



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 243 of 2012**

**JESSICA KAVULANI JUMBA .....1ST PLAINTIFF/APPLICANT**

**FRANCIS MULEI JUMBA ..... 2ND PLAINTIFF/APPLICANT**

**JANE MMBONE JUMBA ..... 3RD PLAINTIFF/APPLICANT**

**VERSUS**

**HASSAN ODARI JUMBA ..... 1ST DEFENDANT/RESPONDENT**

**PATRICK MUGOYWA ..... 2ND DEFENDANT/RESPONDENT**

**ELAM ASIRIGWA ..... 3RD DEFENDANT/RESPONDENT**

**RULING**

The application by way of Notice of Motion dated 17.9.2012 seeks the following orders:-

“1. Spent.

2. That the court be pleased to issue interim orders of injunction restraining the defendants/respondents from interfering, wasting disposing, selling, transferring, developing/constructing or in any other manner whatsoever from denying the Applicant’s access to land known as KAKAKMEGA/KIGAMA/976.

3. That the Honourable court do issue preservative orders by directing the District Land Registrar – Vihiga to stop any dealings in the entries at the land office relating to land parcel No. KAKAMEGA/KIGAMA/976.

4. That until the suit filed herein is heard and finally determined, the orders in 2 above be extended and or be confirmed.

5. That until the suit filed herein is heard and finally determined, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be restrained from further developing/constructing, occupying or taking possession of the building currently under construction until the court determines the shares of the applicants in land known as KAKAMEGA/KIGAMA/976.

6. That costs of this application be borne by the respondent.”

The application is supported by the affidavit sworn by JESSICA KAVULANI JUMBA, the 1<sup>st</sup> applicant. The background facts according to the said affidavit are that the applicants and the 1<sup>st</sup> respondent are the children of the late JOSHUA JUMBA who was the registered owner of L.P. No. KAKAMEGA/KIGAMA/976. It is claimed by the applicant that prior to the death of their late father on 21.7.2006, the 1<sup>st</sup> respondent had fraudulently caused the suit land to be transferred into his names on 8.6.2006 when their late father was ailing and incapacitated. According to the applicant, the 1<sup>st</sup> respondent effected the change of ownership of the land without their consent despite knowing that the applicants had made investments on the suit land. It is averred that the 1<sup>st</sup> respondent is openly acting with impunity to subdivide the land and transfer it to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. According to the applicants, the 1<sup>st</sup> respondent has disinherited them and rendered them homeless.

In opposition to the application, the defendants filed a statement of grounds of opposition and urged the court to dismiss the application on the following grounds:-

“1. The plaintiffs lack *locus standi* over the suit property.

2. The application and the suit do not meet the minimum requirements for the remedy sought under the law.

3. The application and the suit amounts to gross abuse of the process of this honourable court.

4. The Honourable court is bereft of the necessary jurisdiction in the matter.”

Mr. Chitwah Advocate appeared for the applicants while Mr. Musiega Advocate appeared for the respondents. Both counsels essentially reiterated their cases as summarized above. The respondents did not file a replying affidavit. The matters of fact raised in the affidavit in support are therefore not controverted. It is not in dispute that the suit land was registered in the name of the late JOSHUA JUMBA. It is not denied that the late JOSHUA JUMBA was the father to the applicants and the 1<sup>st</sup> respondent. It is not in dispute that the transfer of ownership of the suit land occurred when the late JOSHUA JUMBA was still alive.

Mr. Musiega for the respondents has raised the issue whether the applicants have the *locus standi* to bring this suit. No grant of Letters of Administration in the estate of the late JOSHUA JUMBA have been exhibited.

A party who seeks to file a suit on behalf of the estate of a deceased person must obtain Letters of Administration (see **TROULSIK UNION INTERNATIONSL & ANO. VS MRS. JANE MBEYU & ANOR. CA 145 [1995].**)

Have the applicants filed this suit on behalf of the estate of the late JUSHUA JUMBA? The answer seems to be in the negative. I say so because the Plaintiff in paragraph No. 5, 7, 8 & 10 raises issues of the applicants proprietary rights over their ancestral land which they claim is registered in the 1<sup>st</sup> defendant's name in trust for the estate of the deceased.

In the case of **MUKANGU VS MBUI C.A. NYERI NO. 281 OF 2000**, the Court of Appeal had the following to say in relation to ancestral land:-

***“It is a concept of intergenerational equity where the land is held by one generation for the benefit of the succeeding generation.”***

The court then went ahead to find that a trust arose from the possession and occupation of the land.

The plaintiffs therefore have a cause of action against the defendants and the affidavit evidence by the applicants is not controverted.

The applicant’s case has merit. The requirements set out in the case of ***Gella vs Cassman Brown [1973] E.A. 358*** for a grant of the orders set.

The application is allowed as prayed with costs in the cause.

***Delivered, dated and signed at Kakamega this 19<sup>th</sup> day of December, 2012***

**B. THURANIRA JADEN**

**J U D G E**