



**Nyaribari v Kibagendi (Environment and Land Appeal  
E001 of 2023) [2024] KEELC 5712 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5712 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**JM KAMAU, J**

**JULY 18, 2024**

**BETWEEN**

**LUCY MAKORI NYARIBARI ..... APPELLANT**

**AND**

**NATHAN MOGAKA KIBAGENDI ..... RESPONDENT**

**JUDGMENT**

1. Where the dispute in a cause of action arising from a Deceased's Estate between dependants inter se or between dependants and personal representative(s) and there is already a Grant, there is no need to obtain a limited Grant for purposes of filing a Suit against a Co-dependant.
2. An Estate should not have more than one Grant be it a Normal Grant or Limited. Doing otherwise would cause confusion.
1. The Appellant filed suit No. ELC 43 of 2022 against the Respondent herein in Nyamira Chief Magistrate's Court for orders that: -
  - a. The Defendant be restrained either by himself, his agents, relatives, friends and/or any other person whatsoever from burying the body of Jasper Nyakoe Nyaribari on the parcel of land known as West Mugirango/Bogichora/953.
  - b. Costs of the suit.
  - c. Interest on costs.
2. The Appellant described herself as the lawful beneficiary of the Estate of her late mother Keremensia Kemunto Nyaribari who died on 4/3/2019 at Christiane Marianne hospital and who was the registered owner of the aforesaid suit land. The Respondent, a stranger to the Deceased took out letters of Administration in respect to the Deceased's Estate in Nyamira CMCC Succession Cause No. 48 of



- 2020 and a Grant issued to him and the same confirmed. He was then registered as the owner of the suit land without indicating whether it was by way of transmission. There was an objection filed by the Appellant and a prayer for revocation of the Grant which is still pending in court. In the meantime, and regardless of an order of the Status Quo by the Succession Court, the Respondent unlawfully entered the suit land and destroyed crops viz, Maize, avocado trees, guava trees, bananas and other trees.
3. This was in preparation of bringing the body of Jasper Nyakoe Nyaribari on the land. She attached to the Plaint a copy of the Title Deed of the suit land showing that the same measures 3.2 Hectares and is in the property of Kemunto Nyaribari of ID No. 1655498, a copy of letter dated 23/12/2019 from the Respondent's Advocates demanding that the Appellant vacates the suit land, a reply to the same dated 6/1/2020, Summons to the Appellant and the Respondent among other people from the Assistant County Commissioner, Nyamira Division asking them to appear before him on 6/2/2020 at 9.00a.m. The same is dated 22/1/2020, a caution placed against the Title to the suit land in favour of both parties. A copy of Citation by the Respondent to the Appellant in respect to the Estate of Keremensia Kemunto Nyaribari, a copy of the Death Certificate in respect to the Deceased and a copy of the burial permit in favor of Hellen Mokeira dated 21/03/2019, a copy of Green Card showing that the Title Deed to the suit property was first registered in the name of the Respondent on 16/12/2020 and the Title Deed issued the same day without indicating whether it was by way of transfer or transmission, a copy of order maintaining the Status Quo in Succession Cause No. 48 of 2020 Nyamira Chief Magistrate's Court . The same was issued on 19/1/2021.
  4. In his statement of Defence dated 2/12/2022, the Respondent admitted that the Appellant is a lawful beneficiary of the Estate of the late Keremensia Kemunto Nyaribari, the owner of West Mugirango/Bogichora/953 but that he, the Respondent, is also a beneficiary thereof, as well as the legal administrator of the deceased's Estate. He further averred that the Order of Status Quo did not include barring the burial of the body of Jasper Nyakoe Nyaribari on the suit land and that he was not intent on disinheriting the Appellant nor burying Jasper discretely.
  5. On 6/12/2022, the Respondent filed a Notice of Preliminary Objection to the effect that the Appellant's suit offended the mandatory provisions of Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya in that she lacked the locus standi to prosecute the suit in court. The court ruled that the matter proceeds for hearing with expedition since there was a body lying in the mortuary.
  6. On 3/12/2022 the Appellant adopted her statement dated 2/12/2022. She testified that the Respondent, the late Jasper Nyakoe, Collins Mongare, Irene Nyagwaya, Linet Moraa and Yucabeth Onsuna were her mother's adopted children since the year 1992. Before her mother's death the deceased gave her the original Title Deed in respect of L.R. No L.R. West Mugirango/Bogichora/953 in the Deceased's name. When her mother died and she went to file probate, she discovered that the Respondent had already obtained letters of Administration and the same confirmed and she was told to vacate the suit land by the Respondent. She then filed objection to the same. The Respondent then obtained a Title Deed to the suit land in his name and took possession on the suit land. On cross-examination by Mr. Nyamwange for the Respondent, Lucy said that her late mother had already revoked the adoption.
  7. Pw2- Hellen Mokeira Nyaribari, 2<sup>nd</sup> born daughter of the late Keremensia, repeated the evidence of her 1<sup>st</sup> born sister and said in cross-examination that the Respondent had been away for over 19 years prior to the mother's death.
  8. Pw3 – Ronald Onyancha Nyaribari, a step brother to the Appellant testified that at the time of her death, her step-mother Keremensia had already broken ties with the adopted children who had started having sour relationship with the children she had sired and that because the adopted children



- had neglected her, they should not inherit from her Estate. The said adopted children did not even contribute towards Keremensia's burial.
9. Pw4 – Peter Bundi Nyagesia, nephew to Title Deed, testified that by the time the Respondent was adopted he (the Respondent) was already in form 2 and that none of the adopted children ever built a house on the suit land, until Jasper died. He tried to look for the Respondent and his immediate siblings when Title Deed fell sick but with no success until she died.
  10. Pw5 - Ishmael Misire a 76-year-old Kisii elder said that the Respondent and his siblings did not fulfil the purpose of their adoption since they didn't bring up children in the family of Keremensia.
  11. In cross-examination, he said that the Kisii customs provide for adoption to cure a certain need in a family. He also said that adoption can be revoked due to old age but not secretly. Adoption is conducted openly just like a wedding.
  12. After the close of the Appellant's case, the Respondent took to the witness box and adopted his witness statement dated 2/12/2022 where he had recorded that he was an adopted son of Keremensia Kemunto Nyaribari which adoption status was never revoked. He said that all the family members were aware of the Succession Cause and that the shares of each one of them was known. He said that Jasper had a house on the suit land. He then produced the following documents to buttress his case.
    1. A copy of photographs showing family members at the funeral of the late Keremensia Kemunto Nyaribari.
    2. A copy of the chief's letter.
    3. A copy of the late Jasper Nyakoe Nyaribari's Identity card and his certificate of birth.
    4. A copy of a photo showing the late Keremensia Nyaribari's house in the same compound with the late Jasper's house and the Defendant's house.
    5. Copies of National identity card and birth certificate for the late Jasper Nyakoe Nyaribari.
    6. A copy of the letter from Nyaisa Tea buying Centre and a tea weighing receipts for the late Jasper Nyakoe Nyaribari.
    7. A copy of a photo showing the Plaintiff on the far right, her sister Olpha and the defendant's sister Linet in the year 2008 when they had gone with twelve other ladies to visit the Defendant's sister's children at Kisumu on behalf of the late Keremensia Kemunto Nyaribari according to the Kisii Custom.
    8. Any other document with the leave of the Court.
  13. He admitted in cross-examination that he started preparations of the burial of Jasper on Plot No.953 and that his demand letter indicated that only him, Collins and Jasper were entitled to the suit land. He said that he has the Title Deed to the suit land and that he is also the Administrator of the Estate. He admitted that the Appellant has already objected to the letters of administration and that the objection is yet to be heard but that he wants the land shared equally among the 11 of them but which formula the Appellant rejected. Dw2 Andrew Agwata Nyaribari testified that he is a step brother to the parties in the case. He denied that the adoption was ever revoked. He also said that the Respondent left the Country around 2008, 2009 for Netherlands.
  14. The last witness, Linet Moraa, adopted her statement dated 2/12/2022 stating that the Appellant is her sister. She said that she is aware the land is in the name of the Respondent but that she never took part in the Succession process.



15. This is the evidence that was adduced in court.
16. The learned Trial Magistrate then pronounced his Judgment. The Court confirmed that the Plaintiff did not produce any Grant authorizing her to institute and prepare the suit on behalf of her late mother and that the fact that she is an objector is clear proof that she is not an Administrator. She therefore is not clothed with legal right to file a suit in respect to her mother's property/Estate under section 82 of Cap 160. The trial Magistrate went ahead to state that since the distribution of the Estate is yet to be determined and the same can only be ascertained by the Succession Court then the court could not ascertain the ownership of the suit property in order to decide whether the Deceased could be buried thereon or not. The Trial Magistrate did not go into the substance of the suit before him but after hearing all the evidence, he dismissed the same on want of locus standi, a matter that had been raised before the hearing started but was reserved until after the hearing of the case. Accordingly, the Court made a Decree as follows; -
  - a. That the Plaintiff lacks locus standi to institute and prosecute the suit and as such the same was dismissed with costs to the Defendant.
  - b. That the Plaintiff shall pay the accumulated mortuary charges as from 25/11/2022 being the date of filing suit up to and until 15/6/2023.
  - c. That the body of the late Jasper Nyakoe Nyaribari shall not be buried on the suit property know as West Mugirango/Bogichora/953 pending the outcome of Nyamira Chief Magistrate's Succession CauseNo.48 of 2020.
  - d. That for avoidance of doubt, the Defendants is free to bury the Deceased Jasper Nyakoe Nyaribari elsewhere.
17. Having been dissatisfied with the Decision and Appellant filed this Appeal asking for orders that: -
  - a. The Appeal be allowed.
  - b. The Judgment and Decree of the lower Court directing that the Plaintiff pays the accumulated mortuary charges in respect of the body of the Deceased Jasper Nyakoe Nyaribari from 25/11/2022 to 15/6/2023 be varied and set aside.
  - c. The finding and holding of the learned Trial Magistrate that the Plaintiff had no locus standi to institute and prosecute the matter before the court and subsequent dismissal of the suit be reviewed and substituted therewith an order allowing the suit in the Lower Court as prayed.
    - d. The order directing the Plaintiff to pay costs for the suit in the Lower Court be reviewed and substituted with an order directing the Defendant in the Lower Court to pay the costs of the suit.
    - e. Costs of this appeal be awarded to the Appellant.
18. The said Appeal is grounded on the following; -
  1. The learned Trial Magistrate erred in law in making a find that the Appellant had no locus standi to institute and prosecute the matter before the court.
  2. The learned Trial Magistrate erred in law and fact in ordering the Appellant to pay all accumulated mortuary charges despite allowing the Plaintiff's only relief in the suit before him.
  3. The learned Trial Magistrate erred in law in making a find that the Appellant had no locus standi to institute and prosecute the matter before the court.



4. The learned Trial Magistrate erred in law and fact in treating the matter before him as an Estate claim under the law of succession by failing to appreciate that the dispute before hi related to a burial site of a deceased person.
  5. The learned Trial Magistrate misconducted the proceeding before him failing into the danger of demonstrating a bias against the appellant thereby partly affecting his final judgment.
19. And since the court made an order that whether the body of the late Jasper Nyakoe should be buried on the suit property or not shall be made after the conclusion of the Succession Cause Nyamira Chief Magistrate’s Succession Cause No. 4 of 2020 and rightly so, the main issue in this Appeal is whether the Appellant did have locus standi to file a suit and depending on the response to this, whether the other orders for the accumulated mortuary costs as well as the costs of the suit should stand. The last 2 orders made in the Judgment are not contested at all.
  20. This court need not summarize the facts since the case was dismissed on a matter of locus. The question to be determined by this court is whether the learned trial magistrate was right in dismissing the suit in the lower court for want of locus standi by the Appellant.
  21. The first question to ask here is whether the Appellant was required to apply for Letters of Administration *Ad litem* before filing the suit against the Administrator of the Estate of the Deceased.
  22. The [Law of Succession Act](#) (CAP 160 Laws of Kenya) provides for issuance of letters of administration or probate to qualified persons to undertake settling the estate of a deceased person.
  23. Where there is urgent need of the dependents of the deceased, a pending case by/against the deceased or the need to collect and preserve the estate of the deceased before the letters of administration are granted/confirmed, one can apply to the court for a limited grant to allow them undertake the specified tasks. “Grant” in simple terms can be defined as authority issued by the court to a person to act in respect of the estate of a deceased person.
  24. It is imperative that you have good legal representation to protect the estate of the deceased from wastage or intermeddling (where third parties seek to reap where they did not sow). The issuance of a full grant may take some time and depending on the needs of the deceased family, it may be necessary to obtain a limited grant as a matter of urgency.
  25. A grant may be limited as to special purpose, property, time or other of the various special types as set out in Schedule 5 of the [Law of Succession Act](#).
  26. In Re Estate of Mary Syokwia Kyalili [2015] Eklr and Mary Waithera v Ann Ndegwa & Another [2014] eKLR the court held as follows;
 

“...where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased...”
  27. In Re the estate of Helena Wangechi Njoroge (Deceased) (2015) Eklr, the Court applied its inherent jurisdiction to order the following concerning letters of administration ‘ad litem’;
 

“..... It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory



application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or Defence the estate against third parties.”

28. Is the Respondent herein a third party in respect to the Estate of the late Keremensia Kemunto Nyaribari who died on 21/3/2019 in Nyamira documents Chief Magistrate’s Succession Cause No. 48 of 2020 having moved the court by representing himself as an adopted son? I will not delve into the issue of whether that is so since this issue is a subject of the Succession Court. The said Grant was issued by the Subordinate Court. The entire suit land was registered in the name of the Respondent on 16/12/2020 and the Title Deed issued to him on the same date. It is not indicated by what manner the land was so transferred. Was it by transmission? The Green Card does not show. The Appellant did not move to court to sue a third party but a person who claims to be a beneficiary and who has already been issued with a Grant in respect to the Estate. She also filed an Objection to the issuance of the Grant to the Respondent and thereby became a Cross-Petitioner by persuading the court that she ought to be the Personal Representative/Administrator to the Estate in place of the Respondent. This is an issue yet to be decided by the Chief Magistrate’s court, Nyamira. Had she applied for Limited Grant of Letters of Administration Ad litem would the court have issued her the same when a Grant had already been issued to another person about 2 years earlier.
29. However, in Re Estate of M’Ngarithi M’Miriti (Deceased) [2017] eKLR the court issued a Grant Ad litem to an objector who needed to represent the Estate in a specific legal matter, despite there being a confirmed Grant. The court found that the issuance of a Grant Ad litem was necessary to protect the interests of the objector and to ensure the fair administration of justice.
30. But where a Grant has already been issued, is it mandatory to obtain another Grant for purposes of filing a suit between Dependants inter se? My understanding of the law is that in a proper case, an Ad litem Grant ought to be issued when there is no Grant and where a suit has to be filed in extreme urgent circumstances such as the one that the Appellant was faced with in the lower Court. But issuance of a Limited Grant where there is a full Grant would cause confusion and, in any case, the full Grant would take pre-eminence. Does that mean that the Appellant had no recourse for redress?
31. An Ad litem Grant by its nature of urgency may not always be obtained when the ordinary Grant has already been issued. Courts may be reluctant to do so to avoid confusion. This would thus lock out the Appellant. The necessity of obtaining a Grant Ad litem is to identify who a beneficiary is. Accordingly, when the Legal Representative/Administrator is messing and or intermeddling with the Deceased’s Estate after having been issued with the Grant, a beneficiary has a right to move the court against the Administrator. In such circumstances the beneficiaries are already known and consequently, a Grant Ad litem, in my view, is not mandatory.
32. Does *the Constitution* of Kenya, 2010 have anything to say concerning the issue? Article 48 of *the Constitution* of Kenya, 2010 provides that the state shall ensure access to justice for all persons. Under Article 159 (2) (d)(e) of *the Constitution*.
- “In exercising judicial authority, the Courts and Tribunals shall be guided by the following principles:-
- (d) justice shall not be administered without undue regard to procedural technicalities, and
- (e) the purpose and principles of this Constitution shall be protected and promoted.”
33. One of the purposes and principles of *the Constitution* of Kenya 2010, is under Article 40 which provides that every person has the right to acquire and own property.



34. Having made the above observations, I find that the learned Trial Magistrate was wrong in shutting out a beneficiary of the Estate of the late Keremensia Kemunto Nyaribari when there was no dispute at all that she was a daughter of the said late Nyaribari and whose beneficiary status is not in dispute at all. The fact that the Respondent had served her with a Citation and even sworn an affidavit, in the Civil Case No.E043 of 2022, against which this appeal in preferred, acknowledging that she is indeed a beneficiary, affirms this position. When seeking the protection of an asset belonging to the Estate and which was now in the hands of one of the foster children and which transfer to the current holder has been questioned in court, this court is of the opinion that no Ad litem Letters of Administration were required. In fact, the Appellant did not have to seek the Orders in another substantive Suit but in the Succession Cause that is still ongoing. And in any case the court went ahead and found in favour of the Appellant by ordering that the body of the brother to the Respondent should not be buried in the suit premises until after the Succession Cause in Nyamira Chief Magistrate's Succession Cause No. 48 of 2020 has been heard and determined which holding this Court will not upset. In the premises, this court allows this Appeal and sets aside the Judgment and Decree of the lower court in Nyamira CMCC ELC No. E043 of 2022 dated and delivered on the 15/6/2023. And for the avoidance of any doubt, the Appellant shall not be made to pay the accumulated mortuary fees or any at all in respect to the body of Jasper Nyakoe Nyaribari. Further, if not yet disposed, the body of the late Jasper Nyakoe Nyaribari shall not be buried on L.R. No. West Mugirango/Bogichora/953 or on any part thereof until the Hearing and final determination of Chief Magistrate's Succession Cause No.48 of 2020.
35. The Appellant shall also have the costs of this Appeal as well as those of Nyamira CM CC No.ELC 043 of 2022.
36. I also order that since there are multiple suits between the parties herein, in the interest of fairness, there should be no execution of any costs that the Appellant has been ordered to pay to the Respondent until after the costs herein have been taxed and the same offset against each other.
37. A copy of this Judgment to be supplied to the officer Commanding Nyamira South Police Division and Officer Commanding Kiambere Police Station.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY JULY, 2024.**

**MUGO KAMAU**

**JUDGE**

In the Presence of: -

Court Assistant -Brenda

Appellant – Sisters to the Appellant Hellen and Esther

Respondent's Counsel – Mr. Ombati

