



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. E1 OF 2021**

**MAURICE JOMO SHIKHUTLI.....APPELLANT**

**VERSUS**

**FRED BURUDI MURUNGA**

**ALICE SHIHUNDU.....RESPONDENTS**

**RULING**

The application is dated 18<sup>th</sup> January 2021 and is brought under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and Sections 6, 3A & 1A of the Civil Procedure Act, Cap 21 Laws of Kenya seeking the following orders:-

1. That this application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
2. That pending the hearing of this application inter parties this honourable court be pleased to stay proceedings in Butali SPM MCL & E No. 309 of 2019 Fred Burudi Murunga & Another vs Maurice Jomo Shikhutuli.
3. That this honourable court be pleased to order stay of proceedings in Butali SPM MCL & E. No. 31 of 2019 Fred Burudi Murunga & Another vs. Maurice Jomo Shikhutuli pending the hearing and determination of this appeal and or pending the hearing and determination of the summons for revocation of grant filed in Butali SPM Succession Cause No. 246 of 2018 and or until further orders of the court.
4. Costs of this application be provided for.

It is based on the affidavit of Maurice Jomo Shikhutuli, the appellant/applicant and on the following principal grounds that the respondents herein sued the appellant in Butali SPM MCL & E. No. 39 of 2019 seeking the appellant's eviction from land parcel No. L.R. No. N. Kabras/Matsakha/848, which forms part of the estate of the deceased Murunga Kisosi upon secretly obtaining a grant and certificate of confirmation of grant in respect of the said deceased vide Butali SPM Succession Cause No. 246 of 2018. The appellant/applicant maintains that he is an heir of the deceased Murunga Kisosi and he is beneficially entitled to the suit land parcel No. N. Kabras/Matsakha/848 whereon he lives and occupies and the appellant has applied for revocation of the grant and certificate of confirmation of grant secretly and irregularly obtained by the respondents in Butali SPM Succession Cause No. 246 of 2018 as he was improperly and unlawfully excluded and disinherited and the revocation proceedings are scheduled for hearing on 21<sup>st</sup> January, 2021. That the issue as to whether the appellant is beneficiary entitled to the suit land parcel No. N. Kabras/Matsakha/848 as an heir or dependant of the deceased Murunga Kisosi is an issue to be determined in the Succession Cause vide Butali SPM Succession Cause No. 246 of 2018 not in the land case filed vide Butali SPM & E no. 39 of 2019 and it is also evident that that is the single major issue directly and substantially in dispute between the appellant and the respondent in both matters. That vide an application dated 2<sup>nd</sup> November, 2020 the appellant sought stay of the proceedings in Butali SPM MCL & E No. 30 of 2019 pending the hearing and determination of the proceedings in Butali SPM Succession Cause No. 246 of 2018 to save the court's time and avoid a situation where the same dispute is heard more than once or by a court sitting as a land court which has no jurisdiction to finally adjudicate over inheritance matters but the appellant's application was disallowed. The land case Butali SPM MCL & E 39 of 2019 was then fixed for hearing with the risk that it will be heard and determined prior to the Succession dispute thereby rendering the appellant's revocation proceedings a nullity and otiose because should he be evicted vide the land case and it is subsequently held that he is an heir and beneficiary entitled to the suit land in the succession cause the latter verdict will be rendered a mere academic exercise and the prejudice, damage, loss and hardship he would have suffered will be irreparable. That it is in the interest of justice and fair play that the proceedings in Butali SPM MCL & E No. 39 of 2019 be stayed pending the outcome of the proceedings in Butali SPM Succession Cause No. 246 of 2018.

The respondent submitted that the application is an afterthought, misconceived, lacks merit, an abuse of the court process, improper, a delaying tactic, ill advised, its brought in bad faith and should be dismissed with costs. That the supporting affidavit is full of falsehood, mischief and is only meant to mislead the honourable court and/or perverting the course of justice. That parcel of land number North Kabras/Matsakha/848 belonged to his deceased father Murunga Kisosi and petitioned his estate vide Butali SPMCC Succession Cause No.

246 of 2018 and a grant of letters of administration was issued thereafter confirmed on 4<sup>th</sup> December, 2018 distributing the estate of the deceased to the rightful beneficiaries among other properties owned by the deceased. Annexed is a copy of the certificate of confirmation of grant marked A.S.M. 1. That prior to petitioning of the estate of his deceased father they had attempted on several occasions to have the appellant herein move out of their said parcel of land number North Kabras/Matsakha/848 since they had only invited him to utilize the said parcel of land as a caretaker and having abused the said right by taking possession of the said land and of violent character whenever they visited the land they instituted Butali SPM MCL No. 39 of 2019 to have him legally and procedurally evicted from that land. That the appellant filed a defence way back on 27<sup>th</sup> January, 2020 and upon directions being taken in court in the presence of both parties and their counsels there said case was fixed for hearing on 29<sup>th</sup> October, 2020 and witness summons issued to the registrar of persons, chief Shamberere location, chief Chekulo location and assistant chief Namushiya sub-location who all attended court on the date for hearing of the said case. That he was advised to file a formal application for stay and upon the court considering his application and facts of the case the same was disallowed to pave way for hearing of Butali SPM MCL No. 39 of 2019 vide the ruling made on 3<sup>rd</sup> December, 2020 and directions were again made by consent of the parties that the said case proceeds for hearing hence the hearing of 21<sup>st</sup> January, 2021 taken by consent. That prior to directions being taken to hear the main suit the applicant had been restrained by an order of the court from interfering with the suit parcel of land yet he went ahead and harvested the entire sugarcane notwithstanding the pendency of the said court order which the court allowed him to benefit. Annexed are copies of both rulings one dated 23<sup>rd</sup> April, 2020 and 18<sup>th</sup> June, 2020 respectively marked ASM 2(A) & (B). That the appellant herein is not related to him nor to the estate of his deceased father Murunga Kisosi and they have no duty at all to include him in the succession proceedings of his late father. That the applicant who hails from Shamberere has his own land that he succeeded from his deceased father Nathan Shikhutuli being parcel of land number Kakamega/Shamberere/18 vide Kakamega High Court Succession No. 170 of 1988.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution or proceedings are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

*“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”*

Order 42, rule 6 states:

*“No order for stay of execution shall be made under sub-rule (1) unless:-*

- a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

From the grounds of the application, the respondents herein sued the appellant in Butali SPM MCL & E. No. 39 of 2019 seeking the appellant's eviction from land parcel No. L.R. No. N. Kabras/Matsakha/848, which forms part of the estate of the deceased Murunga Kisosi upon secretly obtaining a grant and certificate of confirmation of grant in respect of the said deceased vide Butali SPM Succession Cause No. 246 of 2018. The appellant/applicant maintains that he is an heir of the deceased Murunga Kisosi and he is beneficially entitled to the suit land parcel No. N. Kabras/Matsakha/848 whereon he lives and occupies and the appellant has applied for revocation of the grant and certificate of confirmation of grant secretly and irregularly obtained by the respondents in Butali SPM Succession Cause No. 246 of 2018 as he was improperly and unlawfully excluded and disinherited and the revocation proceedings are scheduled for hearing on 21<sup>st</sup> January, 2021. That the proceedings in Butali SPM MCL & E No. 39 of 2019 be stayed pending the outcome of the proceedings in Butali SPM Succession Cause No. 246 of 2018. I find that these are final orders of this appeal. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the orders. I find this application has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20<sup>TH</sup> APRIL 2021.**

**N.A. MATHEKA**

**JUDGE**