



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**MISC. APPLICATION NO. 35 OF 2018**

**MOHAMED SALMIN KHAMIS.....APPLICANT**

**RAMLA SALMIN KHAMIS.....APPLICANT**

**VERSUS**

**YAHYA MOHAMED SULEIMAN.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6.12.18 and filed under Certificate of Urgency, Mohamed Salmin Khamis and **Ramla Salmin Khamis** the Applicants seek the following orders:

**1. Spent**

**2. That the ruling of Hon Evans Makori Chief Magistrate delivered on 10<sup>th</sup> October, 2018 revoking the grant issued in Mombasa Chief Magistrate's Court succession 138 of 2016 and the sub sequent execution of the order emanating from the said ruling thereto be stayed pending the determination of ownership of parcel 151 Section IV Mainland North by a Court of Competent Jurisdiction.**

**3. That the Grant issued in Chief Magistrate Succession Cause no 138 be reinstated forthwith to the Administrators and be validated by this Court to allow the administrators participate in all the court proceedings concerning parcel MN/IV/151 which is the estate of Salim Mbiyo Salmin.**

**4. That due to the value of the estate of Salmin Mbiyo Salmin which exceeds Ksh. 50, 000,000/=, the file be transferred to the Mombasa High Court Family division for hearing and disposal.**

**5. That the order made on 24/11/2014 by the Mombasa Hon Kadhi in succession cause 143 of 2014 directing the Registrar of Titles Mombasa to unconditionally issue the Respondent/Objector Yahya Mohamed Suleiman with a title of parcel MIM/IV/151 without gazettment and the sub sequent execution of the said order be stayed and the title of parcel MN/IV/151 be reverted back to its original owner pending the determination of ownership of the said parcel 151 Section IV Mainland North by a Court of Competent Jurisdiction.**

**6. That for the interest of justice and good order, Mombasa Kadhi succession cause no 143 of 2014 and Mombasa Chief Magistrate Court succession cause number 138 of 2016 be transferred to this court, for consolidation and determination by this Court.**

**7. That temporary injunction order be issued restraining the Registrar of Lands Mombasa Land Registry, the Objector Yahya Mohamed Suleiman, his family, agents, servants, employees and any person claiming interest derived from them, from disposing, subdividing, selling, charging, occupying, and interfering with parcel 151 Section IV Mainland North which is the estate of Salmin Mbiyo Salmin deceased pending the inter parties hearing of this application.**

**8. That injunction order be issued restraining the Registrar of Lands Mombasa Land Registry, the Objector Yahya Mohamed Suleiman, his family, agents, servants, employees and any person claiming interest derived from them, from disposing, subdividing, selling, charging, occupying, and interfering with parcel 151 Section IV Mainland North which is the estate of Salmin Mbiyo Salmin deceased pending the inter parties hearing of this application.**

**9. Any other order or direction the Honourable Court will be pleased to grant as it may deem fit in the ends of justice.**

2. The Application is founded on the grounds therein and in the Supporting Affidavit of the 1st Applicant sworn on 6.12.18. He avers that Salmin Mbiyo Salmin, the Deceased the subject of the proceedings herein died on 24.6.01 at Majengo Kanamai. The Applicants are the children of the Deceased and administrators of his estate by virtue of a grant of letters of administration (the Grant) issued to them on 7.4.17 in Mombasa Chief Magistrate Court Succession Cause No. 138 of 2016. The Grant was however revoked by the Chief Magistrate on 18.10.18 upon the application of Yahya Mohamed Suleiman, the Respondent.

3. According to the Applicants, the Deceased bought Parcel No. MN/IV/151 measuring approximately 100 acres (the Property) from Mohamed Bin Omar. The transfer was registered at the Mombasa Lands Registry and title in the name of the Deceased was issued on 3.9.63. The Property was carved out of Parcel No. MN/IV/86 measuring approximately 624 acres and the same was registered in the name of Abdulla Bin Omar administrator and trustee of the Estate of Malim Bin Hero. A dispute arose on ownership of the portions carved from the original Parcel No. MN/IV/86 and the Deceased filed land case 247 of 1964. Judgment was delivered in favour of the Deceased and a decree issued. The file however went missing and was only found in 2011. An application to execute judgment and decree was filed and granted by the Court on 30/8/2011. The file however disappeared when the order was taken for signature and has not been found to date.

4. The Applicants further aver that the Respondent planned to grab the Property and purported that Omar Mohamed had bought this parcels and backdated entries no. 2 to 31/5/1982 without any supporting documents whatever. The Applicants aver that the Property is still in the name of the Deceased and an official postal Search of 1995 confirmed this. The original title remains in the safe custody of the Applicants. The Deceased was never called to return his title to the Land Registry. That the original file of parcel MN/IV/151 disappeared in the lands office and the Respondent managed to back date the transfer on a photocopied title. The Land Registrar noted that the said transfer dated 31.5.82 was a suspect and stated so in an exhibited letter.

5. The Applicants further claim that the Respondent filed Kadhi Court Succession Cause No. 143 of 2014 in respect of estate of Omar Mohamed. The Court was compromised and issued orders vesting parcel the Property and directed the Land Register to unconditionally issue a provisional certificate of title. The Applicants further avered that when the National Land Commission directed the parties to present their respective documents, the Applicants did so but the Respondents had nothing to present. On 6.7.17, National Land Commission by a letter confirmed that the Property belongs to the deceased. On 22.6.18, the Kadhis Court issued orders cancelling the title issued to the Respondent

6. The Applicants contend that there are several cases including Mombasa Cause No. 247 of 1964, Mombasa Kadhi Court No. 143 of 2014 and Malindi ELC No. 135 of 2018 all touching on the Property which are pending in the Courts. The revocation of the Grant is therefore prejudicial to the Applicants. That it is in the interest of justice that this Court exercise its supervisory jurisdiction to intervene and call for both Kadhis Cause No. 143 of 2014 and CMC Cause No. sue 138 of 2016 and give directions and or orders as the Court may deem fit.

7. The Respondent Yahya Mohamed Suleiman opposes the Application by his Grounds of Opposition dated 11.12.18. To him, the Application is an abuse of the Court process. The Applicants are not the personal representatives of the estate of the Deceased within the meaning of Section 82(b) of the Law of Succession Act. As such, they lack *locus standi* to move this Court on behalf of the estate of the Deceased. The Grant having been revoked, the Applicants are strangers and have no capacity to bring the Application and the same must be struck out. The Constitution cannot come to the aid of the Applicants who have failed to comply with specific and mandatory provisions of the law. The Respondent further stated that he would request to argue a preliminary objection as to the competence of the proceedings.

8. At the hearing, the Applicants who were unrepresented submitted that they seek reinstatement of the revoked Grant. The Applicants were involved in cases relating to the Property belonging to their father of which they have original title. They prayed that the Grant be reinstated to enable them proceed with Mombasa Kadhi Court Case No. 143 of 2014, Malindi ELC No. 135 of 2018 and Case No. 247 of 1964, Supreme Court, Mombasa. If the Grant is not reinstated their rights will be contravened.

9. For the Respondents, Counsel submitted that this is a succession Court and cannot grant injunctive orders concerning land which can only be given by the Environment and Land Court. The Kadhi's Court case relates to the estate of Omar Mohamed, a brother to the Respondent, and not the estate of the Deceased. Judgment was delivered and decree issued. It was further submitted that the Grant was issued in CM Succession Cause No. 138 of 2017, in respect of the Property. The Property is in the name of the Respondent and has been subdivided and is full of squatters. The Grant was revoked because the Property is not in the name of the Deceased and there was no property for distribution. The Grant having been revoked, the Applicants have no authority to come to Court. They ought to have followed the procedure set out in the Law of Succession Act. The Respondent prayed that the Application be dismissed.

10. I have considered the Application, the grounds in support thereof, the grounds of opposition and the able submissions by parties and the law. The Applicants submitted only on the prayer for reinstatement of the Grant and appear to have abandoned all other prayers. The Applicants seek reinstatement of the Grant that was revoked by the Chief Magistrate on 18.10.18. They argue that the Grant will enable them prosecute the several cases pending in various Courts relating to the ownership of the Property which they claim to belong to their father, the Deceased. The Respondent contends that the Grant having been revoked, the Applicants lack *locus standi* in bringing the Application. The Court notes that the Applicants are affected parties/applicants in Mombasa Kadhi Court Cause No. 143 of 2014 and are the Plaintiffs in Malindi ELC Cause No. 135 of 2018. There is also Mombasa Supreme Court Land Civil Case No. 247 of 1964. All these relate to the ownership dispute of the Property which the Applicants maintain belongs to their father, the Deceased.

11. The Constitution of Kenya, 2010 guarantees to every person the right to a fair hearing as follows:

***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

12. In order for a party to have a dispute entertained by a Court or other tribunal or body, such party must have *locus standi*. Black's Law Dictionary Tenth Edition defines *locus standi* as:

***The right to bring an action or to be heard in a given forum.***

13. The Applicants have a right to have the dispute relating to the Deceased's ownership of the Property decided in a fair and public hearing before a Court or another independent and impartial tribunal or body. The Grant had given them the necessary right to bring the actions in the various Courts and in the National Land Commission. Without the Grant the Applicants are incapacitated and cannot pursue the aforesaid actions.

14. The right to a fair trial is jealously protected by the Constitution and is one of the rights that may not under any circumstances be limited. Article 25 of the Constitution provides:

***Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***

***(a) ...***

***(b) ...***

***(c) the right to a fair trial;***

15. With the revocation of the Grant, the Applicants have been stripped of that right to a fair trial and will not be able to proceed with the said cases. This amounts to an infringement of their right to a fair trial as enshrined in Article 50 of the Constitution which by dint of Article 25 may not be limited.

16. The Respondent argues that without a grant, the Applicants have no *locus standi* to bring this Application as they are prohibited from doing so by the Law of Succession Act. The Respondent cited the cases of Lucy Wamuyu Marubu v Mercy Njoki Irungu [2017] eKLR and Charles Ratemo Nyambati (Suing as the legal representative of the estate of Samson Nyambati Nyamwenya) v Jackton Ocharo & 7 others [2017] eKLR to buttress his submissions. In these 2 authorities however, the Courts found that the Plaintiffs had no *locus standi* to institute the matters before the Environment and Land Court. With respect, these 2 authorities are irrelevant in that the Applicants are not seeking to pursue the cases in the other Courts without a grant. On the contrary, they seek reinstatement of the Grant which will restore their *locus standi* in the matters pending in the other Courts. Had the Applicants tried to proceed with the matters in the ELC and the Kadhi's Court post revocation of the Grant then the Respondent would be justified in claiming they had no *locus standi*. Further, there is nothing in the Law of Succession Act or any other law that prevents a party from seeking a grant to enable him have the requisite capacity to exercise his constitutional right to prosecute or defend a case.

17. The Court notes that the Grant was revoked on the ground that the Property was not in the name of the Deceased. Given that the lower Court was aware that there existed an ownership dispute in respect of the Property, the justice of the case required not the revocation of the grant but a stay of the certificate of confirmation of the Grant. It would appear the lower Court did not fully appreciate the ramifications of revoking the Grant.

18. The upshot of the foregoing is that the Application herein has merit. Accordingly, I make the following orders:

**i) The Grant of Letters of Administration in respect of the estate of Salmin Mbiyo Salmin issued to Mohamed Salmin Khamis and Ramla Salmin Khamis on 7.4.17 and revoked on 18.10.18 be and is hereby reinstated.**

ii) The Certificate of Confirmation of Grant issued on 24.4.18 is hereby stayed pending the hearing and the determination of Malindi Environment Land Court Cause No. 135 of 2018.

iii) The Applicants shall have costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 1<sup>st</sup> day of February 2019**

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**M. THANDE**

**JUDGE**

In the presence of: -

.....**for the Applicants**

.....**for the Respondent**

.....**Court Assistant**