

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 130 OF 2014

JOHN B. INDIMULI.....PLAINTIFF/RESPONDENT

VERSUS

JOHN EMONYI.....DEFENDANT/APPLICANT

RULING

The application is dated 26th June 2019 and is brought under Sections 1A, 1B, 3A & 6 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this honourable court be pleased to stay proceedings herein pending the outcome of Kakamega HC Succession Cause No. 417 OF 1990.
2. That costs of this application be provided for.

The application is based on the grounds that originally land parcel known as Kakamega/Chekalini/204 was owned and registered in the name of the defendant/applicant's late father Edward Epeni Oracho before it was secretly without the knowledge of the defendant/applicant subdivided into new title numbers Kakamega/Chekalini/3474, 3475, 3476, 3477, 3478, 3479, 3480 and 3481 respectively. That the defendant/applicant was not aware of the institution and or filing of the petition in Kakamega HC Succession Cause No. 417 of 1990 which was instituted secretly without his knowledge and or active participation therein thus a grant of letters of administration intestate was issued on 27th August, 2001 jointly to the petitioners Veronica Khatali Eben (now deceased) and Zaid Andaye Eben which was subsequently confirmed on 26th September, 2011. That the plaintiff/respondent was included in the said succession cause in Kakamega HC Succession Cause No. 417 of 1990 yet he is not a beneficiary and or dependent in the estate of the late Edward Epeni Oracho alias Edward Eben Oracho. That as a result of material non-disclosure, fraud and misrepresentation in Kakamega HC Succession Cause No. 417 of 1990 the plaintiff/respondent was illegally and fraudulently registered through transmission as the owner of land parcel known as Kakamega/Chekalini/3474 created from the sub division of the original land parcel known as Kakamega/Chekalini/204 forming estate of the defendant/applicant's late father Edward Epeni Oracho alias Edward Eben Oracho. That it is on the strength of the illegally acquired title number Kakamega/Chekalini/3474 registered through transmission that the plaintiff/respondent instituted the suit herein seeking inter alia to evict the defendant/respondent from his father's land which he is entitled to get a share as a birthright.

That the defendant/applicant was not aware of the existence of succession proceedings in Kakamega HC Succession Cause No. 417 of 1990 until he was served with the pleadings herein by the plaintiff/respondent and upon seeking and obtaining legal counsel from his lawyers on record it emerged that succession cause had been done secretly without his knowledge and the plaintiff/respondent had acquired illegal and fraudulent title number Kakamega/Chekalini/3474. That some of the deceased children who are legitimate beneficiaries were deliberately left out and strangers introduced to the estate of the deceased including one plaintiff/respondent herein John B. Indimuli who is not a son to the deceased. That one John B. Indimuli now purporting to use the title he obtained through transmission irregular manner seeking to evict the defendant/applicant from a portion of land parcel known as Kakamega/Chekalini/204. That the defendant/applicant has now moved the court in Kakamega HC Succession Cause No. 417 of 1990 seeking inter alia to revoke and or annul the grant and certificate of confirmed grant and consequential orders made pursuant thereto be set aside. That in view of the pendency of the succession proceedings in Kakamega HC Succession Cause No. 417 of 1990 it is in the interest of justice that the proceedings in the suit herein be stayed pending the outcome of the said cause. That Hon. Justice W. Musyoka on 8th May, 2019 directed how the said succession cause in Kakamega HC Succession Cause No. 417 of 1990 should be proceed. That the plaintiff/respondent shall suffer no loss and or damage given that he has never stepped his foot on the suit land. That it is in the interest of justice that the prayers sought herein be issued.

The respondent submitted that it was true that parcel of land known as Kakamega/Chekalini/204 was registered in the name of one Edward Epenyi Oracho (deceased) but the plaintiff/respondent denies the allegation that sub-division of the said parcel was done secretly. That the said sub-division of the parcel of land and creation of the said new members was as a result of that succession cause KAK No. 417 of 1990. That the said succession cause was carried out by the family and the two widows being co-administrators namely Veronicah Khatali Eben (now deceased) and Zaid Andaye Eben as can be depicted from a copy of petition for letters of administration annexed and marked as 'JBI-1'. That sub-division of the suit property into Kakamega/Chekalini/204 into 3481 was as a result of the said succession cause. That he did not participate in the said succession cause but he facilitated in his capacity as a lawful purchaser. That the applicant is untruthful as he was present in court on the date of not only the whole process but even on the date of confirmation of the grant issued jointly to the two widows. That the plaintiff/respondent herein was included in the succession cause as a lawful purchaser in which sale agreement the defendant/applicant was a signatory. Attached and marked 'JB1-2' is a copy of the sale agreement. That he was not fraudulently registered as owner of a portion Kakamega/Chekalini/3474. That the said succession cause was carried out lawfully by consent of the entire family including the applicant and the (then) Provincial Administration-Annexed and marked as exhibit 'JBI-3, (a) – (c) Chief's letter dated 4/12/2000 dated 24/9/2001, a copy of the Kenya Gazette. That it is not true that one Zaid Andaye Eben (the 2nd petitioner did transfer the purchased portion to the respondent but the 1st petitioner did-as is exhibited by annex-'JBI-4', a copy of discharge and transfer of land dated 28th June, 2004. That at one point the applicant herein undertook before the area chief to leave the respondent's portion of land-Annexed and

marked 'JBI'-4, a copy of the said agreement dated 16th November, 2012. That in the said Kakamega Succession Cause No. 417 of 1990 all members of the family were provided for a share including the applicant herein whose share he sold part of it attached and marked 'JBI-5' is a copy of certificate of confirmation of grant dated 26th September, 2011 thus the issue of him being evicted from any parcel by any person is a lie. That the alleged application for revocation if at all and which came to his attention on service of the application for stay on 27th June, 2019 is an afterthought, misplaced, and meant to peaceful and quiet utilization in opposition of the applicant's notice of motion and pray that the same be dismissed with costs.

This court has considered the application and the submissions therein. It has come out in the submissions that, the parcel of land known as Kakamega/Chekalini/204 was registered in the name of one Edward Epenyi Oracho (deceased). That the said sub-division of the parcel of land and creation of the said new numbers was as a result of that succession cause KAK No. 417 of 1990. The applicant submitted that, the plaintiff/respondent was included in the said succession cause in Kakamega HC Succession Cause No. 417 of 1990 yet he is not a beneficiary and or dependent in the estate of the late Edward Epeni Oracho alias Edward Eben Oracho. That as a result of material non-disclosure, fraud and misrepresentation in Kakamega HC Succession Cause No. 417 of 1990 the plaintiff/respondent was illegally and fraudulently registered through transmission as the owner of land parcel known as Kakamega/Chekalini/3474 created from the sub division of the original land parcel known as Kakamega/Chekalini/204 forming estate of the defendant/applicant's late father Edward Epeni Oracho alias Edward Eben Oracho.

That the defendant/applicant has now moved the court in Kakamega HC Succession Cause No. 417 of 1990 seeking inter alia to revoke and or annul the grant and certificate of confirmed grant and consequential orders made pursuant thereto be set aside. That in view of the pendency of the succession proceedings in Kakamega HC Succession Cause No. 417 of 1990 it is in the interest of justice that the proceedings in the suit herein be stayed pending the outcome of the said cause. I find that the present case before this court is one of title to land. This is a competent court of law with jurisdiction to determine and resolve issues of fact and law raised by both parties. All the matters canvassed in this application can be brought out in the main suit in this instant case I find that this application is unmerited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE