



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 828 OF 2013**

TUNDUI OLE SALOI NKILIMO .....1<sup>ST</sup> PLAINTIFF

SABENA KINA KITOLE.....2<sup>ND</sup> PLAINTIFF

VERSUS

JOYCE MEDUKENYA .....DEFENDANT

**RULING:**

The matter coming up for determination is a Notice of Motion application dated 7<sup>th</sup> July 2013 brought by the Plaintiffs/Applicants herein. The application is brought under **Order 40 Rule 1&4** of the **Civil Procedure Rules, Rule 3** of the High Court Practice Rules and all other enabling provisions of law.

The applicants have sought for these orders that :-

- a. *Upon hearing this application interpartes, the Honourable court be and is hereby pleased to issue permanent injunctive orders to the Defendant/Respondent either by her agents, servants and /or employees from rent collection on the houses erected on land reference No. **Kajiado /Kaputei North 15054 and Kajiado /Kaputei North 210630** pending the hearing and determination of this suit.*
- b. *That the Respondent be condemned to pay costs.*

The application was supported by the grounds stated on the face of the application and by the supporting affidavit of **Tundui Ole Saloi Nkilimo**. It was stated on the grounds in support of the application that; the full names of the deceased whose Estate the proceedings herein relate to is **Joseph Kitole Solai** who was married to **Philipina Samba Kitule**, and together they had one daughter named Sabina .

That the property of the deceased in issue was acquired and developed by the deceased and his deceased wife during the subsistence of their marriage.

Further, that since both are now deceased, the legal beneficiaries of this estate are the deceased daughter, Sabina and her seven children and also the brother to the deceased, **Tundui Ole Saloi Nkilimo**.

However, a stranger by the name of **Joyce Wambui Medukenya** has started to illegally collect rent on the houses and she had kicked out the orphans of the deceased from the estate of their father.

That if the property is not protected, for the benefit of the plaintiffs, then they will be deprived their lawful beneficial rights in the estate but the **Defendant/Respondent** herein does not stand to suffer any prejudice if the orders sought herein are granted and it is therefore for the interest of justice that the orders sought herein are granted.

**Tundui Ole Saloi Nkilimo** swore a supporting affidavit and stated that he is a brother to **Joseph Kitole Solai** who died on 17<sup>th</sup> April, 2013. The deponent later obtained letters of Administration to the Estate of the deceased on 21<sup>st</sup> June, 2013. He further averred that the deceased was married to Philipina Samba Kitole who died in the year 2006.

The deponent averred that he has brought this petition to get orders of preventing the Estate of the deceased from being misused by strangers. That the deceased's assets are being controlled by strangers and he has come to court so that he could obtain orders to protect the Estate from misuse by strangers who are not the rightful heirs. He further contended that the plaintiff's beneficiaries stand to suffer great prejudice and irreparable loss unless these strangers are immediately barred from collecting rent on the deceased property pending the hearing and determination of both the application and the petition herein. The deponent urged the court to order the Defendant to immediately stop collecting rent on the deceased's property pending the hearing and determination of the suit.

The defendant /Respondent, Joyce Medukenya, swore a Replying Affidavit and averred that she was legally married to the late **Joseph Kitole** until the time of his death. She further contended that as per his will, her late husband gave her the authority to inherit the suit premises as his wife. She further contended that her late husband had married one **Philipina Sipriani Kilimangio** who had one daughter **Anne Naisula Kitole**. She further averred that **Tundui Ole Saloi Nkilimo**, has no legal right to inherit her late husband's Estate while she is still alive and she does not know him. The Respondent also contended that she collects rent from the structures her late husband gave her and she uses the same to feed herself and upkeep of their children that were left behind by the deceased **Joseph Kitole**. She also contended that the said rent is her only source of livelihood after the death of her husband and she would suffer financial difficulties if she is stopped for collecting the rent since she is not working. She also averred that she is not a stranger to the deceased's Estate and that the 2<sup>nd</sup> plaintiff has been provided for.

She also averred that if she was married to **Gideon W Nareiyio**, the said marriage was dissolved upon his death, and she married **Joseph Kitole**.

**Sabina Kina Kitole**, the 2<sup>nd</sup> Plaintiff/Applicant filed a Supplementary Affidavit. She stated that she is a daughter of the late **Joseph Kitole**, and has 7 children. She denied that the Defendant/Respondent was ever legally married to her late father. She also denied that her late father ever left a **Will** to give her authority to inherit their family premises. She averred that the Respondent is a mere stranger to the Estate of her late father. She also contended that she had applied for letters of Administration to the Estate of her late father and that **Tundui Ole Saloi Kilimo** is not interested in any way in the Estate of her late father but he is only fighting to ensure that herself and her sister **Anne Naisula** have got justice by ensuring that they have inherited their father's Estate. She also denied that the Respondent supports her and her sister **Anne Naisula** financially as alleged by the Respondent. She reiterated that the Respondent is the wife of the late **Gidion Olole Nareiyio** but not a wife of her late father, **Joseph Kitole**. She also contended that her father never left any **Will** and he died intestate and therefore the Respondent, **Joyce Medukenya** is a stranger to the Estate of her late father. She also averred that the Respondent wants to fraudulently dispose of the estate of her late father without letters of Administration as evidenced by annexures **SKK6** and **SKK7**.

The parties herein were ordered to put in their written submissions by the court on 25/11/2013. On

7/2/2014 when the matter came for mention, the plaintiffs/applicants had put in their written submissions but the defendant failed to do so. Matter was set for ruling without the Defendant /Respondent's written submissions. I have however considered all the pleadings herein and the Plaintiffs written submissions and I make the following findings.

The applicants herein have sought for injunctive orders. These are equitable reliefs that are granted at the discretion of the court. However, this discretion should be exercised judicially (See **Sargent Vs Patel (1994)16 EACA 63**). The purpose of injunctive order is to preserve the Status Quo or protect the suit property. **Order 40 Rule 1** of the **Civil Procedure Rules** provides instances when an order of temporary injunction can be granted.

**Order 40(1)** where in any suit it is provided by affidavit or otherwise.

- a. ***That any property in a dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongly sold in execution of a decree ; or;***
- b. ***That the Defendant threatens to remove or dispose his property in circumstance affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit; the court may order or grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting , damaging, alienating sale, removal or disposition of the property , as the court thinks fit until the disposal of the suit or until further orders”.***

For this court to grant the injunctive orders sought herein, the applicants needed to establish the threshold principles for grant of the same. These principles have been stated in various judicial decisions and findings: In the case of **Kibutiri Vs Kenya Shell, Nairobi High Court , Civil Case No. 3398/1980 ( 1981) LR 390** the court held that:-

***“ The conditions for granting a temporary injunction in East Africa are well known and these are; First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.*** (See also ***Giella Vs Cassman Brown & Co Ltd (1973) EA 358.***

Have the applicants herein satisfied the above principles to warrant grant of the injunctive orders sought?.

The applicants have sought an injunctive order to issue against the Respondent herein, **Joyce Medukenya**, barring her from collecting rent on the houses erected on **LR No. Kajiado/Kaputei North 15054 and Kajiado/Kaputei North 210630**. The applicants alleged that the stated properties belonged to the deceased **Joseph Kitole Solai** who died on 17<sup>th</sup> April, 2013 as per the death certificate annexure TOSN 1(1)

The applicants also stated that Sabina Kina Kitule was the daughter of the late **Joseph Kitole Saloi**. It was the applicants' contention that **Joseph Kitole** was married to one Philippina Samba Kitole who died in the year 2006. It was further alleged by the applicants that one Joyce **Wambui Medukenya** has started to collect rent of the rental houses of the deceased Estate and she is a stranger to the deceased estate. I have seen a copy of Kenya Gazette Notice for 6<sup>th</sup> December, 2013 whereby Joyce Wambui Medukenya, the Defendant herein has advertised the Estate of the late **Joseph Kitole Solai** in **Cause No. 2725 of 2013**. It is therefore evident that the Defendant/Respondent has applied for grant of letters of Administration to the estate of the deceased, Joseph Kitole, who is the registered owner of **Kajiado/Kaputei North 15054 and Kajiado / Kaputei North 210630**, the suit land. The Respondent has not denied that she had indeed filed for such letters of Administration. However, she contended that she is the legal wife of the deceased and she has capacity to file for succession as per the last will of the deceased and also collect rent from the deceased's rental houses.

I have also perused letters of Administration to the Estate of Gideon Lorkenyoke Nareiyo being succession cause No. 1598/2010. The Defendant herein stated in an affidavit in support of the cause that she was the 3<sup>rd</sup> wife of the deceased Gidion Nareiyo and she was desirous of taking letters of Administration to the estate of the deceased. The applicants have denied that the Respondent was ever a wife of the late Joseph Kitole and she is thus collecting the rent illegally. The Respondent alleges that she was a wife and she had capacity to marry the late **Joseph Kitole** after the death of her husband **Gidion Nareiyo** . However, the Respondent did not attach any document or evidence to show that she was married to the late **Joseph Kitole** . She applied for letters of Administration to the estate of her deceased husband, **Gidion Nareiyo**. She has also petitioned the court again for letters of Administration to the Estate of the deceased, **Joseph Kitole**.

In her affidavit in opposition to the instant Notice of Motion, the Respondent alleges that she collects the rent in issue so that she can feed herself and children of the deceased. She named them as **Anne Naisula, Henry Lemayan Kitule and Dorcas Soila**. However in affidavit in support of confirmation of grant, the Respondent named **Henry Lemaiyan Nareiyo alias Henry Lemaiyan Kitule** as the son of the deceased **Gedion Nareiyo** . The Respondent cannot now again name the said Henry Lemaiyan as a son of the deceased Joseph Kitole.

The Respondent has not denied that she is collecting rent from the rental houses in question. She claims that she is a wife of the deceased Joseph Kitole . That claim has been denied by the applicants. The said claim is now a disputed issue which can only adequately be addressed in the Family Division during the hearing of the Succession Cause. The applicants have therefore established that they have a prima-facie case with probability of success.

Having found that the applicants have described that they have a prima-facie case with probability of success, I find no reason of dealing with the other principles. A prima -facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**, by the Court of Appeal as:-

***“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.***

Having now considered the instant Notice of Motion, written submissions and all the annexures therein, the Court finds that the applicants’ application dated 7<sup>th</sup> July 2013 is merited. The same is allowed entirely and costs be borne by the Defendant herein.

Dated, signed and delivered this 31<sup>st</sup> day of March 2014

**L. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

Lukas: Court Clerk

**L. GACHERU**

**JUDGE**