



**REPUBLIC OF KENYA**

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

**ELC CASE NO. E004 OF 2020**

**MUSYOKA MAWEU (Suing as the Administrator and Legal**

**Representative of the estate of WILLIAM**

**MAWEU MUNYOLI -Deceased.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**JULIUS MATHEKA KITAMA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMUEL NDIVO KITULA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. What is before this court for ruling is the Notice of Motion application dated 28<sup>th</sup> October, 2020 and filed in court on 29<sup>th</sup> October, 2020 by the counsel for the plaintiff/applicant under certificate of urgency for orders: -

**1. Spent**

**2. Spent**

**3. Spent**

**4. THAT this Honourable Court do suspend the use of the Temporary Grant by the respondents until this matter is heard and determined.**

**5. THAT this Honourable Court do order that all parcels of land of KITULA MUNEVA (deceased) that have been sold and/or transferred by the respondents allegedly using the said Temporary Grant having done illegally, be cancelled and all the parcels of land do revert the estate of KITULA MUVEVA (deceased).**

**6. THAT the respondents, their agents or servants or any other be restrained by another person be restrained by and order of injunction from interfering, selling or charging of doing any action with the land parcel NZAUI/KITHUMBA/345 until this matter is heard and determined.**

**7. THAT the cost of this application be paid by the respondents.**

2. The application is predicated on the grounds on its face and is supported by the affidavit of Musyoka Maweu, the plaintiff/applicant herein, sworn at Nairobi on 28<sup>th</sup> October, 2020.

3. The application is expressed to be brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 17 Rules 2 (3)** of the **Civil Procedure Rules and Order 51 Rule 1** of the **Civil Procedure Rules 2010** and other enabling provisions of the law.

4. The application is opposed by the defendants/respondents vide the replying affidavit of Julius Matheka Kitama, the 1<sup>st</sup> defendant/respondent, sworn at Wote on 16<sup>th</sup> November, 2020 on his own behalf and that of the 2<sup>nd</sup> defendant/respondent.

5. The application was canvassed by way of written submissions and by the time of writing this ruling, it is only the plaintiffs/applicants who had filed theirs.

6. The plaintiff/applicant has deposed inter alia that the respondents are his neighbours and relatives of one Kitula Muveva (deceased) who had land cases between him and the applicant's late grandfather, William Maweu Munyoli, regarding land parcel number Nzai/Kithumba/245, that he obtained letters of administration ad litem for purposes of filing this suit and to reclaim their portion of land which was adjudicated as part of Kitula Muveva's, that the respondents are awaiting confirmation of grant as administrators of the estate of Kitula Muveva in Succession Cause No. 108 of 2019 and may proceed to sell land parcel number Nzai/Kithumba/345, that the family of the late William Maweu Munyoli has lived on the said parcel of land from 1971 and the respondents are aware of the same and that the three quarters of land belonging to William Maweu Munyoli (deceased) was surveyed, got registered and title issued as part of Kitula Muveva's (deceased) land to which he was aware but did so intentionally with view of unlawfully acquiring land which was not theirs.

7. On the other hand, the 1<sup>st</sup> defendant/respondent has deposed inter alia that he has been advised by his advocate on record and whose advise he verily believes as true that the instant application offends the mandatory provisions of the law for being brought during the pendency of the applicant's chamber summons application dated 21<sup>st</sup> November, 2019 in Makueni Succession Cause number 108 of 2019: **Julius Matheka Kitama and Samuel Ndivo Kitula v. William Maweu Munyoli** wherein the same prayers were sought, as between the same parties before the Senior Principal Magistrate Court but which has not been disclosed to the court, that even though the Chambers Summons Application dated 21<sup>st</sup> November, 2019 is expressed to be brought by one William Maweu Munyoli (deceased), the same is actually brought, on behalf of the said deceased by Musyoka Maweu, the applicant in the instant application, that the applicant has sought substantive prayers which are the same prayers sought under Prayers 4 and 5 of the instant application, that the disposal of the application dated 21<sup>st</sup> November, 2019 has progressed considerably with parties having filed their respective submissions and the same is only awaiting ruling, that it is clear from the foregoing that the instant application is nothing but an act of forum shopping for a favourable outcome which is evident from his failure to disclose the existence of the application dated 21<sup>st</sup> November, 2019, that land parcel number Nzai/Kithumba/345 belongs to the late Kitula Muveva (now deceased) having been registered in his favour on 11<sup>th</sup> October, 1976 and a title deed issued on 17<sup>th</sup> October, 2007 and that following the death of the said Kitula Muveva the 2<sup>nd</sup> applicant with the consent of the beneficiaries of the estate of petitioned for grant of letters of administration intestate on 1<sup>st</sup> July, 2019 and a grant was issued on 4<sup>th</sup> November, 2019 by the Senior Principal Magistrate, Makueni.

8. In his submissions, the counsel for the plaintiff/applicant framed three issues for determination namely: -

**i. Whether the Honourable Court should stay any proceedings in the Succession Cause No. 108 of 2019 before the Senior Principal Magistrate Court at Makueni until the application and the suit is heard and determined.**

**ii. Whether the Honourable Court should revoke title in respect to land parcel Number. Nzai/Kithumba/345.**

**iii. Whether the Honourable Court should issue an order to allow sub-division of the land parcel number Nzai/Kithumba/345 and ascertainment of each interested party share and issuance of title deeds.**

9. The counsel however submitted on the first two issues. On whether the court should stay proceedings in Succession Cause Number 108 of 2019 before Senior Principal Magistrate Court at Makueni until the application and the suit are heard and determined, the counsel submitted that the conclusion of the aforementioned Succession Cause will disadvantage the plaintiff/applicant since the defendants/ respondents will be at liberty to distribute the suit property. The counsel further submitted that the plaintiff/applicant was never involved in the succession process and that the defendants/respondents are awaiting confirmation of the letters of administration.

10. On whether the court should revoke the title in respect of land parcel number Nzai/Kithumba/345, the counsel submitted that the plaintiff's/applicant's family has lived on the suit land since 1971.

11. Having read the application, the replying affidavit together with the submissions by the applicant, I am of the view that the only issue for determination is whether or not the application should be allowed.

12. First and foremost, there is no basis whatsoever on why this court should stay Succession Cause number 109 of 2019. If the plaintiff/applicant is aggrieved by the decision that was made by the Learned Senior Principal Magistrate, he ought to have moved to the High Court and not this court. This court does not have the requisite jurisdiction to suspend the use of temporary grant that is sought by the plaintiff/applicant.

13. The plaintiff has not denied the existence of chamber summons application dated 21<sup>st</sup> November, 2019 marked JMK-1 where he has sought the following orders:

**1. That the court do order that all the parcels of land of the deceased that have been sold and/or transferred by the petitioners allegedly using the grant the same having been done illegally, be cancelled and all the said parcels of land do revert to the estate of the deceased.**

**2. That the costs of this application be paid by the petitioners/respondent.**

Application marked as JMK-1 in the defendants/respondents replying affidavit.

14. Arising from the above, one is inclined to agree with the defendants/respondents that the plaintiff/applicant is forum shopping since he is silent on what became of the Chamber Summons application dated 21<sup>st</sup> November, 2019 (JMK-1) in Succession Cause number 108 of 2019 where similar orders as the instant suit were sought. I also note that the prayer for cancellation of parcels of land allegedly sold by the defendants/respondents cannot be granted at interlocutory stage.

15. The upshot of the foregoing is that I am inclined to agree with the defendants/respondents that the application by the plaintiff/applicant is fatally defective, misconceived, bad in law and an abuse of the court process. In the circumstances, therefore, I hereby proceed to dismiss it with costs to the defendants/respondents.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT NAROK ON THIS 28TH DAY OF OCTOBER, 2021.**

**MBOGO C.G**

**JUDGE**

**28/10/2021**

In the presence of: -

Mr. Timothy Chuma – Court Assistant