



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA**  
**AT MILIMANI**  
**ELC CASE NO. 759 OF 2013**

**BARBARA MUGAKI**

(Suing as the Administrator of the Estate of

**PITY WANGARI MUGAKI.....PLAINTIFF**

**=VERSUS=**

**JUDSON MARANGA NYAMBANE .....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING.**

1. The applicant holds limited grant of letters of administration ad litem in respect of the estate of Pity Wangari Mugaki (deceased). The deceased had purchased a house identified as House No X-12 on LR No Nairobi/Block/62/694 at Ayany Estate in Nairobi from National Housing Corporation (NHC). When the deceased completed repaying the loan to NHC, a letter was written to the Commissioner of Lands asking that the suit property be registered in the name of the deceased.
2. It was later discovered that the suit property had been registered in the first respondent’s name. The deceased filed a suit against the first defendant in 2010 but that suit was dismissed as it had abated due to expiry of service of summons to enter appearance. The deceased then filed the present suit and sought service of summons by substituted service. As the suit was going on, the deceased passed on. It is after the demise of the deceased that the first respondent moved into the suit property and started carrying out construction on the same. This is what forced the applicant to move to court seeking to restrain the first respondent from carrying on with the illegal construction.
3. The applicant contends that on 31<sup>st</sup> January 2017, she learnt that the first respondent had hired goons who started constructing a wall in the suit property. She reported the incident at Ayany Police Station who advised her to obtain a court order.
4. The first respondent has opposed the applicant’s application based on a replying affidavit sworn on 25<sup>th</sup> May 2017. The first respondent contends that he purchased the suit property from one Herman Guleho Obaga on 14<sup>th</sup> November 1995 and has since obtained a Certificate of Lease in respect of the same property. That he did not require any permission from anyone to develop his property. The first respondent further contends that he has been occupying the suit property which he bought in 1995 and that if the person who sold land to the deceased could not give her title, he should not be blamed for that.

5. I have carefully gone through the applicant's application as well as the opposition to the same by the first respondent. As this is an application for injunction, an applicant is expected to meet the threshold set out in the **Giella Vs Cassman Brown & Co. Ltd ( 1973) 358**. First an applicant has to demonstrate that he/she has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless otherwise the applicant will suffer loss which will not be compensated in damages. Thirdly if the Court is in doubt it will decide the application on a balance of convenience.

6. A prima facie case in a civil application was described in the case of **Mrao -Vs- First American Bank of Kenya Limited and 2 others (2003) KLR 125** 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 the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.***

7. In the instant case, the applicant has demonstrated that the deceased had purchased a house identified as X-12 from NHC. When the deceased completed paying the loan to NHC, NHC wrote a letter asking the Commissioner of Lands to register the suit property in the deceased's name. The letter from NHC, describes the property to be registered in the deceased's name as Ayany Estate, House No. X-12 on Nairobi Block 62/694 whose area was 0.0343 hectares. A further letter from NHC shows that the suit property was erroneously registered in the first respondent's name and that the same should be cancelled and registered in the name of the deceased.

8. There is a letter from NHC which shows that House No. X-12 was allocated to the deceased. I have looked at the documents by the respondent which show that the same suit property was sold to him by one Herman Guleho Obaga on 14<sup>th</sup> November 1995. The said Obaga applied for allocation of the suit property which was said to be vacant Government Land in 1994. This cannot be true because as at this time, the suit property had been built up by NHC and already allocated to the deceased in 1978. The acreage is shown as 0.026 hectares. It is therefore not possible that land which had already been given to NHC which had developed the same and sold it to the deceased would then be available as vacant land unless the said Obaga illegally tried to hive off part of the suit property for sale to unsuspecting members of the public.

9. From the documents availed, it is clear that the applicant has demonstrated a prima facie case with probability of success. Already the applicant is in possession of the suit property. There is a house on it bought in 1978. If the applicant lost the house or any portion of the property, she may not be adequately compensated as she might not get another parcel of the same size at the amount the deceased obtained it. I find that the applicant's application dated 1<sup>st</sup> February 2017 has merit. The same is allowed in terms of prayers Four (4) ,Five (5) and Eight(8).

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **15<sup>th</sup>** day of **November 2017**.

**E.O.OBAGA**

**JUDGE**

In the absence of parties who were aware of the date and time of delivery of Ruling.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**