



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**P&A NO. 29 OF 2018**

**IN THE MATTER OF THE ESTATE OF MUTETEMA ITUMO (DECEASED)**

**JOSEPH MAKUSA MUTHOKA.....APPLICANT**

**-VERSUS-**

**LABAN NDUVA MASAI .....1<sup>ST</sup> RESPONDENT**

**KINGOO MUTETEMA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination is dated 20/02/2019 and was filed under certificate of urgency. It is brought under Section 76 of the Law of Succession Act and rule 44 (1) of the Probate & Administration Rules, seeking the following orders:

**a. THAT** this Honorable Court be pleased to grant a stay of the lower court proceedings and the execution of costs in Kilungu SRMC SUCC No. 27 of 2016 and the Respondents be restrained whether by themselves, agents or servants from attaching, selling or removing for sale any proclaimed assets of the Appellant pending the hearing and determination of the appeal lodged herein.

**b. THAT** costs be provided for.

2. The application is supported by the grounds on its face and the supporting affidavit of the Applicant sworn on 20/02/2019. He avers that the lower court in Kilungu SRMC Succ Cause No. 27 of 2016 delivered a judgment on bill of costs and ordered him to pay Kshs 1,518, 425/= to the Respondents. That the Respondents are in the process of execution and he has filed an appeal which has merit and a hearing date before this honorable court. That upon confirmation of the letters of administration, the Respondents transferred the property to their names and have advertised it for subdivision and change of user. He is apprehensive that if the orders are not granted, he will suffer irreparable harm and the appeal will be rendered nugatory.

3. The application is opposed through a replying affidavit sworn on 25/02/2019 by Laban Masai. He deposes that the orders sought have been overtaken by events as the suit premises have been transferred to the beneficiaries legally. That the Applicant lost in the lower court and was condemned to pay costs which have been taxed by the taxing master. That the Applicant was a party during the taxation and if any stay of execution is granted, he should deposit the amount taxed as required by law.

4. Further, he deposes that due process was followed in transferring the property and obtaining the certificate of costs. He also deposes that advertisement of the property for sub-division and change of user is a preserve of the County Government. According to the Respondent, the Applicant has not shown proof of ownership of any property and is therefore an imposter, a window shopper without legal basis to claim proprietary rights over an estate he does not belong to.

5. Mr. Kioko for the Applicant prayed for stay of the lower court proceedings and execution of costs and submitted that failure to grant the stay would cause suffering to the Applicant.

6. Mr. Oyugi for the Respondent opposed the application and submitted that there was neither an appeal nor record of appeal filed. That if an appeal had been filed, the orders sought would have been granted with conditions. He urged the court to dismiss the application with costs.

7. From the material placed before the Court by the parties, the estate herein has a long history which, in my view, should be highlighted as it has a bearing on the current application.

**Background**

8. There was a land parcel known as Machakos/Ulu/30 which was sub-divided into No.s 380 and 381. Land parcel No. 380 was the subject matter in Kilungu District Magistrate's Court Civil Suit No. 127 of 1977 in which Muthoka Itumo (*deceased*) had filed suit to evict Mutetema Itumo (*deceased herein*), Kamene Nzalai (*deceased in P&A 28/18*) and five others. Judgment was given in favor of the plaintiff but Mutetema Itumo left the suit land before eviction could be done. Accordingly, the eviction orders were issued against the remaining six defendants and the eviction took place in May 1978.

9. The evictees, Mutetema Itumo and Kamene Nzalai, sued Muthoka Itumo in Nairobi HCCC No. 1727 of 1990 (*the Nairobi case*) and from what I have gathered from the record, their claim was that they had been in adverse possession from 1964 or 1966 or thereabouts. On 04/12/1990, Justice P. Tank entered judgment in favour of the plaintiffs after receiving their evidence. In the said judgment, the Court noted that although the defendant had been served with summons to enter appearance, he had neither entered appearance nor filed defence.

10. Back to the history of the subdivisions, parcel No.380 was subdivided into 396,397,398 and 400. The number subdivided is the one which had been retained by Muthoka Itumo as the other resulting numbers were disposed of to third parties. Muthoka Itumo retained No. 396 which was later subdivided into 409 and 410. He retained 409 which he subdivided into 427 and 428. He retained 427 and subsequently subdivided it into 450, 451 and 452.

11. Parcel No. 427 was the subject matter in NRB.HCC.NO.1727/1990 and in the default judgment, the court ordered that the parcel be registered in the name of the plaintiffs. The judgment was executed on 02/08/1995 when the same was registered against the register and a Title Deed issued to the plaintiffs on 29/01/1996. Later on, the defendant (Muthoka Itumo) moved the Court and had the default judgment set aside vide a ruling delivered by Khamoni J (*as he then was*) on 17/12/1998. It appears that even after the judgment of 04/12/1990 and all consequential orders were set aside, the defendant did not take any step to have the register in respect of plot No. 450 rectified.

12. Meanwhile, the matter was transferred to the Environment and Land Court in Machakos and registered as ELC Case No. 69 of 2017. It remained in abeyance until 01/11/2006 when it was dismissed for want of prosecution at the instance of the defendant. Before having the suit revived, the defendant filed an application dated 23/08/2007 seeking orders that the Deputy Registrar of the Court be authorized to sign documents, re-transferring plot No.s 450 and 451 to him, on the ground that the irregular judgment which granted the parcels to the plaintiffs had been set aside.

13. In a ruling delivered on 26/01/2018, Justice Angote noted that the application dated 23<sup>rd</sup> August, 2007 should have been filed before the suit was dismissed. Further, he stated that, the irregular judgment having been set aside, it was upon the defendant to move the Court and have the entries made in the register rectified before the suit was dismissed. He dismissed the application for lack of '*legs*' to stand on and emphasized that the suit stood dismissed as per the orders of the Court of 01/11/2006.

14. The effect of the foregoing is that Mutetema Itumo and Kamene Nzalai remained the registered owners of parcel numbers Machakos/Ulu 450 and 451.

15. Coming now to the Kilungu Succession cases it has been shown that Kilungu SRM's court succession No. 27 of 2016 was in relation to the Estate of Mutetema Itumo and the petitioners were King'oo Mutetema and Laban Masai (*now Makueni HC P&A 29 of 2018*).

16. Kilungu SRM's Court Succession No. 28 of 2016 was in relation to the estate of Kamene Nzalai and the petitioners were Dorcus Mbele Munguti and laban Masai (*now Makueni HC P&A 28 of 2018*).

17. Consequently, the Respondents herein are administrators of the estates of Mutetema Itumo and Kamene Nzalai and the Applicant herein is the administrator of the estate of Muthoka Itumo.

18. In April 2018, the Applicant filed applications to revoke the confirmed grants in the above matters and in a ruling delivered on 11/10/2018, E.M. Muiru SRM observed that the ELC orders were still in force and as such, she had no basis for revoking the grants. The applications were consequently dismissed.

19. It is that ruling which the applicant is challenging in this 'appeal'.

20. From the foregoing, this Court has to consider whether the prayers sought are merited.

### **Determination**

21. An application for stay of execution may be made before the trial court or the court to which an appeal has been filed. In this case, this is not the trial court and so there ought to be an appeal filed for the application of stay to be grounded. No appeal has been filed yet the ruling complained of was delivered on 11<sup>th</sup> October, 2018. What appears to have been filed is an "appeal" for revocation of grant. The application is therefore not grounded.

22. Assuming there is an appeal in existence and in light of the history highlighted above, what is the probability of its success? The Applicant is aggrieved by failure of the Kilungu court to revoke the confirmed grant. His expectation from this court is that the lower court's decision would be reversed however, the decisions resulting in the registration of the land parcels in the names of the deceased persons were issued by courts of concurrent jurisdiction and this court cannot assume appellate jurisdiction over them. It is evident that there were errors and omissions from either the applicant's late father or his legal representative in the course of the years resulting in a trickledown effect in the progression of this matter.

23. In dismissing the application, the subject of this "Appeal" E.M Muiru SRM was simply complying with the orders of Justice Angote of ELC, Machakos, a court of equal status with this one. The real issues in this matter must be properly addressed and filed before the court

with jurisdiction to deal. What is before this court is not even an appeal in the first instance.

24. I opine that an appeal against the ruling of E.M. Muiro SRM will be an exercise in futility since decisions in respect to these parcels of land have been made by various judges of the High Court, and the same have not been overturned. The recent one being in Machakos ELC. NO. 69/2017.

**25. I find that the application has no merit and is dismissed. Owing to the history, each party will bear his own costs.**

26. These orders apply to Makueni HC. P&A No. 28 of 2018. **(The Estate of Kamene Nzalai)**. A copy of this ruling to be placed in that file.

Orders accordingly.

**DELIVERED SIGNED AND DATED THIS 12<sup>TH</sup> DAY OF JUNE 2019, IN OPEN COURT AT MAKUENI.**

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**H. I ONG'UDI**

**JUDGE**