



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ENVIRONMENT AND LAND CASE NO. 77 OF 2016**

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

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

**(Suing as legal representative of the estate of**

**NYAMONGO ONKWARE (deceased)**

**VERSUS**

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

**RULING**

1. This suit was initiated by the plaintiffs as the legal representatives of the estate of Nyamongo Onkware (deceased). The deceased was the registered owner of land parcel number **North Mugirango/ Mokomoni/51** which the plaintiffs aver he had prior to his death subdivided into two portions on the ground between the plaintiffs and each was utilizing their irrespective portions. The plaintiffs state that they have cultivated tea bushes in their respective portions which they depend upon for their livelihoods. The plaintiffs claim that sometime in 2013 the defendant unlawfully and without any colour of right or justification entered onto a portion of the land and cut trees thereon and has now started picking the plaintiffs tea bushes and the plaintiffs seek an order of injunction restraining her from continuing to do so.

2. The plaintiffs pray for judgment against the defendants for orders:-

**(a) That an order of eviction of the defendant from the suit land;**

**(b) An order of permanent injunction;**

**(c) Damages**

**(d) Costs of the suit.**

Together with the plaint the plaintiffs filed a Notice of Motion application praying for an order of temporary injunction restraining the defendant from entering onto, picking tea leaves or in any other way whatsoever interfering the plaintiff's lawful possession of the suit land. Though the defendant was served and she in fact attended court on 9<sup>th</sup> June 2016 when she requested for time to file her response she never did so. The application for injunction was fixed for hearing on 18<sup>th</sup> October 2016 when Bosire Gichana advocate appeared for the plaintiffs/applicants and the defendant appeared in person.

3. Mr. Bosire Gichana advocate drew the attention of the court to a pending succession cause Kisii HC Succession Cause No. 508 of 2014 which relates to the husband of the plaintiffs and the defendant's alleged father in law. It was pointed out that the defendant claims to be entitled to a portion of the deceased estate as her husband now deceased was the son of the deceased. The court in view of the revelations was of the opinion that indeed the matter was one related to succession and could only properly be dealt with in the succession court as it was the proper court that could determine who the beneficiaries of the deceased estate were. The court in ordering a stay of the instant suit expressed itself thus:-

**“The defendant in this suit claims to be entitled as a wife of her deceased husband. There is a succession cause that relates to the estate of the father of her alleged husband. The land the subject matter relates to the estate of her supposed father in law and it is in that suit she ought to stake her claim as a beneficiary through her deceased husband who was a son of her father**

**in law. Consequently this suit will be stayed to await the determination of the succession.”**

4. As there was the question whether the defendant was picking tea belonging to the plaintiffs, the court made a further order referring the issue to the local administration for arbitration in the following terms:

**“As Mr. Bosire alleges the defendant is picking tea leaves which belongs to the plaintiffs and the defendant states the tea belongs to her deceased husband the court refers that aspect of the dispute for arbitration by the Area Assistant Commissioner with the assistance of at least 4 elders agreed upon by the parties. The Assistant Commissioner to file a report in court within 60 days from today and either party be at liberty to apply to the court for directions after that period.”**

5. Following the order of reference the Assistant County Commissioner heard the dispute on the 23<sup>rd</sup> November 2016 and filed the report on 16<sup>th</sup> January 2018. Among the findings as per the report was that the alleged marriage between the respondent and her deceased husband (Matibe Nyamongo) was forbidden under the Abagusii Customary on account of their parents having been closely related. They were first cousins and this led to the respondent being ostracized in March 1982 when she left/separated with Matibe Nyamongo. The respondent could not be allocated land belonging to the plaintiffs' late husband since she was not lawfully married to the deceased son. However the claimants bought the respondent land elsewhere but the respondent refused to take up the land. The claimants further purchased for the respondent another parcel of land in Borabu Sub-County measuring over ¼ acre or thereabouts which the defendant/respondent is yet to take occupation of. The Assistant County Commissioner states the defendant has failed to furnish a National Identity card to enable the land to be registered in her name so that the land is now registered in the name of James Nyamongo (the claimant's son) ostensibly in trust for the respondent.

6. On the basis of the pleadings the annexures and the report from the Assistant County Commissioner, I am satisfied that the plaintiffs have demonstrated a prima facie case with a high probability of success. I take note that the respondent left the suit property in 1982 and only resurfaced in 2013 to lay claim to a portion of property through her alleged deceased husband. On the available evidence it is evident it is the plaintiffs who have been utilizing the suit land and the tea bushes exhibited in the photographs “BN1(a) and (b)” must have been planted by the plaintiffs and the defendant would have no reason or justification to pick them. The defendant did not file any response in rebuttal of the plaintiffs' averments and in the premises the plaintiffs' evidence remains unchallenged.

7. In the circumstances, therefore even though I have made an order to stay the instant suit until the succession matter is finalized, I do also grant an order of injunction in terms of prayer (3) of the Notice of motion. The costs of the application will be in the cause.

8. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 22<sup>ND</sup> DAY of JUNE, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Momanyi for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

N/A for the Defendant

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**