



Make & 2 others v Maake (Sued as Personal Representative of the Estate of Amenya Misiani Make - Deceased) & 4 others (Land Case E003 of 2025) [2025] KEELC 5080 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
LAND CASE E003 OF 2025**

**M SILA, J
JULY 2, 2025**

BETWEEN

**DAVIS AMENYA MAKE 1ST PLAINTIFF
MARY MORAA MAKE 2ND PLAINTIFF
REUBEN AMENYA MAKE 3RD PLAINTIFF**

AND

**JEREMIAH MISIANI MAAKE (SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AMENYA MISIANI MAKE - DECEASED) 1ST DEFENDANT
DICILLAS MONG'ARE NYOKWOYO ALIAS DICKLAS MONG'ARE NYOKWOYO 2ND DEFENDANT
MARY KEMUNTO 3RD DEFENDANT
COUNTY LAND REGISTRAR, KISII 4TH DEFENDANT
HON ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. What is before me is an undated application filed on 21 January 2025 by the plaintiffs who act in person. There are 11 orders sought in the body of the application but when I peruse them some cannot pass to be prayers such as the prayer 9 that damages shall not be an adequate remedy. What I can fish out as being actual prayers which can be subject of a ruling after a hearing inter partes are prayers (3) (4) (5) (7) and (8). Respectively, they ask for the following (paraphrased) :
 - (3) That there be issued an order of stay of execution of the judgment, decree and orders made in Nyamira Chief Magistrates' Court Succession Cause No. 7 of 2016 pending hearing of this suit.



- (4) That it be declared that the land parcel Bokiamutwe/Nyaribari Masaba/1334 belongs to the plaintiffs and the title of the 2nd defendant be revoked.
 - (5) That it be declared that the land parcel West Kitutu Chache/Bogusero/2098 belongs to the plaintiffs and the title of the 3rd defendant be revoked.
 - (7) That the defendants be restrained from dealing with the two land parcels pending hearing and determination of the suit.
 - (8) That the OCS Kisii Police Station to oversee compliance of the orders.
2. At this juncture it will be seen that prayers (4) and (5) above are not the type of prayers that the court would grant in an interlocutory application. That will need a hearing. I will proceed to dismiss the said prayers (4) and (5) of the application. Regarding prayer 3, I do not have jurisdiction to stay a succession matter as succession matters are handled by the High Court and not the Environment and Land Court. That prayer is thus dismissed. That only leaves prayer (7) of the application as the sole substantive prayer given that prayer (8) is an enforcement prayer. I construe prayer 7 as one seeking an order of injunction.
 3. Nothing was filed by the respondents to oppose the motion although at the hearing thereof, Mr. Ndiritu, learned State Counsel, did point out, as I have enumerated above, that the only prayer that can be entertained is the prayer for injunction which position was supported by Mr. Mochiemo for the 1st defendant.
 4. In the case of *Giella v Cassman Brown* [1973] EA 358, it was settled that to succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable loss unless the injunction is granted; and where the court is in doubt, it will decide the application on a balance of convenience.
 5. The applicants aver to be children of one Amenya Maake Misiani who died in June 1997. They say that he left three properties i.e Bokiamutwe/Nyaribari Masaba/1334 , West Kitutu Chache/Bogusero/2098, and Manga Settlement Scheme/207. Only the first two properties are in issue in this case. The applicants contend that the 1st defendant/respondent in September 2011, fraudulently transferred the land parcel Bokiamutwe/Nyaribari Masaba/1334 to the 2nd defendant. They further contend that the 1st defendant fraudulently transferred the land parcel West Kitutu Chache/Bogusero/2098 to the 3rd defendant. Inter alia it is averred the transfers were fraudulent as the properties belonged to the estate of the late Misiani and the 1st respondent had not obtained any grant of letters of administration. They claim that the 1st respondent filed the suit Nyamira Chief Magistrates' Court Succession Cause No. 7 of 2019 while privy to an already existing succession cause, i.e Kisii High Court Succession Cause No. 241 of 2012 now Nyamira Chief Magistrates' Court Succession Cause No. 167 of 2016.
 6. I have not seen the actual prayers in the plaint which part of the plaint does not appear to have been uploaded into the court online filing platform. However, when I read the body of the plaint, it appears that they want the titles of the 2nd and 3rd defendants cancelled and they be evicted and be permanently restrained from the suit properties. They want the suit properties registered in their names.
 7. I have seen displayed a grant of letters of administration dated 9 August 2012 jointly issued to the 1st applicant David Amenya Make and the 1st respondent Reuben Amenya Make, vide Kisii High Court Succession Cause No. 241 of 2012. I have also seen a Certificate of Confirmation of Grant dated 9 November 2022 but this time issued in the case Nyamira Chief Magistrates' Court Succession



Cause No. 7 of 2019. In their plaint, the applicants contend that this grant was confirmed despite their protest. I see that in this confirmed grant, the land parcel Bokiamutwe/1334 was distributed equally to David Maake, Jeremiah Maake and Reuben Maake who are respectively, the 1st applicant, 1st respondent, and 3rd applicant. The parcel West Kitutu/Bogusero/2098 was distributed equally to David Maake, Jeremiah Maake, Reuben Maake, Martha Maake, Ruth Maake, Wilkister Maake, and Sarah Maake.

8. The applicants have exhibited searches showing that the parcel Bokiamutwe/1334 was transferred to the 2nd respondent on 15 September 2011. For the parcel Bogusero/2098 what is exhibited is a title deed in name of Amenya Misiani Make (the deceased) issued on 26 June 1990. No current search or green card was displayed to show the current status of this property. I have nothing before me to show any dealings in this property nor do I have any evidence that it was transferred to the 3rd respondent as claimed. I am therefore unable to make any injunctive orders in respect of this land parcel Bogusero/2098.
9. Regarding the parcel Bokiamutwe/1334, it is of course claimed that it was fraudulently transferred to the 2nd respondent in 2011 before succession was done.
10. Now, what is not clear to me is under what capacity the applicants have filed this suit. Are they filing suit on behalf of the Estate of the late Misiani so that they can recover this property and make it part of his estate, or are they suing on the basis that they are beneficiaries of the confirmed grant issued in Nyamira Chief Magistrates' Court Succession Cause No. 7 of 2019? That is not clear and it is an important point. It is important because if they are suing in respect of the estate of the late Misiani, then they need to come to court on that foundation in which case they must demonstrate that they have capacity to represent the said estate. That capacity can only come through a grant of letters of administration which the applicants must use as the basis for their suit. I have not been informed that the applicants have come to court as representatives of the estate of the late Misiani and if so under which grant of letters of administration. There were of course two grants displayed i.e the grant dated 9 August 2012 jointly issued to the 1st applicant David Amenya Make and the 1st respondent Reuben Amenya Make, vide Kisii High Court Succession Cause No. 241 of 2012 and the confirmed grant issued in Nyamira Chief Magistrates' Court Succession Cause No. 7 of 2019. I am unable at this point in time to reconcile how two grants can co-exist and I do not know if one was nullified in favour of another. There is no elaboration on this by the applicants.
11. But what I am driving at is that without coming to court on the basis of a grant of representation in respect of the estate of the late Misiani, the applicants cannot be entertained in so far as they seek recovery of land in respect of the estate of Misiani. They could probably have capacity to file suit as beneficiaries of the confirmed grant, but they have also not pleaded that they have filed this suit under that capacity. Moreover, if they are coming to court as beneficiaries, then they would be affirming the same grant they allege was improperly confirmed despite their protest, and I do not see how the applicants can approbate and reprobate at the same time.
12. In essence, there is a serious issue regarding capacity and for that reason I am not persuaded that a prima facie case has been displayed.
13. Having held as much, I regret my inability to issue any order of injunction and this application is dismissed. I will not make any orders as to costs since nothing was filed to oppose it.
14. Orders accordingly.

DATED AND DELIVERED THIS 2ND DAY OF JULY 2025



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

Delivered in presence of:

Mr. Mochiemo for the 1st defendant/respondent – Present

Mr. Ndiritu for the 4th and 5th defendants/respondents – Present

Applicants acting in person - Absent

2nd & 3rd defendants not entered appearance - Absent

Court Assistant – Allan Angwenyi

