



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 5 OF 2019

ELIUD MAKHAKHA KHAEMBA (suing as the legal

representative and administrator of the estate

of ELIUD SACHIDA WANGUSI).....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

DISTRICT (COUNTY) LAND REGISTRAR,

KAKAMEGA COUNTY.....2ND DEFENDANT

THE HON. THE ATTORNEY-GENERAL.....3RD DEFENDANT

RULING

1. The application that I am called upon to determine is a Motion dated 19th March 2019. It seeks temporary orders to restrain disposal of the suit property, being Kakamega/Soy/2777, 2778, 2779 and 2780, which are subdivisions of Kakamega/Soy/215, originally registered in the name of Eliud Sachida Wangusi, who I shall hereafter refer to as the deceased.

2. It is brought at the instance of Eliud Makhakha Khaemba, who describes himself as the plaintiff. In his affidavit sworn in support of the Motion, he avers that the property was originally Kakamega/Soy/215 registered in the name of the deceased. The deceased took out a loan with the first defendant using the said property as security sometime in 1995. He alleges that the deceased repaid the loan but the first defendant has continued to charge interest on the principal amount that notwithstanding. He also alleges that the first defendant has severally sought to sell the property in purported exercise of its statutory power of sale. He states that the said sales have only failed to take place because of court orders that have been obtained in such suits as Eldoret HCCC No. 60 of 2006, Kakamega HCCC No. 13 of 2007 and Kakamega HCCC No. 141 of 2011. He alleges further that the first defendant has failed to render accounts despite being called upon to do so several times. He claims that the deceased was always willing and able to redeem the loan but has faced frustration from the first defendant. He alleges that the first defendant has gone ahead and irregularly and illegally caused the property to be subdivided into Kakamega/Soy/2777, 2778, 2779 and 2780 with an intention to offer the said portions for sale.

3. The plaintiff states that his interest in the property stems from the fact that he is the administrator of the estate of the deceased, and that he holds a grant of letters of administration *ad litem*. He avers that prior to the death of the deceased he held a power of attorney as the deceased resided aboard. He also claims to have had bought ten (10) acres out of the land from the deceased. He says that the subdivision of the said property by the first defendant did not take into account his interests and that he, therefore, stood to suffer as a result.

4. The matter was initially filed at the Environment and Land Court at Kakamega on 19th March 2019 as Kakamega ELC No. 18 of 2019. The instant Motion was contemporaneously filed with the plaint initiating the suit. The matter was placed before Matheka J., of the Environment and Land Court, who directed, as the matter concerned a charge/loan, that the said court had no jurisdiction, and referred the same to the High Court. The matter was thereafter placed before Njagi J., on 1st April 2019, where it was directed that the application be served on all the parties, and that the same be placed before me on 9th April 2019 for *inter partes* hearing. It transpired that I did not sit on the said date. It would appear that there were three advocates who attended court on the said date, who then caused it to be fixed for mention on 24th April 2019 for directions. On 24th April 2019, only the advocate for the plaintiff was in attendance. He urged me to allow the Motion, where upon I gave him a date for ruling to enable me go through the record, but I nevertheless granted interim orders to last till the date of the delivery of the ruling.

5. I have gone through the record. I have not encountered any affidavit of service. It is not clear whether the application was ever served on any of the defendants. But the attendance by two advocates for the defendants would suggest that there perhaps was service.

6. There is an appearance on behalf of the first defendant, who has filed a notice of preliminary objection, arguing that the suit was *res judicata* as there was a similar suit at Kisumu being CACA No. 28 of 2018, where similar issues are raised.

7. The matter came up on 24th April 2019 for directions, and not for hearing. It would be premature and prejudicial to the other parties to go ahead and determine the matter just because they did not attend court on the day the matter was scheduled for directions. Ideally, the matter should have been taken out then and given a date for hearing, and it would have been on the date allocated for hearing that the matter would have been reserved for hearing in the event the other parties failed to attend court.

8. Consequently, I hereby decline the invitation by the advocate for the plaintiff to determine the application. I shall instead direct that the application be given a date for hearing, to be obtained at the registry on priority. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July 2019

W MUSYOKA

JUDGE