



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Succession Cause 136 of 2000**

**IN THE MATTER OF THE ESTATE OF JUMA BALONGO JOHN ----- DECEASED**

**A N D**

**RAEL WEKULO ----- OBJECTOR/RESPONDENT**

**V E R S U S**

**ELIZABETH NAKHUMWA**

**-----PETITIONER/APPLICANT**

**R U L I N G**

The application before me has been brought by ELIZABETH NAKHUMWA JUMA, who is the petitioner herein. She seeks two substantive reliefs against the respondent, RAEL WEKULO, being;

- (a) *An injunction to restrain the respondent/objector from leasing out, contracting, constructing any structures on the suit property, as well as alienating or in any manner whatsoever interfering with the said property; and***
- (b) *The eviction of the respondent from the suit property L. R. NO. KAKAMEGA/LUKUME/523.***

It is the applicant's contention that she was the owner of the suit land. However, the respondent had encroached onto the said parcel of land and constructed a house thereon.00.

The applicant says that the respondent is the widow to the applicant's brother-in-law. In other words, the husband to the respondent was a brother to the applicant's husband.

When the respondent was served with the application, she neither filed any affidavit in reply to the applicant's affidavit, nor did she attend court, during the hearing of the application.

When the court asked the applicant about the date when the respondent encroached onto the suit property, the applicant said that that was in July 2003. During that month, the respondent is said to have constructed a house on the suit property.

The court then sought to know from the applicant if she was aware of the objection proceedings that had been lodged by the respondent herein. The applicant's answer was that she knew nothing about the objection proceedings or about the respondent's application for the revocation of the grant issued to the applicant.

For all intents and purposes, the application before me is uncontroverted. However, in determining whether or not the applicant had met the requirements for the award of the relief sought, it did not matter that the respondent did not oppose the application. I say so because the court is not simply concerned with the question as to whether or not a respondent opposes an application.

Whereas the failure of a respondent to file a replying affidavit would imply that the facts spelt out in an affidavit filed in support of an application were uncontroverted, that may or may not be a good enough reason to award the reliefs sought. I say so because in a case in which the facts establish all the legal requirements for the issuance of the reliefs sought, the court would have no hesitation in granting the said reliefs. In other words, such reliefs would not be granted simply because the respondent had filed no replying affidavit; but more so because the facts set out in the supporting affidavit met the requirements for the grant of the said reliefs.

In the event that there was no replying affidavit, but also that the unchallenged facts set out by the applicant, did not meet the requirements for the grant of the reliefs sought, the court would not grant the reliefs, even if the application was unopposed.

In this case, the applicant has conceded that the respondent got onto the suit property in July 2003 and constructed a house thereon, during that same month.

It was not until the 24<sup>th</sup> of September 2008 that the applicant moved the court for an injunction. The said injunction was intended, inter alia, to stop the respondent from construction.

But, as the respondent had already constructed a house, she could not now be restrained from doing so. If anything, she could only be restrained from further or other construction.

It is my considered view that any further or other construction by the respondent would cause irreparable loss to the estate of the late **JUMA BALONGO JOHN**. And, as the respondent had not filed any affidavit, I am unaware of how, if at all, the said respondent could compensate the estate for the (apparently) unauthorized entry onto and use of the suit land.

From the record of the proceedings in this Succession Cause, it is clear that on 15<sup>th</sup> June 2004, the respondent filed an application for the revocation or annulment of the grant of letters of administration, which were issued to the applicant herein. In that application, the respondent herein did acknowledge that the court had issued the grant on 4<sup>th</sup> July 2000, and that the said grant was confirmed by the court on 26<sup>th</sup> June 2001.

The main reason for her seeking to have the grant either revoked or annulled was that the late **JUMA BALONGO JOHN** had been holding the suit property in trust for himself and for his two brothers, **KAITANO WEKULO** and **BENEDICTO BALONGO**.

Prior to filing the application for the revocation or annulment of the grant, the respondent had earlier filed another application, which sought to have her enjoined to the Succession Cause. That other application was filed in court on 18<sup>th</sup> September 2002.

It is interesting to note that in that earlier application, the respondent herein had described herself as “the second widow to the deceased.”

That description is noteworthy because the respondent thereafter described herself as the sister-in-law to the deceased, as the deceased was a brother to her husband, **KAITANO WEKULO BALONGO**.

As regards the application for joinder, H. P. G. Waweru J. observed as follows, on 26<sup>th</sup> September 2002;

***“The application appears to me to be incompetent. Perhaps what the objector should do is to file an application for revocation or annulment of the grant.”***

That explains the reason why thereafter, the respondent herein filed the application for the revocation or the annulment of the grant.

The application was listed for directions on several occasions. However, the court did not give directions because either the respondent herein did not attend court, or she did not prove that she had served the application and the appropriate hearing notice.

In effect, the respondent was well aware that until and unless the confirmed grant was revoked or annulled by the court, the estate had already been distributed. Her complaint, in the application for the revocation or the annulment of the grant was that she had not been provided for, yet she deemed herself and her children to be beneficiaries to the estate of JUMA BALONGO JOHN.

In the light of her said complaint, the respondent must be deemed to have been fully aware that until and unless the court ordered that she should be given a portion of the land constituting the estate of the deceased, she had no other way of obtaining it lawfully. Therefore, by moving onto the land in question and apportioning to herself a portion thereof, the respondent knew that she was not acting lawfully. She cannot therefore be permitted to enjoy the fruits of that unlawful step which she has undertaken.

Accordingly, the respondent shall be restrained, from now henceforth, from using the suit property or any developments thereon, until further orders of this court.

However, for now, the house which she constructed shall not be demolished, although she is not permitted to use it.

The respondent shall also be restrained from leasing out the suit property or any part thereof. She will also be restrained from alienating the property and from interfering with the applicant's use of the said property.

Finally, the respondent will pay the costs of this application. Those costs shall be paid to the applicant.

*Dated, Signed and Delivered at Kakamega, this 22<sup>nd</sup> day of January 2009*

**FRED A. OCHIENG**

**J U D G E**