



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HC SUCC NO. 33 OF 2017**

**IN THE MATTER OF THE ESTATE OF LAXARO MULEI KYAI (DECEASED)**

**MUTUNGA KIILU.....APPLICANT/BENEFICIARY**

**VERSUS**

**DR. MARIA NDUKU MULLEL.....PETITIONER/RESPONDENT**

**RULING**

1. There are 2 Applications filed by same parties herein namely;

- **Chamber Summons dated 10/12/2018 by Mutunga Kiilu noted as a 1<sup>st</sup> Respondent in the main matter and claims to be a beneficiary of the deceased estate.**

- **Application dated 11/12/2018 filed by interested party via the firm of the Mulei & Co. Advocates.**

2. The parties agreed to hear same Application together.

3. The 1<sup>st</sup> Applicant seeks the following orders;

**1. Spent.**

**2. That an order do issue restraining to the Respondents her servants, agents or any other person from evicting the Applicants tenants from plot No. 4236 Mutitu adjudication section pending hearing and determination of this application.**

**3. That an order do issue restraining Mambu Auctioneers or any other person instructed by the Administrator herein from evicting the remaining Applicants tenants and demolishing the remaining structures of the Applicant on plot No. 4236 Mutitu Adjudication Section pending hearing and determination of this application.**

**4. That an order be issued to the Administrator herein or whosoever is concerned to reconstruct, repair all the demolished, destructed buildings and/or structures of the Applicant.**

**5. That this Honourable Court be pleased to issue an order that the Administrator herein do pay the Applicant all the monthly rent that he has been collecting from his rental houses from this month of December 2018 until fulfillment of prayer number 4 herein and tenants occupy it in full as it was.**

**6. That costs be provided for.**

4. It is supported by the grounds on it's face namely;

**1. That the Applicant is a beneficiary of the estate of the deceased.**

**2. That the Respondent did misinterpret the Ruling of the court dated the 4<sup>th</sup> October 2018.**

**3. That the Respondent did instruct an Auctioneer to evict all my tenants and demolish all my structures.**

**4. That the Auctioneer has already demolished some of my structures and evicted all my tenants.**

5. ***That*** the Auctioneer is intending to come back anytime and demolish all the remaining structures.

6. ***That*** this honourable court did not issue an order for demolishing any structure or building.

7. ***That*** this honourable court only issued an order for status quo and eviction of 2, 3 and 5<sup>th</sup> Respondents only whereby the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are my tenants.

8. ***That*** no notice was served by the Administrator or the Auctioneer to me or to my tenants to vacate thus the eviction was done unprocedurally.

5. It is based on Applicant Affidavit sworn on 10/12/2018 reiterating some grounds.

6. The same is opposed by Affidavit of Dr. Maria Nduku Mulei sworn on 31/12/2018.

7. The same Affidavit opposes the Application by interested party dated 11/12/2018.

8. The Applicant in the Application dated 10/12/2018 opted to give oral submissions while the Respondent (Maria Nduku Mulei) filed Submissions dated 23/01/2019 for both Applications and a Supplementary Submissions dated 20/02/2019 for Application dated 11/12/2018.

9. The second Application is dated 11/12/2018 seeks the orders namely;

1. ***That*** there be an interim order of stay of execution of the order dated 2<sup>nd</sup> November 2018 and the subsequent Warrant to Give Vacant Possession dated 3<sup>rd</sup> November 2018 pending hearing and determination of the application herein.

2. ***That*** the Interested Party/Applicant be enjoined in these proceedings and be served with all pleadings filed.

3. ***That*** this honourable court do set aside and or vacate all orders and proceedings taken in relation to the Summons dated 15<sup>th</sup> November 2017 and the Interested Party/Applicant be granted an opportunity to defend the said Application on its merits.

10. It is supported by grounds namely;

a) The deceased herein was the lawful owner of Plot No. 4236 MUTITU ADJUDICATION SECTION.

b) On 31/07/1999 and 13/10/2000 the deceased in his lifetime sold a portion thereof to one JOHNES KIVUVA MUTHOKA and planted sisal demarcations of the portion sold.

c) The said JOHNES KIVUVA MUTHOKA later on 23/02/2016 and 21/04/2017 sold the said portion to the Interested Party/Applicant herein.

d) The sold portion is now known as Plot No. 5304 MUTITU/MBOONI and is in the name of the Applicant herein.

e) That the same does not therefore form part of the estate of the deceased herein as he had already sold, subdivided and transferred the same in his lifetime.

f) The Applicant obtained approvals for development of the said portion of land from the County Government of Makueni and is in the process of putting up heavy permanent structures thereon.

g) That the Administrator/Respondent herein filed the Application dated 15<sup>th</sup> November 2017 seeking eviction orders against intermeddles on Plot No. 4236 MUTITU ADJUDICATION SECTION.

h) That the Application did not seek any redress against the Applicant herein and neither did it touch on the Plot No. 5304 MUTITU/MBOONI.

i) The Applicant was never served with the Application herein and was therefore unaware that there was any case pending in court that could affect her proprietary rights.

j) If the Applicant had been served with the Application dated 15<sup>th</sup> November 2017, she would have defended the same and the failure to serve has led to her being condemned unheard which is against the principles of natural justice.

k) The Administrator/Respondent obtained orders on 02/12/2018 pursuant to the Application dated 15/11/2017 which orders directed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents be evicted from the plot No. 4236 MUTITU ADJUDICATION SECTION.

l) The Administrator/Respondent further went ahead and obtained warrants to give vacant possession dated 03/12/2018.

m) The orders and warrants did not in any way affect Plot No. 5304 MUTITU/MBOONI and or the Applicant herein.

*n) The Administrator/Applicant has illegally entered Plot No. 5304 MUTITU/MBOONI which belongs to the Applicant herein and started demolishing the Applicant's permanent structures thereon.*

*o) The Applicant herein stands to suffer irreparably and lose her colossal investment on the land if the orders sought are not granted.*

*p) That the Applicant is appealing to this honourable court for the grant of the orders sought in the Application.*

#### **SUBMISSIONS BY 1<sup>ST</sup> APPLICANT MUTUNGA KIILU**

11. The land was shared by his grandfather. The land was shared into 4 portions; 3 to 3 houses and 1 portion to himself.

12. Before he died he had gone to survey but he died before completion. The 2<sup>nd</sup> wife Maria Kavindu is mother of Dr. Maria. 2<sup>nd</sup> wife wanted to chase them out of the land ie him and Muthina Lazaro (3<sup>rd</sup> wife). He is a grandson of 1<sup>st</sup> wife.

13. The clan interfered. The clan ruled the land to be divided into 3 portions. For the deceased portion he was to be a share thereof. Maria Kavindu was satisfied.

14. He started constructing where his grandmother was allocated. Maria Kavindu reported to police and he was arrested. He was taken to court in Tawa. The court heard case and rendered judgement allowing him to construct where his grandmother was allocated. They went to chief; himself and Muthina to commence succession. They lodged HC Succ. No. 263/2015 in High court at Machakos. Maria Kavindu filed their HC Succ. No. 210/2015 in which status quo orders were issued.

15. Maria was not satisfied and thus came and lodged the HC Succ No. 33/2017. This court also on 04/10/2018 issued orders via a Ruling.

16. On 07/12/2018 execution in form of demolition of houses was effected.

17. Applicant lamented that, he was having a lot of problems as his house was demolished and he has no income to take care of his family. The demolition order was not in court file and police were used to implement it.

18. He urged court to grant orders vide Application dated 10/12/2018.

#### **SUBMISSIONS BY INTERESTED PARTY VIA MULEI ADVOCATE**

19. Interested party submitted that, in citing Section 101 of the Land Registration Act 2012, in application dated 15/11/2017 which provides that the ELC and subordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land, the Applicant stated that the summons dated 15<sup>th</sup> November 2017 on its face sought remedies barring Respondents from cultivating, subdividing and disposing off land on the grounds of trespass into the said property that formed part of the deceased's estate. This implied that there were questions regarding the rightful owners and occupiers of the said suit property.

20. The court delved into matters in the ambit of the ELC court, a substantive ground that warrants the stay of its orders and the consequential warrant issued. The succession court lacked jurisdiction to hear and determine issues relating to the said suit land since the dispute over the property does not stem from a succession matter of the deceased's estate from the rightful ownership and occupation of the same.

21. The Applicant/interested party has deponed in her further affidavit of how she has invested over Kenya Shillings Fifteen Million in developing the property Plot No. 5304 Mutitu/Mbooni and unless the court intervenes, the Respondent who has already proceeded to demolish the Applicant's permanent structures renders this a mere judicial exercise which defeats the import of her prayers 3 and 4 in her Application.

22. The interested party submits that her names are Elizabeth Ndunge Onesmus or Elizabeth Mativo, vide her ID card and thus she was not a party when adverse orders were made and she was not served with subject application thus prays that the court sets aside and vacates the orders and proceedings taken in relation to the summons dated 15<sup>th</sup> November 2017, and have her enjoined and properly served. She cites **Art 50 of the constitution** and the case of **ROZAAH AKINYI BUYU –VS- IEBC AND 2 OTHERS (2014)EKLR**.

#### **SUBMISSIONS BY PETITIONER DR. MARIA NDUKU MULLEI VIA KIVUVA ADVOCATE**

##### **Application by the 1<sup>st</sup> Respondent.**

23. The respondent submits that the 1<sup>st</sup> applicant has never pleaded tenancy since commencement of the matter despite knowing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent were sued independently and he is now estopped from claiming such.

24. Additionally he has not adduced evidence of tenancy between himself and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should have signed affidavits themselves (in person) to confirm tenancy, that has not been done.

25. The Administratrix and FRANCIS MBUVI of MAMBU AUCTIONEERS, have deponed on oath that there were no tenants or remaining

tenants at all and that no house or structure belonging to the 1<sup>st</sup> Respondent was demolished.

26. The application is based on deep lies, gross material non-disclosure and is a game of chance geared towards delaying the process of eviction of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents and ultimately delay the conclusion of the succession matter against the orders of the court that the matter be heard on priority basis on distribution. It ought to be dismissed with costs.

### **Application by Interested Party**

27. The Interested Party must first give valid reason(s) why she should be enjoined in this matter and, secondly, if enjoined; as the court may determine, why she should be afforded the chance to defend the application dated 15/11/2017.

28. The core issue is, she should demonstrate that she was not served with the application dated 15/11/2017. The Interested Party was duly served with the application dated 15/11/2017. She clearly appended her signature as the 5<sup>th</sup> Respondent having been served on 21/11/2017 at 12.00 noon and a return of service was duly filed in court.

29. The Interested Party cannot thus claim that she was not served or not aware of the court case since, the process server who used to serve her together with the other Respondents, on several occasions was forced to pin or place the court papers on the structure under construction and took photographs capturing the structure and the Interested Party's employees that are already on record.

30. Annexures MNM 1 & 2 in the Supplementary Affidavit filed in court on 09/03/2018 and annexure MNM 2 of the Replying Affidavit filed in court on 09/03/2018 and annexure MNM 2 of the Replying Affidavit both of the Administratrix are the best evidence of service upon the Interested Party.

31. The fact that the Interested Party is called Elizabeth Ndunge Onesmus or Elizabeth Mativo or Charity Mativo and the 5<sup>th</sup> Respondent in the application dated 15/11/2017 has not been disputed or controverted by her. The court should have no doubts in believing that fact.

32. Having incontrovertibly established that the Interested Party was duly served with the application dated 15/11/2017, which is the backbone of her application dated 11/12/2018, it is her considered opinion that this honourable court need not waste its precious time and energy in addressing the other would be issues in her application like whether Plot No. 5304 Mutitu/Mbooni is part of the estate or not, trespass among others, or as the court may determine.

33. The upshot is that the Interested Party was the 5<sup>th</sup> Respondent in the application dated 15/11/2017. She was duly served with the application and signed. She however chose to abscond court. The application has already been heard and determined.

34. That being the case, there are no reason(s) to enjoin the Interested Party in the matter and accordingly, or even if enjoined, no reason(s) to serve the Interested Party with all pleadings again and to defend the application having been already served and absconded court and lastly to set aside and or vacate all orders and proceedings taken in relation to the Summons dated 15/11/2017.

35. Relying on the case of **Independent Electoral and Boundaries Commission & Another –Vs- Stephen Mutinda Mule & 3 Others [2014] eKLR Court of Appeal at Nairobi Civil Appeal No. 219 of 2013** she submits that the issue of Jurisdiction of the court was never pleaded in the Chamber Summons dated 11/12/2018. Paragraph 12 of the Further Affidavit shows that the orders the Interested Party is seeking to set aside emanate from the Amended Chamber Summons Application dated 11/12/2018.

36. The issue of Jurisdiction, was not pleaded at all, in the Chamber Summons dated 11/12/2018 or leave of court sought to introduce the same and, has been raised without notice.

### **DETERMINATION**

37. The court has observed that the 1<sup>st</sup> applicant laments on demolition of structures he claims to belong to him and his tenants. He claims that being a grandson of the deceased he was entitled and in fact he allotted by deceased a portion of the suit land where he developed.

38. On the other hand the interested party complains of orders which demolished her property while she claim to have interest on the suit land. She says she was not a party when she was affected by the order. She thus seeks to be enjoined as a party herein.

39. The Petitioner insists that the interested party was a party and is listed as respondent no 5 in application dated 15/11/2017.

40. Without investing much time in the issues raised in the interlocutory applications, I find that the only solution to expedite settlement of the instant dispute herein, the court should just hear all parties in the instant contest and determine distribution of estate herein once and for all.

41. Thus the court makes the following orders;

**i. -The status quo prevailing on the ground be maintained.**

**ii. -the interested party one Elizabeth Ndunge Onesmus A K A Elizabeth Mativo, is hereby enjoined as a party herein.**

**iii. The matter is to be mentioned before the Presiding Judge High Court Makueni for directions on hearing of the same.**

**SIGNED, DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY, 2019 IN OPEN COURT.**

**HON. C. KARIUKI**

**JUDGE**