



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Succession Cause 651 of 2008

**IN THE MATTER OF THE ESTATE OF WILLIAM SHAMBARI AKA WILLIAM
SABALI CHALENGA**

BETWEEN

ALICE MUHONJA ----- APPLICANT/OBJECTOR

VERSUS

KENNETH LITSWA ASEGA ----- RESPONDENT

RULING

On 18th December 2008, the Objector filed an application for revocation of the grant which was issued to SAMUEL MADAGA SABALI, in Vihiga SRM's Court, Succession Cause No. 77 of 1999.

Simultaneously with the summons for revocation of the grant, the objector filed an application for an interlocutory injunction to restrain the respondent from evicting her, and also from entering onto, using or cultivating L.R. NO. KAKAMEGA/KEGOYE/643. By the interlocutory application, the objector also sought an order of inhibition, to stop any dealings with the title of the suit property, L.R. NO. KAKAMEGA/KEGOYE/643.

When the interlocutory application was first placed before the court, it was certified urgent.

That was on 2nd February 2009. On that occasion the court ordered that the status quo prevailing would be maintained until 16th February 2009, when the application was scheduled

for *inter partes* hearing.

However, on 16th February 2009, the parties to this case failed to attend court. Consequently, the court adjourned the application indefinitely.

On 5th March 2009 the Objector filed another “*Certificate of Urgency.*” In that certificate, she stated that as at the time when the application was called out in court, on 16th February 2009, her advocate was filing an affidavit of service, at the registry.

Notwithstanding the Certificate of Urgency dated 5th March 2009, this court declined to certify as urgent, the application dated 18th December 2008. I made that decision because I held the view that the applicant and her advocate had only themselves to blame for failing to attend court at the time when the case was called out on 16th February 2009.

Undeterred by that development, the objector filed a new application, dated 9th March 2009. That new application was prompted by the fact that the respondent was harassing the applicant, by commencing the demolition of the applicant’s house. The respondent was also said to have roughed-up the applicant, inflicting injuries on her body.

As it appeared that matters were getting out of hand, I did certify as urgent the application dated 9th March 2009. I also issued an interim injunction, *ex parte*, in the first instance. By the said interim injunction, the respondent was restrained from demolishing any structures on the suit property. He was also restrained from putting the said property to any use, for his own benefit or for the benefit of anyone who claims through him.

Having thus secured the subject matter of the application, I fixed the application for hearing on 16th March 2009.

In answer to the application, the respondent submitted that this court would be setting a dangerous precedent if it allowed the application, because it would be tantamount to permitting the applicant to use the back door to revive an injunction order which had lapsed.

As far as the respondent was concerned, the applicant must face the consequences of their failure to be in court on 16th February 2008, when the initial orders lapsed. He asked this court to take note of the fact that the two applications, (dated 18th December 2008, and 9th March 2009, respectively), seek the same reliefs.

In that respect I have noted that whereas the application dated 9th March 2009 seeks an injunction until the hearing and determination of the application dated 18th December 2008;

the other application seeks an injunction pending the hearing and determination of the summons for revocation of the grant in Vihiga SRM's COURT SUCCESSION CAUSE NO. 77/1999. To that end, the two applications do not seek the same reliefs. At best, the application dated 9th March 2009 is a subset of the application dated 18th December 2008.

The respondent then said that he is the registered proprietor of L.R. NO. KAKAMEGA/KEGOYE/643 (*"the suit land"*). He became the registered proprietor after he purchased the said suit land from SAMUEL MADAGA SABALI. Therefore, in his view, his interests cannot be defeated on the basis of mere allegations.

As far as the respondent was concerned, until his proprietorship was cancelled, he would be entitled to use the suit land.

Furthermore, the respondent holds the view that the issue of the ownership of the house which he had allegedly started bringing down, was in doubt. The doubt is said to stem from the fact that whilst the applicant has deponed that the house belongs to her, the advocate for the applicant submitted that the house belongs to the applicant's mother.

In the certificate of urgency, which the applicant used to persuade this court to certify her application as urgent, it was stated that the house which the respondent was allegedly demolishing, belonged to the applicant. In the application itself, the applicant reiterated that the house in question was hers. It is *"the Applicant's house"* which the applicant wishes to have this court protect from demolition. That is prayer 2 of the application. Yet, in the grounds in support of the very same application, it is stated that;

"the Respondent has started demolishing the Applicant's mother's house where the applicant has been residing."

At first glance, it would appear that there is some confusion in the mind of the applicant, as regards the ownership of the house which the respondent was intent on demolishing. But a reading of paragraph 3 of the applicant's affidavit reveals the applicant calls the house her home, because she had been staying therein. It does therefore appear that there is really no confusion of substance.

The respondent submitted that at this stage of the case, the court was not dealing with the issue of the validity or otherwise of the grant. Therefore, he says that this application should not pre-empt the application for revocation.

It is true that the application for revocation of the grant is distinct from this current

application. But it is equally true that the subject matter of both applications is the same.

In giving due consideration to the application for an interlocutory injunction, the court cannot close its eyes or its mind to the application for revocation. I say so because an interlocutory application cannot be granted if the applicant's substantive claim was not shown to have a probability of success.

The respondent herein would appear to be an innocent purchaser for value. At least, the applicant has not cast any aspersions on the conduct of the respondent, in the manner in which he purchased the suit property.

However, the applicant has raised serious issues as to the conduct of the person who sold the suit property to the respondent. That person is SAMUEL MADAGA, now deceased. He is said to have acquired title to the suit property, through transmission by inheritance. SAMUEL MADAGA is a brother to the applicant herein. The two of them were children of WILLIAM SHAMBARI, who died on 2nd July 1992.

It is the applicant's case that her father was survived by four children;

(i) *Samuel Madaga Sabali*;

(ii) *Grace Embale*;

(iii) *Alice Muhonja*; and

(iv) *Esau Kagota*.

All the four children are said to have consented to Samuel Madanga Sabali filling the Succession cause in respect to their late father.

Having obtained the interim grant, the said Samuel Madanga Sabali is said to have completely excluded his brother and two sisters from the rest of the proceedings. He is said to have misled the learned magistrate at the Vihiga, that he was the sole heir to the estate of his late father, save only for his mother. In the event, the court at Vihiga is said to have awarded the whole property to Samuel Madanga Sabali, although his mother was given a life-interest therein.

If the applicant's claims, as set out herein are proved to be correct, I find and hold that the applicant has demonstrated a prima facie case with a probability of success. Meanwhile, as the suit property is now registered in the respondent's name, I find that unless appropriate orders are made to preserve it, the subject matter of the application for revocation of the grant may well be placed beyond the reach of both the applicant and the court. If

that
happened, the applicant and her other siblings would suffer irreparable loss, as they
would
have been disinherited.

In the event, I do now order that an interlocutory injunction shall issue forthwith, to
restrain
the respondent from demolishing the house in which the applicant lives, on the suit
property.

This order shall remain in force until the hearing and determination of the application
dated
18th December 2008.

Meanwhile, in recognition of the fact that the applicant has raised no issues against the
conduct of the respondent, and because the applicant only lays claim to a portion of the
estate
of her late father, I direct that the application for revocation be heard and determined as
a
matter of priority. I so order because Samuel Madanga was entitled to inherit at least a
portion of his late father's land. In the circumstances, it appears that the respondent
may well
be lawfully entitled to a portion of the suit property. The sooner he can get to know his
position, the better for all concerned.

The respondent shall, for now, also be restrained from the suit property until the
application
dated 18th December 2008 is heard and determined.

The costs of the application dated 9th March 2009 are awarded to the applicant.

Dated, Signed and Delivered at Kakamega, this 30th day of April, 2009.

FRED **A.** **OCHIENG**
J **U** **D** **G** **E**