



**Wabwile v Musinaka (Environment & Land Case 107 of 2017)
[2023] KEELC 17178 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 107 OF 2017**

EC CHERONO, J

APRIL 27, 2023

BETWEEN

SALOME NALIKA WABWILE PLAINTIFF

AND

ALFRED OKUMU MUSINAKA DEFENDANT

RULING

- 1 The Plaintiff/Applicant vide a Chamber Summons application dated October 28, 2022 seeks the following orders;
 - a. That there be a stay of execution of eviction order herein pending hearing and determination of this application.
 - b. That there be a stay of execution of eviction order herein pending hearing and determination of Summons for confirmation of grant in Kitale High Court Succession Cause No. 69 of 2014.
 - c. That the Costs of this application be provided.
- 2 The application is supported by the affidavit of Salome Naliaka Wabwile the defendant/applicant sworn on October 28, 2022 and grounds apparent on the face of the said application. The application is opposed by the defendant/respondent vide a replying affidavit sworn on December 8, 2022.

Plaintiff's/applicant's Summary Of Facts.

- 3 The Plaintiff/Applicant in her affidavit in support of the application confirmed that this Honourable Court in its Judgment delivered on May 27, 2020 ordered her to vacate land parcel No Bungoma/kabisi/61 within six months from the date of Judgment failing which she was to be evicted therefrom in accordance with the relevant provisions of Section 152 of the *Land Act*. She further deposed that the defendant/respondent acquired the suit land by way of transmission in Kitale High Court Succession



- Cause No 69 of 2014. The Applicant also stated that the Certificate of confirmed grant listed the defendant/respondent as the sole beneficiary in the estate of Desterio Musinaka Khaoya (deceased)
- 4 The Applicant stated that during the pendency of the Succession Cause, she initiated objection proceedings citing the defendant/respondent for fraud and non-disclosure of material facts from the Court during the hearing of the Petition and Summons for confirmation of Grant.
- 5 She stated that she served the defendant with all the court processes in respect of the Succession case but he chose to keep off the proceedings
- 6 She further deposed that as a consequence of the defendant's failure to take part in the Succession proceedings, the Honourable Court revoked the Grant issued to the defendant/respondent and appointed her as the sole Administrator.
- 7 She stated that the Honourable Court directed her to serve all beneficiaries in the estate of the deceased in the Succession Cause including the defendant/respondent herein and attend Court for directions on disposal of the Summons on October 26, 2022.
- 8 The Applicant further deposed that She was unable to effect Service of the order together with Summons for confirmation of the grant upon the defendant/respondent in good time prompting the Honourable Court to defer directions to December 5, 2022.
- 9 She stated that the eviction orders are drastic and if implemented will occasion her and all people living on the suit land severe consequences which would not be reversible.

The Defendant's/respondent's Summary Of Facts.

- 10 The defendant/Respondent in his replying affidavit sworn on December 8, 2022 deposed as follows;
1. That the objection proceedings in Kitale High Court Probate and Administration Cause No 69 of 2014 was an afterthought and an evil plan to defeat the Judgment of this Honourable Court or delay and altogether obstruct the execution of the Decree herein.
 2. That the Applicant sued him in this matter in his capacity as the legal representative of the estate of Desterio Musinaka Khaoya and raised no issue over his capacity to the determination of the suit and that She cannot be allowed to blow hot and cold at the same time.
 3. That the application for objection was never served upon him nor notified to him in any way but he has taken steps to set aside the *ex-parte* orders made on October 26, 2022
 4. That this Honourable Court has no Jurisdiction to issue orders suspending the eviction orders on the basis of an application pending before another Court of concurrent competent jurisdiction.
 5. That the Applicant was granted 6 months to vacate his land but failed to do so and this Court on humanitarian grounds gave her an extension of 2 more months to vacate but She never did and remains on his land to date.
 6. That he is entitled to the fruits of the Judgment made in his favour and there being no stay order pending appeal, there is no basis to grant an order to suspend the eviction order as the Court is *functus officio*.
 7. That the Applicant has applied for suspension of the eviction order in anticipation of favourable orders from Kitale High Court.



8. That the attempt to dislodge him as the Administrator of the estate of the deceased at this point in time is a non-starter and bound to fail.
9. That he is a biological son of the late Desterio Musinaka Khaoya(deceased) and rightful heir and the Applicant, a trespasser on his land cannot take away his heritage.

Analysis And Decision

- 11 I have considered the Notice of Motion application dated October 28, 2022 and the supporting affidavit as well as the annexures thereto. I have also considered the replying affidavit by the respondent sworn on December 8, 2022 and the annexure thereto. I have further considered the submissions by the Respondent and the applicable law.
- 12 What the applicant is seeking in the application dated October 28, 2021 is a stay of the judgment of this Honourable Court on May 27, 2020. The reasons advanced by the applicant for the stay of execution order is that during the pendency of these proceedings, She initiated objection proceedings in the Succession Cause citing the Defendant/respondent for fraud and non-disclosure of material facts before the Probate and Administration Court during the hearing of the Petition and Summons for Confirmation of the grant.
- 13 From the plaint dated August 24, 2017, the plaintiff/applicant sought the immediate nullification or cancellation of the defendant's/Respondent's title in respect of title No Bungoma/kibisi/61 and the same be registered in her name. The basis of the plaintiff's/Applicant's claim is that she is the Administrator of the Estate of her late Husband Francis Wabwile(deceased) who before his death in 1996, had purchased the suit land measuring 15 acres from one Joseph Katukhulu in 1971. This Honourable Court in the Judgment delivered on May 27, 2020 discussed the plaintiff's/Applicant's claim as follows;

“However, and that is why at the commencement of this Judgment I described this case as a sad one, the plaintiff's claim to the suit land is not by way of adverse possession or even trust. It is based on a purchase in 1971 as supported by a Court decree that was never executed. In any event, it is clear that any claim based on adverse possession would not have been sustainable because there is also evidence that in 1981, Khaoya's house on the suit land was torched and he was attacked following a dispute with the deceased.”
- 14 The findings of this Court is that the plaintiff's/Applicant's claim was dismissed and the defendant's/respondent's counterclaim was allowed.
- 15 It is not clear how the plaintiff/applicant would legally challenge the Decree holder's/Respondent's title after losing her claim in this suit on the basis of a purchase in 1971. In my view, the Judgment debtor/applicant is not a family member of the Estate of Desterio Musinaka Khaoya(deceased) to warrant her challenge the . Since her claim based on the basis of a purchase in 1971 has failed, this Court cannot suspend the execution of the Decree awaiting the Judgment debtor's/ Applicant's attempt in obtaining a favourable judgment from a different Court.
- 15 It is also clear from the Court record that the Applicant had filed an application for stay of the eviction orders which was heard and determined on March 2, 2021. It is trite that once the application for stay of execution is heard and determined on merits, this Court is bereft of jurisdiction to issue any stay orders save for the limited purpose of either enforcing its orders or where the Court is moved to set aside its decision.



- 16 There is no doubt the Judgment debtor/Applicant filed this suit against the Judgment debtor/Applicant thereby acknowledging him as the Administrator of the Estate of Desterio Musinaka Khaoya. As such, she is now estopped from challenging his capacity. It is for that reason that I agree with Counsel for the Decree holder/Respondent that this application is an afterthought, made in bad faith with the sole purpose of delaying the matter further and to defeat the course of justice.
- 17 It is also to be noted that after the delivery of the impugned Judgment by this Honourable Court on May 27, 2020, the Judgment debtor/Applicant filed a Notice of Appeal on June 17, 2020.
- 18 For all the matters aforesaid, I find that the Judgment debtor/Applicant has not given any sufficient reasons to enable this Honourable Court grant the orders sought. Consequently, I find the Notice of Motion application dated October 28, 2022 without merit and the same is hereby dismissed with Costs.
- 19 Orders accordingly.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 27TH APRIL, 2023

HON E C CHERONO

ELC JUDGE

In the presence of;

Applicant/Advocate-absent

Respondent/Advocate-absent

Joy C/A-present

