



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 197 OF 1993.

JULIANA AGUNGWI WANJALA ::::::::::::::::::::::::::::::: PETITIONER.

VERSUS

YUSUF MOI CHUMA ::::::::::::::::::::::::::::::: OBJECTOR/APPLICANT.

AND

VICTOR MUSOGA

JOSEPHAT AMWAYI :::::::::::::::::::::::::::::::RESPONDENTS.

LUGA ROMANS

RULING.

1. The objector moves court via application dated 25th January, 2012 seeking the orders that:-

(i) Spent;

(ii) The prohibitory order e issued restricting any dealing on land parcel registration number E. WANGA/LUBINU/980 pending the determination of the objection herein;

(iii) The costs of this application be provided for.

2. The same is supported by the grounds on the face of Chamber Summons namely:-

(a) The property subject of the succession cause was fraudulently disposed off by the petitioner herein during the pendency of the objection proceedings and has successively changed hands;

(b) The sale of the said property shall render the succession cause worthless and cause untold suffering to the objector who is a beneficiary thereof;

(c) The alienation and disposal of the property by the petitioner and the subsequent transfer to the respondents was done fraudulently and in bad faith.

3. The application is also supported by the affidavit sworn by Yusuf Moi Chuma on 25/1/2012 which reiterates the grounds set on the chamber summons.

4. To oppose the application, the respondent Victor Musoga, Respondent No. 1 has filed grounds of

opposition dated 5/7/2012 and sworn a replying affidavit on 18/11/2015. The applicant case is that the petitioner obtained grant fraudulently in the instant cause and subsequently sold the land matter to the said victor Musoga who in turn transferred it to one Josephat Amwayi and Luga Romans.

5. The petitioner was charged with offence of forgery and convicted. He was jailed to serve 12 months imprisonment on 11/3/99. The applicant avers that he was the only survivor of the deceased herein but he died while he was a minor. He thus seeks to preserve the subject matter.

6. The respondent Victor Musoga opposes the application and avers that the orders have been overtaken by event, there is no reasonable cause of action. He further avers that the application is *res judicata* same having been determined on 5th June, 2000 vide orders issued on 25/5/2000. The application is thus fundamentally defective.

7. Further the second buyer and transferee Josphat Amwayi is deceased and he acquired same procedure during his life time. The parties' advocate agreed to canvas the application via written submissions however at the time for drawing the instant ruling, none of the parties had lodged his submissions.

8. The application is brought under section 45 Cap 160 and rule 73 of P.A. The purpose and intendment of the prohibitory orders are intended to preserve the subject matter until further orders of the court or until the matter in court is heard and determined.

9. The cited rule donates court with inherent powers to do justice. On 20/6/1995, there were orders in favour of the applicant to preserve the subject matter pending hearing of the objection interparties.

10. On 25/5/2000 the objector and his advocate failed to attend the court and thus the orders were discharged. The court notes that the land now is in the hands of the estate of Josephat Amwayi, deceased who is not a party herein.

11. The subject herein was transferred to deceased on 6th August, 2004 and title issued on 20/8/2004. The instant application was lodged on 1st February, 2012 after a period of 8 years after transfer to the deceased and 12 years after the discharge of the orders which had preserved the subject matter. No explanation as to why the orders vacated were not sought to be reinstated or the cause for the delay in filing the application.

12. There is a maxim for Equity which is to the effect that Equity does not aid indolent. The applicant has waited for too long to wake up from the slumber to seek further preservation of the subject matter.

13. There is no explanation as to why the objection herein has not been disposed. The material before the court is not sufficient to warrant the grant of the orders sought. The delay is inordinate and in any event there is no legal representative joined to represent the estate for the current registered owner.

14. The tenor and effect of Article 50 (1) of the Constitution matter would not allow the issuance of the sought orders to affect non parties without granting them a hearing.

15. The same stipulates that:-

“Art 50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

16. This article entrenches the principles of natural justice which demands a hearing to be rendered to a person before an adverse decision is made against them.

17. The court thus finds no merit in the application and dismisses the same with no orders as to costs.

DELIVERED, DATED and SIGNED at KAKAMEGA this 27TH day of SEPTEMBER, 2016.

C. KARIUKI.

JUDGE.

In the Presence of:-

..... **for the Petitioner.**

.....**for the Objector/Applicant**

.....**for the Respondents.**

..... **Court Assistant**