



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**SUCCESSION NO. 941 OF 2014.**

**IN THE MATTER OF THE ESTATE OF LUUYO MUNIAFU (DECEASED)**

**AND**

**YUNES MUNIAFU MUKOLWE.....PETITIONER**

**VERSUS**

**MOSES MAKOKHA**

**ETEMESI ELIJAH ANDATI**

**CHRISTOPHER ELIAMBIRA**

**HAMISI JASON NAMULONDO.....RESPONDENTS**

**R U L I N G.**

1. The applicant Yunes Muniafu Mukolwe filed an application on 4<sup>th</sup> June, 2015 seeking the following orders:-

- i. *That an order do issue cancelling titles title Number Marama/Shinamwinyuli/3056 (sic), 3057 and 3058 to revert back to Marama/Shinamwinyuli/1336 (sic) in the names of Luuyo Muniafu (deceased);and*
- ii. *That costs of the application be provided for.*

2. The application is anchored on the following grounds:-

- i. *That land parcel number Marama/Shinamwinyuli/1336 (sic) formed the estate of the deceased herein and was undivided as at the time of death of the deceased herein and at filing this cause (sic);*
- ii. *That subsequently the respondents have fraudulently and unprocedurally without obtaining letter (sic) of administration intestate subdivided the deceased's estate; and*
- iii. *That this resultant subdivision must be annulled to enable the sharing of the estate of the deceased herein procedurally.*

**The applicant's case**

3. Ms. Omar for the applicant submitted that a hearing notice was served on the law firm of Khayumbi & Co. Advocates on 4<sup>th</sup> December, 2015. The said law firm was however not represented in court on the

date of the hearing of this application. Ms. Omar submitted that the application was supported by the applicant's affidavit dated 27<sup>th</sup> May, 2015. In the said affidavit, the applicant deposes in paragraphs 2 and 3 that her father died intestate on 13<sup>th</sup> October, 1983 and as that time he was the proprietor of parcel Land Ref. No. Marama/Shinamwenyuli/1336. She attached a copy of the green card marked as YMM2 to her affidavit.

4. In paragraph 12 of her affidavit, the applicant deposes that the said parcel of land was registered in the deceased's name and that one Fredrick Nandwa had placed a caution on the said land. The applicant attached a copy of the search certificate and marked as YMM-4 to confirm that assertion.

5. The applicant further deposes that Moses Makokha Luyo, Elijah Etemesi and Christopher Eliambira colluded and fraudulently changed ownership of the land to Moses Makokha Luyo. The applicant avers that in paragraph 13 of her affidavit.

6. In paragraph 14 thereof, she deposes that the said Moses Makokha Luyo fraudulently without succession and/or due procedure of law sub-divided the land parcel No. Marama/Shinamwenyuli/1336 into three portions.

7. The applicant deposes in paragraph 15 that Moses Makokha Luyo retained Marama/Shinamwenyuli/3057, Elijah Etemesi got parcel No. Marama/Shinamwenyuli/3056.

8. The applicant prays for the sub-divisions to be cancelled and the same to revert to the original parcel No. Marama/Shinamwenyuli/1336, as the respondents' action is (sic) meant to disinherit the other dependants of their property.

9. Ms. Omar informed the court that among the respondents, only Christopher Luuyo (the 3<sup>rd</sup> respondent) is a beneficiary of the deceased's estate.

### **Determination of the application**

The only issue for determination is if the deceased's estate has been fraudulently subdivided and transferred to third parties.

10. This court notes that the applicant attached a copy of a green card and search certificate showing that as of 6<sup>th</sup> December, 2011, when a caution was registered by Frederick Nandwa, land reference No. Marama/Shinamwenyuli/1336 was still registered in the deceased's name. No documentary evidence was availed by the applicant to show that the said land has been sub-divided into three parcels registered in the names of third parties.

11. It is a cardinal principle of law that **"he who alleges must prove"**. This principle is well captured in sections 107 to 109 of the Evidence Act which reads as follows:-

***"107 (1) whoever desires any court to give judgment as to the legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person.***

***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on the other side.***

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person."***

12. Having regard to the foregoing provisions of law, it is my finding that the applicant has failed to demonstrate that the land the subject matter of the deceased's estate has changed hands. The applicant having been represented by an Advocate, would have been expected to place all the relevant documentation before this court to enable me to reach an informed decision. This was not done

13. In the case of **Stephen Wasike Wakho & Another vs. Security Express Limited [2006] eKLR**, the court stated as follows:-

*“A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove.”*

14. Having found that all the necessary information was not laid bare before this court, I hereby dismiss the application with no order as to costs.

**DELIVERED, DATED and SIGNED** in open court at **KAKAMEGA** on this **10<sup>TH</sup>** day of **MARCH**, 2016.

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of:-**

..... **for the Petitioner/applicant**

..... **for the Respondents**

..... **Court Assistant**