Succession Cause had been determined and that the grant had been confirmed. As there was no evidence on record to attest to those averments, the court allowed the Plaintiff to file a supplementary affidavit to introduce that evidence.

3. The Plaintiffs filed a supplementary affidavit sworn by the 2<sup>nd</sup> Plaintiff dated 15<sup>th</sup> March 2019 and annexed the grant of letters of administration issued to the plaintiffs jointly on 4<sup>th</sup> February 2016 together with the confirmation of grant issued on 1<sup>st</sup> December 2016. The confirmed grant shows that land parcel **North Mugirango/ Mokomoni/51** the subject matter in the present suit was distributed to the Plaintiffs to hold for themselves and in trust for **Alice Kerubo Laboso, James Nyamongo, Janeth Momanyi, Naomi William Mong'are, George Momanyi Nyamongo** and **John Kebaso Nyamongo**. The Plaintiffs therefore are the persons legally entitled to hold the suit land on behalf of the named beneficiaries. The Defendant is not one of the beneficiaries of the estate of Nyamongo Onkware as per the confirmed grant.

4. In the present matter, the Court on 18<sup>th</sup> October 2016 following claims by the Defendant that she was in occupation of the suit land as a beneficiary through her deceased husband, ordered a stay of the suit pending the determination of the succession cause that was pending in court. Further, as there was a contestation as to the ownership of some tea bushes that the Plaintiffs asserted the Defendant was picking claiming the tea bushes belonged to her deceased husband, the court referred that aspect of the dispute to the local administration for determination.

5. The Assistant County Commissioner filed the arbitration proceedings (award) in court on 16<sup>th</sup> January 2018. As per the arbitration, the elders made a finding that the Defendant and her deceased husband were closely related as their parents were first cousins and their marriage would fall within the prohibited marriage relationship both under custom and legally. Indeed, they held the Defendant's father one Mzee Kinyosi Omwanza "**strongly condemned the marriage and cursed his daughter before a Baraza held in Mokomoni Sub-location**". The Defendant thereafter left her alleged deceased husband, the late Matibe Nyamongo and only came back after his death.

6. The elders observed in the circumstances that the Defendant was not a lawful wife of the deceased, and was therefore not welcome to live in the home of the Plaintiffs. The Plaintiffs were directed to find an alternative place for the Defendant where she could relocate to. The Plaintiffs' purchased land parcel **Ekerubo Settlement Scheme/328** measuring approximately 0.16Ha situated in Borabu Sub-County but the Defendant has declined to relocate there and/or provide her personal details to enable the land to be formally transferred to her.

7. Having reviewed the pleadings and the record, I note the Defendant never filed any pleadings at all inspite of being afforded an opportunity to do so. I further note that Kisii HC Succession Cause No. 508 of 2014 that related to the estate of the late Nyamongo Onkware Marasi was concluded and his estate which only comprised of land parcel **North Mugirango/Mokomoni/51** was distributed to his beneficiaries as per the certificate of confirmation of grant dated 1<sup>st</sup> December 2016. The Defendant was not one of the listed heirs. The certificate of confirmation of grant has not been set aside and/or varied.

8. The Assistant County Commissioner who arbitrated the matter following an order of reference by the court filed a report/award confirming that the Defendant was not legally married to Matibe Nyamongo (deceased) and directed that the Defendant do relocate to another parcel of land to be procured by the Plaintiffs. The Plaintiffs have in furtherance of that direction purchased land parcel **Ekerubo Settlement Scheme/328** for the benefit of the Defendant.

9. I have carefully reviewed the arbitration proceedings/award and I am satisfied it has fully resolved the issues in this suit. I adopt the arbitration award as the judgment of the court in these proceedings and make the following final orders:

**1. The Plaintiffs as trustees of the beneficiaries of the estate of Nyamongo Onkware Marasi are the lawful owners of land**

parcel North Mugirango/Mokomoni/51.

2. The Defendant is ordered to vacate land parcel North Mugirango/Mokomoni/51 and relocate to land parcel Ekerubo Settlement Scheme/328 within sixty (60) days from the date of this ruling failing which the Plaintiffs to be entitled to an order of eviction against her upon application.

3. Each party to bear their own costs of the suit.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JUNE 2019.**

**J. M. MUTUNGI**

**JUDGE**