



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 402 OF 2000**  
**SUNGUTI MUSIMBI ALIAS SUNGUTI CHITUWI.....DECEASED**  
**AND**  
**DINA SUNGUTI.....APPLICANT**  
**VERSUS**  
**PATRICK HANDA SUNGUTI**  
**JANE NAMBWA**  
**GEORGE NAMBWA SUNGUTI**  
**ALBERT NAMBWA NDOMBI**  
**WYCLIFEE MUTORO NAMBWA.....RESPONDENTS**

**R U L I N G**

**The Application**

1. The Notice of Motion dated 22.02.2012 was filed by Dina Sunguti on 23.02.2012. The applicant seeks ORDERS;-

1. THAT the Respondents by themselves, relatives, agents servants or any other person claiming under them be restrained by way of an injunction from trespassing erecting any structures, staying, cultivating and/or in any other manner interfering with the Applicant's peaceful occupation and or utilization of the parcel of land known as S.KABRAS/BUSHU/3344.
2. THAT any other further orders be made as the court may deem just in the circumstances.
3. THAT the costs of this application be provided for.

2. The application is premised on 3 grounds set out on its face and by the averments contained in the applicant's supporting affidavit sworn on 22.02.2012. In the main the applicant contends that LR No. S. KABRAS/BUSHU/3344 is duly registered in her name and that the respondents do not therefore have any interest in the same. She also states that because of the respondent's acts of trespass, she is unable to enjoy peaceful occupation of her property. The application was filed pursuant to Rule 73 of the Probate and Administration Rules.

## **Response to the Application**

3. The Respondents filed their Grounds of Opposition dated 24.09.2012 to the effect;-

1. That the application is incompetent, misconceived and bad in law and should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

2. The court is functus officio in this matter and cannot issue injunctive orders after confirmation of grant.

3. The law of Succession Act does not confer jurisdiction to the court to issue injunctive orders.

4. The land parcel No. South Kabras/ Bushu/3344 has never been a subject of this succession cause and cannot be subjected to succession proceedings when the proprietor is alive.

5. The applicant being the registered owner of land parcel No. South Kabras/ Bushu/3344 if she requires injunctive orders against the Respondents she can only do it through a civil suit against the respondents and not in a concluded succession cause.

6. That the application is an abuse of the due process of the court and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall at the opportune time raise a preliminary objection on a point of law that the same be struck out with costs.

4. Jane Nambwa, the 2nd Respondent also swore a replying affidavit of even date and deponed therein, inter alia, that the applicant herein secretly and in disobedience of a court order issued on 14.04.2011 subdivided land parcel Number Kakamega/Bushu/736 into two portions one of which is Kakamega/Bushu/3344 for the sole purpose of defeating her (Jane Nambwa's) claim against the applicant. She prays that the application be dismissed.

### **Submissions**

5. Both parties filed their written submissions. The applicant gives a history of this case, the highlights of the submission being that;-

- The applicant is the widow of the deceased Sunguti Musimbi, while the respondent is the personal representative of the late Jane Nambwa widow of Charles Nambwa Sunguti.

- Charles Nambwa Sunguti is son to Sunguti Musimbi

- During the life of the deceased and during the succession proceedings both Charles Nambwa Sunguti and Jane Nambwa occupied part of the parcel of land known as Kakamega/Bushu/736

- The claim by Charles Nambwa Sunguti was heard and a decision made to the effect that the late Charles Nambwa Sunguti was not entitled to a share of the estate of his late father comprised in LP Kakamega/Bushu/736 for the reason that Sunguti Musimbi had been given his own land by his late father during his life time and hence the exclusion.

- Patrick Handa Sunguti's application seeking to review the ruling of 20.06.2005 was dismissed vide this court's ruling dated 29.10.2009.

- After 29.10.2009, LP No. Kakamega/Bushu/736 was subdivided creating among other titles land parcel No.S. Kabras/Bushu/3344 which was registered in the applicant's name' with the late Charles Nambwa and Jane Nambwa still resident on the Original parcel.

6. The applicant thus contends that if both Charles Nambwa Sunguti and Jane Nambwa could not successfully claim a portion of the original land parcel Number Kakamega/Bushu/736, then the

respondents cannot succeed on such a claim. It is to be noted that there is in existence Kakamega HCCC No. 114 of 2010 filed by Jane Nambwa seeking declaratory orders that she has acquired title to the parcel of land known as Kakamega/Bushu/736 by way of adverse possession. The applicant prays that the instant application be allowed as prayed.

7. The respondent's submissions are dated 20.01.2016 and filed on 25.01.2016. The respondents pray that the applicant's application be dismissed on the following grounds.

- This court is functus officio in this matter and cannot issue injunctive orders after confirmation of the grant
- The applicant being the registered owner of LR No. S. Kabras/Bushu/3344 can only get injunctive orders against the respondents through the Environment and Land Court and not through this concluded succession cause.
- The land parcel known as S. Kabras/Bushu/3344 has never been the subject of this succession cause and cannot be subjected to succession proceedings when the applicant is still alive.
- The Law of Succession Act [Cap 160 of the Laws of Kenya] does not confer jurisdiction upon this court to issue injunctive orders.

### **Analysis and Determination**

8. I have carefully considered the application as filed, the submissions and the law. I have also read through Nairobi HC Succession Cause No. 2346 of 2008- **Re In the Matter of the Estate of Muigai Kamau (deceased). Wilson Kamau Mungai –vs – Njeri Kamau and Another** in which Musyoka Judge persuasively held that “injunctive orders and other orders to restrain or prohibit certain acts are not provided for under the Law of Succession Act and the Probate and Administration Rules.”

9. Regarding Rule 73 under which the instant application is brought, the learned Judge stated in the Muigai Kamau case (above), and I am in agreement with him, that the rule only saves the inherent power of the court to prevent abuse of the court process and to make such orders as would meet the ends of Justice.

10. Applying all the above Principles to the instant application, I find that the applicant's Notice of Motion dated 22.02.2012 must fail on the following grounds.

- a) The applicant's prayer for injunctive relief is directly linked to HCCC No. 114/2010 in which the respondents are seeking declaratory orders for adverse possession. This is a matter that can only be determined by the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution 2010. The Environment and Land court was established by the Environment and Land Court Act No. 12A of 2012 by Section 4 thereof.
- b) Even if this court had the jurisdiction to hear and determine the issues herein, the application would fail because LP S. Kabras/Bushu/3344 is not the subject of this Succession Cause.
- c) The Law of Succession Act, Cap 160 of the Laws of Kenya does not confer Jurisdiction upon this Court to issue injunctive orders. Only preservative orders may be issued by this court.

11. As was clearly pointed out by Musyoka Judge in the Muigai case (above) neither Section 45 nor 47 of the Law of Succession Act can be relied upon for seeking injunctive relief in a Succession Cause. This Court, being a Probate court can only do what Cap 160 allows it to do. Even Rule 73 of the P&A Rules cannot come to the aid of the applicant.

### **Conclusion**

12. In light of the above, the Notice of Motion dated 22.02.2012 is without merit. The same is accordingly dismissed but with no orders as to costs.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 15<sup>th</sup> day of September, 2016

**RUTH N. SITATI**

**JUDGE**

In the presence of

.....Mr. Munishi for Mukavale.....for Applicant

.....Mr. Shivega.....for Respondent

.....Mr. Langat.....Court Assistant