



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**MISC. APP. NO. 12 OF 2017**

**IN THE MATTER OF ILLEGAL AND ARBITRARY TRANSFER OF LAND**

**PARCEL CENTRALKITUTU/MWAMOSIOMA/915 ORIGINALLY REGISTERED**

**IN THE NAMES OF ATANDI MAKORI (DECEASED IN 1994) WITHOUT DUE SUCCESSION PROCESS**

**AND**

**IN THE MATTER OF CANCELLATION OF ALL TITLES NAMELY CENTRAL KITUTU/MWAMOSIOMA/**

**1924,1925, 4877, 4976, 5061, 5062, 5063, 5142, 5143, 6217, 6218, 6219, 5129, 5130, 5060 AND ALL OTHER**

**TITLE NUMBER THAT MAY HAVE EMANATED FROM THE SAID ILLEGAL AND UNLAWFUL SUBDIVISION**

**OF CENTRAL KITUTU MWAMOSIOMA/915 AND ALSO CANCELLATION OF THE AMENDED REGISTER INDEX MAP**

**AND**

**IN THE MATTER OF RESTORATION OF THE ORIGINAL TITLE NO. CETNRAL**

**KITUTU/MWAMOSIOMA/915 TO ITS ORIGINAL OWNER THE DECEASED**

**ATANDI MAKORI TO ALLOW FOR SUCCESSION BE CONDUCTED BY THE BENEFICIARIES**

**BETWEEN**

**BENARD MOKAYA BORURA.....1<sup>ST</sup> APPLICANT**

**GILBERT MIRUKA BORURA.....2<sup>ND</sup> APPLICANT**

**ERICK OBAGA BORURA.....3<sup>RD</sup> APPLICANT**

**NANCY KWAMBOKA BORURA.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**DOMISIANO BORURA ATANDI.....1<sup>ST</sup> RESPONDENT**

**MICHAEL OMBONGI KWABA.....2<sup>ND</sup> RESPONDENT**

**SAMWEL GESORA ATANDI.....3<sup>RD</sup> RESPONDENT**

**VINCENT BAGWASI.....4<sup>TH</sup> RESPONDENT**

**ANNA NYAMBANE NYATWONGI.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicants filed an Originating Notice of Motion dated 14<sup>th</sup> June 2017. In their claim they allege that title number **Central Kitutu/Mwamosioma/915** was registered in the name of **Atandi Makori** (deceased) who died on 20<sup>th</sup> August 1994. It was their case that the property was subsequently subdivided into Title Numbers **Central Kitutu Mwamosioma/1924, 1925, 4977, 4976, 5060, 5061, 5062, 5063, 5142, 5143, 5129, 5130, 6217, 6218 and 6219** without grant of letters of administration.

2. The Applicants seek an order that the illegal subdivisions and transfer of the original title number **Central Kitutu/Mwamosioma/ 915** (“**parcel 915**”) be restored in the name of the original registered owner, Atandi Makori, for proper succession to be conducted by the Applicants who are the beneficiaries of the estate. The application was supported on the affidavit of Erick Obaga Borura filed on 14<sup>th</sup> June 2017. He deposed that he was a grandson to the deceased. He explained that according to a Certificate of Search obtained in 2013, parcel **915** was still registered in the name of the deceased and that the subsequent registrations were unlawful and illegal thus fit for cancellation. He deposed that the registrations were effected without Letters of Administration which would have allowed for the distribution of the Estate.

3. On 3<sup>rd</sup> July 2018 Michael Ombogi Kwaba, the 2<sup>nd</sup> Respondent, filed his undated replying affidavit opposing the application. He deposed that the application sought substantive orders which could not be granted at an interlocutory stage. He further deposed that there is no such application under the Civil Procedure Rules known as “**Originating Notice of Motion**”. He deposed that the Applicants had not filed any Originating Summons for a claim of adverse possession to warrant the filing of the Originating Notice of Motion. He stated that for the claim of adverse possession to arise the title of some living person must have been extinguished by effluxion of time which was not the position in this case. It was his case that the order for amendment of the Registry Index Map sought by the Applicants is contrary to Section 16 of the Land Registration Act No. 3 of 2012 for reasons that the Applicants do not have any parcels at the area where the suit land was situate. The 2<sup>nd</sup> Respondent contended that that he is entitled to registration of a parcel of land without the same being questioned by the Applicants as that would be contrary to Section 24 of the Land Registration Act No. 3 of 2012. The 2<sup>nd</sup> respondent also stated that the prayer to cancel the title deeds was contrary to Section 80 of the Land Registration Act No. 3 of 2012.

4. The application was canvassed by way of written submissions by the parties. The Applicants in their submission contend that the deceased was the registered owner of land parcel **Central Kitutu/Mwamosioma/ 915** and the subsequent subdivision amounted to intermeddling with the deceased estate. They argued that the actions of the Respondents were contrary to Section 45 of the Law of Succession Act Cap 160 Laws of Kenya. The Applicants relied on the case of **Jeremiah Kamau Gitau & 2 Others -vs- Wandai & 5 Others [1989]eKLR** where the Court held that the acts of an intermeddler were a nullity where no appropriate succession proceedings had been instituted. The Respondents contend that the Applicants’ application is a sham, scandalous, frivolous, and vexatious and an abuse of the court process. They relied on the following cases; **Muchanga Investments Ltd -vs- Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR** where the court dismissed the Originating Summons for invoking a wrong provision of the law and the case of **Madara Evans Okanga Dondo -vs- Kiarie Nganga [2005]eKLR** where the Court held that where a suit is brought in abuse of the court process, such suit is liable to be struck out. The Respondents further contended the Applicants have no legal capacity to institute the legal proceedings herein and in support of their submissions, the respondents relied on the case of **Jeremiah Kamau Gitau case (supra)** where the Court stated that in the case of a deceased person’s estate, where a Plaintiff does not bring an action in a representative capacity as an administrator then the action is a nullity.

5. As the Respondents have raised the issue of *locus standi* of the Applicants to bring the present suit, I will deal with the issue as a preliminary issue. This is because if the Applicants have no locus, then the suit would be defective for want of capacity by the Applicants to institute the application and would be liable to be struck out. It is trite law that the Estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the Estate. A person must therefore take out Letters of Administration in respect to the Estate so that he is clothed with the capacity and authority to represent the Estate of a deceased person. It is common ground in the present matter that succession has not been conducted in respect to the deceased estate. The question for determination is therefore whether the applicants have *locus standi* to institute the current suit?

6. *Locus standi* is defined in **Black’s Law Dictionary, 9th Edition** (page 1026) as “**the right to bring an action or to be heard in a given forum**”. The Court of Appeal in the case of **Alfred Njau & 5 others -vs- City Council of Nairobi [1983] eKLR** put it in the following terms:-

**“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such a proceeding.”**

7. The Court of Appeal in case of **Trouistik Union International & Another -vs- Jane Mbeyu & Another (2008) IKLR (G&F) 730** held that;

**“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to Section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone.”**

8. Section 82 (a) of the Law of Succession Act provides that Personal Representatives shall, subject only to any limitation imposed by their grant, have the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death. In the Originating Notice of Motion the applicant’s grounds (i) and (vi) were as follows;

**(i) That no succession has ever been conducted by any court in Kenya in respect of the estate of the late Atandi Makori who died on 20<sup>th</sup> August 1994.**

.....

**(vi) That there was no letters of administration granted to anybody in respect of the estate of the late Atandi Makori as required by law.**

9. From the Applicants pleadings it is clear that no letters of administration in regard to the deceased estate had been taken out and therefore the Applicants had no *locus standi* to file the instant application. The Applicants had the option to apply for an **Ad Litem** Grant of Letters of Administration under Section 54 and Rule 14 of the Fifth Schedule of Law of Succession Act, Cap 160 Laws of Kenya to enable them to institute the suit but they did not do so. Section 82 of the Law of Succession Act confers the power to institute a suit in regard to the estate of the deceased on personal representatives and on them alone. Where a suit is instituted in regard to a deceased estate by a person or persons without obtaining Grant of Letters of Administration to represent the Estate such a suit is incompetent and void *ab initio* for want of *locus standi* and/or capacity.

10. In the circumstances, the Applicants have no *locus standi* to file the present suit and the Originating Notice of Motion dated 14<sup>th</sup> June 2017 is incompetent and is hereby struck out on account of lack of *locus standi* on the part of the Applicants. In the premises, the Applicants Originating Notice of Motion is struck out with costs to the 2<sup>nd</sup> Respondent.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**