



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.12 OF 2017**

**IN THE MATTER OF THE ESTATE OF THE LATE JOHN JAMIN MUSUNDI - (DECEASED)**

**PHILIP MATANDA MUSUNDI & OTHERS.....RESPONDENTS**

**VERSES**

**JOYCE SIKHOYA BARASA & 2 OTHERS.....APPLICANTS**

**RULING**

1. By her application dated 26<sup>th</sup> July 2019, the Applicant **DOROTHY LUSIKE MUYERA** seeks that this court stays its judgement dated 23<sup>rd</sup> July, 2019 pending the determination of this application and the appeal to the Court of Appeal. She further prays that the Respondents be restrained from felling and selling the eucalyptus trees from the farm and further leasing the farm to other third parties.
2. In her supporting affidavit sworn on the same day, the Applicant states that she has support of her sisters in filing the said motion. She has attached some photographs allegedly showing the wanton destruction of the trees. She prays that the decree of this court ought to be stayed pending the intended appeal.
3. **Stephen Francis Musundi** has filed an opposing replying affidavit on his behalf and that of his other brothers and has urged this court to dismiss the application for the basic reason that they have spent considerable time litigating contrary to the wishes and desires of his father. He said that all that the Respondents who are already married and are in their respective homes are simply attempting to delay the implementation of the decree from the court.
4. He said that the appeal will take a very long time and thus delay their development on the ground. He said that leasing part of the land was not new as they did it while the deceased was alive. He denied that he had cut the trees which at any rate was planted by the 3<sup>rd</sup> Administrator.
5. The court has perused the application and is well seized of the matter having heard the sibling rivalry all through. I find that the issues relating to leasing of the land can adequately be resolved if the parties can each enjoy the usage of the portion allotted to by this court. As it stands now each of the beneficiaries seemed able to roam and utilise the land as they deem necessary to the extent that whoever is mightier carries the day.
6. To forestall this and to ensure adequate use of each of the respective portions as granted in the judgment of this court, I do not think that it is prudent to stay the same for now. The aggrieved parties can still proceed on appeal as this is a constitutional right. They should not however impede the usage of the parcels of the land as given and apportioned by this court.
7. The question of the trees sold by the Respondent is a transient one for the simple reason that I have not been shown any evidence that it was the deceased who planted the same. Neither is there evidence that the photographs are from the estate. I will not make a decision over this as in any case each of the parties are adult enough to be able to grow the trees.
8. For the above reasons, I find that the only preservation which I consider crucial is for the titles not to pass to the beneficiaries as that may compromise the outcome of the intended appeal. For example, should the individual beneficiaries be given their titles and the Court of Appeal tampers with this court's decision then it will be expensive for them to carry out the transfer exercise. It is therefore reasonable that this court puts on hold any transfer of the parcels of land and to await the outcome of the intended appeal.
9. This however does not stop the parties from carrying out the subdivision exercise as per the confirmed grant on record. Each of the beneficiaries should be allowed to utilise freely and unhindered the portion given by this court. The only legal instrument missing shall be the title deed for the reasons given above.
10. In the premises the application is allowed as follows:

- (a) The parties be at liberty to carry out the subdivision of the estate as per the confirmed grant dated 23<sup>rd</sup> July, 2019.
- (b) Each of the beneficiaries be at liberty to utilise but not to sell or dispose the suit portions granted pending the determination of the intended appeal.
- (c) No titles shall be processed and issued to any beneficiary pending the determination of the intended appeal to the court of appeal.
- (d) Each party shall meet their respective costs.

Dated, signed and delivered in open court at Kitale this 18<sup>th</sup> day of December, 2019.

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H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Nakitare for the Applicant - Philip Musundi

Court Assistant – Silvia

Ruling read in open court.