



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 650 OF 2012

IN THE MATTER OF THE ESTATE OF NEHEMIAH MUHATI LUSALA (DECEASED)

B E T W E N

ESTER ANGAYA NEHEMIAH.....1ST PETITIONER/RESPONDENT

SILAS AMWAYI MUHATI.....2ND PETITIONER/RESPONDENT

NASHON ODERA MUHATI alias SIMON3RD PETITIONER/RESPONDENT

AND

PETER AYOYI MACHIKA.....1ST PROTESTER/APPLICANT

WILSON MBOYA MUHATI2ND PROTESTER/APPLICANT

1. The Court now has before it an Application brought by Notice of Motion dated 12th March 2020. The Application was brought shortly after a judgment delivered by Hon Justice Njagi in relation to the Estate of Nehemiah Muhati Lusala. The Application was brought under a certificate of urgency. The Certificate of Urgency was signed by the First Applicant/Respondent. He says that the reason for the urgency is “that the petitioner/respondents had known the outcome of the judgement case before it was delivered in open court and had planned to endanger the lives and properties of the protestors/applicants and are clicking waiting for the appeal period to expire and if the orders sorted are not granted and the period expires the protestors/applicants lives and properties shall be endangered, damaged and or even killed and the case shall become nugatory. The petitioners/respondents shall suffer no harm or damage.”

2. The Application is brought by a Notice of Motion and seeks the following orders:

1. *THAT costs be in cause for the protestors/applicants in the fast instance.*

2. *THAT this application be heard ex parte and urgently.*

3. *THAT the ruling, judgment delivered in this issue on 29/11/2019, 21/02/2020 and the certificate of confirmation dated 9/03/2020 respectively be set aside (stayed) until hearing and determination of this application*

4. *THAT the process server Mrs Vivian Shibanda who served the hearing notice and notice of change of an advocate dated 05/03/2019 and 19/03/2019 be summoned on oath to appear before this Honourable court to be scrutinized and be cross examined by the protestors about her service under her affidavit of service dated 29/05/2019.*

5. *THAT the honourable court be pleased and order the DCI attached to Kakamega Central Police Station or document examination expert to intervene and investigate the origin of the signatures behind the notice of change of an advocate and hearing notice dated 5/03/2019 and 19/03/2019.*

6. *THAT the petitioners/respondents be recalled and testify before this honourable court and be cross examined by the protestors/applicants.*

7. *THAT the protestors/applicants be allowed to file their submissions in this issue for proper process of law to assist the honourable court to deliver a proper and just ruling and judgment.*

8. *THAT the county land registrar and district surveyor attached to kakamega County be restrained from making any transactions in that portion of land known as Butso/452 until hearing and determination of this case.*

9. THAT the O.C.S. attached to Kakamega Central Police Station to enforce law for peace to be maintained on the ground.

10. THAT the costs be in place.”.

3. The Grounds that appear on the fact of the Application are:

1. THAT the petitioners/respondents fixed a hearing date without the protesters/applicants knowledge and or agreement, continued testifying in this court in the absence and without knowledge of the protesters/applicants.

2. THAT the ruling and judgment made on 29/11/2019 and 21/02/2020 was used from the petitioners hearing without cross examination from the protesters/applicants and without protestors submissions for the protestors were not well served and informed.

3. THAT the process server of the hearing notice and notice of change of an advocate dated 19/03/2019 and 5/03/2019 lied before this court.

4. THAT the protesters/applicants were not summoned to attend the court and cross examine the petitioners/respondents something they knew if they follow process the ruling and judgement shall be at the protesters/applicants favour,

5. THAT the documents that are a notice of change of an advocate of service and a notice of a hearing date dated 5/03/2019 and 19/03/2019 the signatures of the recipient at the back were pasted and doctored and does not belong to the 1st protester/applicant.

6. THAT petitioners/respondents are threatening the protester/applicant and creating disturbance on the grounds and even maliciously damaging the properties and or crops of the protesters.

7. THAT unless the ruling and judgement be set aside, even if the protestors/applicants win a case, the case will become nugatory and make the protesters/applicants to suffer irreparable damages.

8. THAT there is a breach of peace on the grounds.

9. THAT the petitioners/respondents shall suffer no harm/damages in case the sorted orders are granted.

4. The Application is also supported by the joint affidavit of Peter Ayoyi Machika and Wilson Mboya Muhati. In the Affidavit, the Applicant (formerly the 1st Protestor) sets out his Complaints in relation to the Hearing of the substantive matter. In the Affidavit the Applicants explain that they are both protesters/applicants in the case. And “THAT the 1st protester/applicant was a liability/interested party in the case No. 17 of 2005 at Mumias that created High Court Succession Case No. 223 of 2008 at Kakamega and later landed to the cause No. 650 of 2012 at kakamega High Court while the 2nd protester/applicant was a petitioner and later on became a 2nd protester/applicant. It is said that “the process of this succession causes were moving well and even the histories of those three files can speak themselves. The Succession case started out as Mumias Succession Case 17 of 2005 which became Kakamega Succession Case No 223 of 2008 and then **Kakamega High Court Succession Case No 650 of 2012**. It seems that the Petitioner’s Advocate passed on the case was taken over by Messrs V.A. Shibanda & Co Advocates. The First Applicant was served with a Notice of Change but the Second was not served and does not know the Advocate. At paragraph 6 it is deponed that, “THAT the 1st protester/applicant on 29/05/2019 at about 2 pm while he was in the office of Kenya National Union of Private Security situated at Kakamega town Kidula house 1st floor, he was visited by a former clerk of Kweyu & Co. Advocates Mr. Fredrick Kweyu who served him with a notice of change of an advocate dated 5/03/2019 and a hearing notice in this matter dated 19/03/2019 and was received one with no question but a hearing notice was received under protest for the hearing date that was fixed on 20/06/2019 was not convenient for the 1st protester and was not in the company of the 2nd protester and the copies are hereby attached and marked as 1st protester/applicants annexure A & B. The Affidavit asserts that the Second Applicant/protestor was never served as deponed in the Affidavit of service. However, it is also deponed that the First Applicant informed the Second Applicant of the hearing on 6th February 2020 and he rushed to the Hearing. The First Protestor states that he had not intended to attend the Hearing because it was not convenient but “THAT on 4th February, 2020 the 1st protester/applicant received a call from his friend Mr. Juma Bakari Keya informing him that, he met the 2nd petitioner/respondent discussing with friends at Shimanyiro market in a video show room planning that since the protesters/applicants are not aware of the proceedings, we proceed to obtain confirmation of certificate and eviction order to ambush him and chase him away after 6/2/2020 confirmation of certificate.”. Thereafter both Applicants/Protestors attended Court on 6th February 2020. They say “THAT upon appearing in court on 6/2/2020 they heard the Honourable judge mentioning and adjourning the case with a reason that the judgement was not ready until 21/2/2020 and they were shocked....upon the 1st protester/applicant attending court on 21/2/2020, he was shocked to hear the honourable judge delivering a judgment of the succession case that stood on 24th October, 2018 after the protesters/applicants had testified and cross examined by the counsel of the petitioners and adjournedTHAT after perusing the court file, the protesters/applicants have learned that, the petitioners/respondents, had fixed a hearing date and testified in court in the absence of the protesters/applicants....THAT the protesters/applicants were not invited in court when their hearing date was fixed and were not aware and not cross examined the petitioners/respondents ...THAT the Honourable Court gave a ruling on 29/11/2019 and the petitioners/respondents counsel did not notify the protesters/applicants, and they proceeded to file their submissions without notifying the protesters/applicants and later fixed judgment date on 6/2/2020 when judgment was delivered...THAT the protesters/applicant’s legal rights have been violated by being denied to cross examine the petitioners/respondents and file their submissions n these matter...THAT the protesters/applicants prays that this honourable court to set aside(stayed) the proceedings taken place after 24/10/2018 including the hearing of the petitioners ruling pronounced on 29/11/2019 and judgement delivered on 21/2/2020 and even a certificate of confirmation dated 9/03/2020 until hearing and determination of the application herein.

5. THAT the protester/applicants are also requesting the Honourable court to recall the petitioners/respondents to testify and be cross examined by protesters/applicants.

6. THAT the protesters/applicants are requesting this Honourable court to summon the process server Mrs Viviane Shibanda to be on oath cross examined by the protesters/applicants about her affidavit of service dated 29/05/2019 and marked PAM & wmm – 2A & B.
7. That the 1st protester/applicant denies the doctored/pasted signatures appearing on the hearing notice and notice of change of an advocate dated 19/03/2019 and 5/03/2019.
8. THAT this Honourable court do make an order to the Director of Criminal Investigation and or the document examination expert to intervene and investigate the activities and acts on the signatures at the back of the hearing notice dated 19/03/2019 of culprit and bring him/her on the charge.
9. THAT the protesters/applicants request the hon. court to be pleased and make an order against kakamega County land registrar along with land surveyor restraining them from making any business against that land known as Butso/452 until hearing and determination of this case.
10. THAT the OCS attached to kakamega central Police Station to enforce law to be maintained on the ground for the life and properties of the applicants/protesters are in danger...".

1. The Second Respondent (formerly Second Petitioner) filed a replying affidavit. In it he states that “
2. *the 1st petitioner is my mother and the 3rd petitioner is my brother that I have authority from the 1st and 3rd petitioners to swear this affidavit on their behalf and my behalf too.*
3. *That we have read and understood the tenor and purport of the contents of the Notice of Motion application (“the said application”) filed herein by the protesters on the 13/5/2020 and the affidavit sworn in support thereof, by Peter Ayoyi Machika on the 12/3/2020(herein after referred to as the said affidavit”) and in response thereto state as follows:-*
4. *That the said application, the said affidavit and all the supporting documents have been read out to us and the implication thereto explained to us by our lawyers which explanation and advise I verily believe to be sound and for which I have the following to state.*
5. *That the protesters were properly served with a notice of change of advocate dated 5/3/2019 and hearing notice dated 19/3/2019 on or about the 5/9/2018 which they received and signed on the return copy as indicated on the annexure PAM 1A & PAM 1B on the supporting affidavit.*
6. *That the protesters have admitted being served with the said documents on paragraph 6 of the supporting affidavit.*
7. *That I am further advised by my advocate, V.A Shibanda, which advise I verily believe to be truthful, that Miss Shibanda advocates, served the protesters with the said documents in the company of the said Fred the former clerk at Kweyu & Company Advocates.*
8. *That the protesters only want to delay the execution of the judgment herein by coming up with all sorts of flimsy excuses to mislead this honourable court.*
9. *That the widow to the deceased herein one Esther Angaya who is the 1st petitioner herein clearly stated in her evidence that the 2nd protester who allegedly sold the suit parcel to the 1st respondent was not a son to the deceased and that she got married when she had already given birth to the 2nd protester and therefore the 2nd protester had no share in the estate of the deceased.*
10. *The 1st petitioner also stated that the 2nd protester has his father who is still alive and who has even given him land.*
11. *That the 2nd protester allegedly sold land belonging to the deceased herein and registered in the names of the deceased herein and which forms the subject of the instant suit, to the first protester after the deceased had passed away and the same was an illegal transaction.*
12. *That the said sale of land is null and void and is illegal as the same amounts to interfering with the estate of the deceased person’s property and cannot be upheld by this honourable court.*
13. *That even if the protesters were allowed to cross examine the petitioners the way in which the protesters acquired the deceased persons land will still remain unattainable under the law.*
14. *That even after service of the said hearing notice which the protesters received they did not bother to attend court or even write a letter to court informing parties that they would not be able to attend court.*
15. *That the protesters are seeking that Miss Shibanda advocate be cross examined on her affidavit of service yet they are accepting that they were served, the said prayer is therefore baseless and a waste of courts precious time.*
16. *That in response to paragraph 22 of the affidavit the said orders sought are unattainable as the protesters have no legal ownership of the subject property and therefore cannot use this court to get protection from the police alleged dangers that have*

not been proved or substantiated.

17. That in response to paragraph 7,8,9 of the said affidavit, the deponent conduct and assertions which are not supported by any documentary or cogent evidence and can only be interpreted to mean lack of urgency of the application, inexpert, dishonesty and incompetency.

18. That the applicants protesters have admitted in paragraphs 8,9, 10 & 11 the protesters have admitted that they were aware of when this matter was coming up in court but still they never made any efforts to move the court or until after they were faced with execution.

19. That we are advised by our advocate on record which advise I verily believe to be true that execution is a lawful and legal process and the same should therefore be allowed to proceed.

20. That in answer to applicant's application, I state that the grant orders sought in the said application would greatly prejudice us for the following reasons.

(a) That we proved our case beyond reasonable doubt and judgement was entered and therefore it would only be prudent that this honourable court upholds the judgement herein.

(b) That there is a clear attempt to deny the petitioners from enjoying the fruits of the judgements/decrees sought to be impugned, the same having been delivered on 6/2/2020, and on appeal or review has not been sought against the same.

(c) That the applicant has not stated which prejudice will be suffered by the protesters if the judgement/decrees herein is executed.

(d) That the applicants were given an opportunity to defend themselves and which they did not and the honourable court made its ruling.

21. That the said application is bad in law and a non starter as the applicant has not given any cogent reasons why they did not attend court in this matter on the hearing date.

22. That I am advised by my advocates on record which advise I verily believe to be true that costs cannot be stayed and as such the applicant cannot seek to stay costs of the suit herein.

23. That the said application is an afterthought and is purely calculated to delay the execution of the decree herein.

24. That the said application falls short of the required in law as both the provisions of the law and the facts do not support the absolute grant of the orders sought.

25. That the said affidavit in support of the application contains allegations which are argumentative in nature and contrary to the clear provisions of the law.

26. That in the circumstances of this case, I verily believe that the discretion of the Honourable Court ought not to be exercised to grant the orders sought in the said application as the applicant has not adduced any cogent evidence to demonstrate to this honourable court that he be granted the orders sought and that there be a stay of execution.

27. That for the foregoing reasons, I verily believe that the said application is bad in law, incompetent, premature, devoid of merit, an abuse of the process of the court, misconceived and merely actuated by grave prejudice and malice with utmost intent to stifle my claim and judgment herein.

28. That what I have depend to hereinabove is true to the best of my knowledge, save as to matters deponed to on information sources whereof have been disclosed and matters deponed to on belief the grounds whereupon have been given.

10. The Parties filed their Written Submissions as directed. The Applicants also filed a further Affidavit. The Arguments are focused on the issue of service of the Notice of Change and the Hearing Notice for one hearing date. In the course of their arguments and further evidence the Applicants have changed their facts and prayers.

11. The Respondents filed their submissions on 8th December 2020. The Respondents say that they strongly oppose the Application and rely on the Affidavit of the Second Respondent dated 12th August 2020. It is said that the Trial Court allowed 30 days for an appeal and 31 days for the First Applicant to vacate the Estate property. It is brought to the Court's attention that although the Applicants state that they were not aware of the date of the Hearing, they attended for judgment and also signed the Notice. The Respondent's Submissions seek to re-visit the trial process, however, this Court simply needs to be satisfied that (1) it has jurisdiction to make the orders sought and (2) there are sufficient grounds to do so. Should the High Court set aside its own order and/or stay execution indefinitely?, is the question to be answered.

12. The respondent's submissions set out that *"The applicants main reasons in a nutshell for seeking the orders sought are that they were never served with any hearing notice. It is our submission that the applicants were properly served with the hearing notice as stated above. The 1st applicant received the hearing notice by signing on the service copy, he has not denied that the signature thereon is not his and instead made a wild claim that the said signature was affixed . Also that the Honourable judge in his judgement referred to the statements*

and or affidavits of the applicant and therefore whatever evidence the applicants want to bring to this honourable already took into consideration and made a finding on the same and therefore the judgment herein should be upheld. They go on to say, "The applicants were duly served with the necessary hearing notice to attend court on the day this matter came up in court for hearing; however they failed to attend court further that there was no representative of the defendant in court on that date. An affidavit of service was filed to that effect and the court record bears the plaintiff witness, this clearly shows lack of interest on the part of the applicants in defending the instant suit". Also that their submission is that "the applicants have not been diligent, rather they have slept on their rights and now merely seek to prolong the pendency of this matter in the courts for ulterior motives. And that "the applicant has not demonstrated the urgency nor cogent reasons for seeking the orders sought this shows that the applicant is merely seeking to delay the conclusion of this matter and or to be evicted from the land he is occupying illegally.

13. It is clear from the history of this matter that this is a long running succession dispute. It relates to the estate of Nehemiah Muhati Luhya. A part of the Estate was acquired by the First Protestor before there was a confirmed grant in place. The First Protestor's case was that he purchased it from the Second Protestor. The Court heard the oral evidence of the Petitioners and the Protestors. The First Applicant/Protestor gave evidence that he has been in possession of the land all along. The Second Applicant/Protestor gave evidence that the Deceased was his biological father. That evidence was contradicted by the First Petitioner, his own Mother. She gave evidence that the Second Protestor was neither the biological child of the Deceased nor a dependant as he had gone to live with his biological father during the life time of the Deceased.

14. The suit was heard by several judges. Evidence was taken viva voce. Documentary evidence was produced, including an agreement of sale that recognized that the registered owner. Submissions were directed and filed – by the Petitioners. The Applicant's around 2017 decided they would both act in person. Finally, it was heard by Justice Njagi. A date for judgment was to be given on 26th September 2019. The Matter proceeded on 23rd October 2018, 12th June 2019 and 20th June 2019. The Applicant's attended for the first date but not the second two. It is clear from the application that they were aware of the dates of hearing. They were also aware that judgment would be delivered on 21st February 2020. Therefore the fact of the Judgment cannot be a shock, or even a surprise. The First Applicant also made admissions being aware of the hearing dates, notwithstanding that the context given is highly implausible.

15. The Applicants are asking the Court to set aside the Ruling of 29th November 2019, the Judgment of 21st February 2020 and the proceedings of 24th October 2018. It is also prayed that in the proceedings in meantime they are stayed. On 18th March 2020 the Certificate came before Hon Justice Njagi. He certified urgency and then stayed the judgment as well as the Certificate of Confirmation of Grant. The Applicants were given leave to file Supplemental evidence. However, what was filed was not supplemental but just repetitious.

16. The Judgment of the Court was arrived at after many days of hearing, each party called its witnesses and each was given the opportunity to cross-examine. The Applicants chose not to attend and the Court made a decision to proceed. All the Applicants ask for is an order setting aside the judgment and a stay of proceedings. The Petition was filed in 2012. The evidence complained about was given in 2018. In the circumstances the Applicant's have not demonstrated that they made their application at the earliest opportunity. They waited two years and when there was an unfavourable decision, they decided the proceedings had been unfair. The Matter was first heard by the Trial Court who ordered a stay pending the hearing of the Application

17. If the Applicants case is that they did not have a fair trial their remedy would have been to appeal to the Court of Appeal. The application before this Court is an abuse of process. In the circumstances, the Application is dismissed with costs. Any stay still operating on the Certificate of Confirmation of 9th March 2020 is lifted.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered electronically signed and dated at Kakamega this the 8th day of February 2021

In the presence of:

Court Assistant: Fred Owegi

Petitioner: Ms Shibanda

Protestor Peter Ayoyi in person