



**Kishasha (Suing as the legal and personal representative of the Estate of Samuel Kiyaya Muhenge - Deceased) v Kihyahya & 6 others (Environment & Land Case E002 of 2022) [2022] KEELC 1095 (KLR) (22 February 2022) (Ruling)**

*Harun Vusisa Kishasha v Pamela Jaladha Kihyahya & 6 others [2022] eKLR*

Neutral citation: [2022] KEELC 1095 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E002 OF 2022**

**BN OLAO, J**

**FEBRUARY 22, 2022**

**BETWEEN**

**HARUN VUSISA KISHASHA (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL KIYAYA MUHENG - DECEASED) ..... PLAINTIFF**

**AND**

**PAMELA JALADHA KIHIAHYA ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN NGAIRA KIHIAHYA ..... 2<sup>ND</sup> DEFENDANT**

**SHEM MUSAMBWA KIHIAHYA ..... 3<sup>RD</sup> DEFENDANT**

**FANUEL MUHENGA ..... 4<sup>TH</sup> DEFENDANT**

**ABSOLOM KIVASO ..... 5<sup>TH</sup> DEFENDANT**

**SARAH NYAMBOKO JORAM ..... 6<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR BUNGOMA COUNTY ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This is in respect to the Notice of Motion dated 1<sup>st</sup> February 2022 and filed by the plaintiff. It is predicated under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rule 1, 2, and 5 of the Civil Procedure Rules and Section 68(1) of the Land Registration Act. It seeks the following substantive orders: -

1. Spent



2. Spent
3. Spent
4. That pending the hearing and determination of this suit, an inhibition order be issued on land parcels No Bungoma/Kamakoiwa/5401, 5402, 5403, 5404, 5405 and 5406 and any other number created therefrom.
5. Costs be borne by the defendants.

It is supported on the grounds set out therein and also by the affidavit of Harun Vusisa Kishasha the plaintiff herein suing as the legal representative of the Estate of Samuel Kiyaya Muhenge (Deceased).

2. The gravamen of the application is that the deceased was, prior to his demise on 27<sup>th</sup> October 2007, the registered proprietor of the land parcel No Bungoma /Kamakoiwa/346. However, on 26<sup>th</sup> January 2012 one Dinah Mmboga who is also deceased had the said parcel of land registered in her names without carrying out succession. She then closed the said title on 7<sup>th</sup> March 2012 to create parcels NO Bungoma/Kamakoiwa/5401, 5402, 5403, 5404, 5405 and 5406. That the 1<sup>st</sup> defendant is the legal representative of the said Dinah Mmboga. That the resultant sub – divisions have now been transferred to the 2<sup>nd</sup> to 6<sup>th</sup> defendants and the plaintiff is apprehensive the said parcels of land may be sold and charged before this suit is heard and determined hence rendering this suit nugatory. The plaintiff will suffer irreparable damage and the defendants will not be prejudiced by the order sought.
3. Only the 3<sup>rd</sup> and 6<sup>th</sup> Respondents have filed responses to the application.
4. In his replying affidavit dated 5<sup>th</sup> February 2022, Shem Musabwa Kihyahya (the 3<sup>rd</sup> defendant) has deponed inter alia, that he is the registered proprietor of the land parcel No Bungoma/Kamakoiwa/5403 which was issued to him in 2012 long before this suit was filed and if the plaintiff had any claim to the said land, it should have been raised during the life time of their deceased mother Dinah Mmboga Kihyahya who died in 2021. That this application is an afterthought and the plaintiff had been allocated four (4) acres at Chepkorok Farm by their father and the defendants were allocated four (4) acres out of the land parcel No Bungoma/Kamakoiwa/346 as per the Minutes of a meeting held. That he obtained his title in a lawful manner over 10 years ago and he has the right to use it as he deems appropriate. The plaintiff cannot now challenge their titles. Annexed to his replying affidavit are the Death Certificate of Dinah Mmboga, Grant of Letters of Administration Ad Litem issued to the plaintiff in respect to the Estate of the deceased, Allotment letter issued to the plaintiff by CHepkorok Farm for Plot No 291 measuring 4.0 acres, Sugar cane Land Leasing Agreement between the plaintiff and one Justin Nasimiyu Wanyonyi and Minutes of meetings held on 25<sup>th</sup> February 2011 and 3<sup>rd</sup> March 2011.
5. In her replying affidavit also dated 8<sup>th</sup> February 2022, Sarah Nyamboko Joram (the 6<sup>th</sup> defendant) also deponed, inter alia that she is the registered proprietor of the land parcel No Bungoma/Kamakoiwa/5401 issued to her in 2012 long before this suit was filed. That the plaintiff ought to have raised his claim during the life time of his mother. That she did not obtain her title in any unlawful manner and the plaintiff has only come to Court long after the demise of his mother and with unclean hands and this application should be dismissed.
6. When the application was pleaded before me on 2<sup>nd</sup> February 2022, I directed that it be canvassed by way of written submissions. These have been filed by Mr Robert Wamalwa Counsel for the plaintiff and by the 3<sup>rd</sup> and 6<sup>th</sup> defendants acting in person.



7. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel for the plaintiff and by the 3<sup>rd</sup> and 6<sup>th</sup> defendants.

Section 68(1) of the [Land Registration Act](#) provides that: -

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

It is clear from the plaint filed herein on 1<sup>st</sup> February 2022 that the plaintiff's suit is premised on claims that the land parcel No Bungoma/Kamakoiwa/346 was previously registered in the names of the deceased but upon his demise, his widow Dinah Mmboga Kihyahya fraudulently sub – divided it into land parcels No Bungoma/Kamakoiwa/5401 to 5406 and transferred them to the 1<sup>st</sup> to 6<sup>th</sup> defendants herein.

8. The defendants are yet to file their respective defences.
9. At this stage therefore, the Court is not determining the issue of ownership of the land parcels in dispute. That appears to be what the 3<sup>rd</sup> and 6<sup>th</sup> defendants are canvassing in their replying affidavits. What the plaintiff seeks now is the preservation of the land in dispute so that it is not further sub – divided thus destroying the substratum of the case before it is heard and determined. As was held in [Dorcas Muthoni & Two others .v. Michael Ireri Ngari](#) 2016 eKLR which has been cited by Counsel for the plaintiff: -

“An order of inhibition issued under Section 68 of the [Land Registration Act](#) is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the Applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”

At this point, it is not in dispute that the plaintiff obtained the Limited Grant Ad Litem in Bungoma Chief Magistrate's Succession Cause No 120 of 2021 allowing him to file this suit on behalf of the deceased's Estate. It is not in dispute also that the deceased was the first registered proprietor of the land parcel No Bungoma/Kamakoiwa/346 on 3<sup>rd</sup> May 1982 before it was registered in the names of Dinah Mmboga Kihyahya on 26<sup>th</sup> January 2012 and on 7<sup>th</sup> March 2012, that title was closed upon sub – division. It is that transmission of the land parcel No Bungoma/Kamakoiwa/346 in the names of the said Dinah Mmboga Kihyahya which the plaintiff alleges was fraudulent because, inter alia, no succession had been carried out. The 3<sup>rd</sup> and 6<sup>th</sup> defendants, who are the only ones who responded to the application, did not avail any grant issued to the said Dinah Mmboga Kihyahya which empowered her to acquire and sub – divide the said parcel of land. Perhaps that will be availed when they file their defences. Prima facie therefore, and going by the evidence available, the said Dinah Mmboga Kihyahya may be an intermeddler of an Estate of a deceased person. That is sufficient ground upon which to grant the order sought so that the land parcels registered in the names of the defendants are not further sub – divided. Of course whether or not Dinah Mmboga Kihyahya was an intermeddler will be a matter for trial. However, as for now, the balance of convenience tilts in favour of the plaintiff.

10. I am also guided by the decision in [Films Rover International & others .v. Cannon Films Sales LTD](#) 1986 ALL E R 772 where it was stated that the Court should always be guided by the course that carries



the lower risk of injustice. The defendants will remain as the registered proprietors of their respective portions created out of the land parcel No Bungoma/ Kamakoiwa/346. No prejudice will be caused to them if the orders sought are granted. On the other hand, if those orders are declined and the plaintiff's case prevails after the trial when those parcels are in the hands of other parties, it will involve the plaintiff having to file other suits against those parties. That will have been a waste of both judicial time and resources as well as an unnecessary expense to the plaintiff. The orders sought by the plaintiff are clearly well merited.

11. Meanwhile, I notice that some of the documents filed herein are in Kiswahili language with no English translation annexed. Hopefully, that will be done before the full trial commences. Counsel for the plaintiff is accordingly put on notice.
12. The up – shot of the above is that the Notice of Motion dated 1<sup>st</sup> February 2022 is allowed in the following terms: -
  1. An order of inhibition is issued inhibiting the registration of any dealings whatsoever on the land parcels No Bungoma/ Kamakoiwa/5401, 5402, 5403, 5404, 5405 and 5406 pending the hearing and finalization of this suit.
  2. Costs in the cause.

**BOAZ N. OLAO.**

**J U D G E**

**22ND FEBRUARY 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 22ND DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

**BOAZ N. OLAO.**

**J U D G E**

**22ND FEBRUARY 2022.**

