



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 177 OF 2017**

**JOSEPH OSUNDWA OTIPI.....PLAINTIFF/APPLICANT**

**VERSUS**

**KUNANI WAKUNGWI ALIAS MWANASHA alias KUNANI WAKUNGWI**

**AMSAN OSUNDWA AKUNGWI.....DEFENDANTS/RESPONDENTS**

**ISMAEL WESONGA ESHIRERE**

**MOHAMMED OMAR.....INTERESTED PARTY**

**PATRICK WASWA OTIPA**

**RULING**

The application is dated 3<sup>rd</sup> December 2018 and seeks the following orders;

1. That this application be certified as urgent and be placed before this lordship judge to be heard on priority basis.
2. That the applicant be allowed to be a substitute or succeed the 1<sup>st</sup> respondent – deceased in this case as an administrator of her estate as per the ruling of the citation cause No. 25 of 2018 from senior principal magistrate court.
3. That any new name/number and boundary arising from registered parcel of land E/WANGA/ELUCHE/808 as E/WANGA/ELUCHE/2296, 2297, 2298, 2299 be cancelled and the same reverted back to its original E/WANGA/ELUCHE/808 and the same be registered to the name of the 1<sup>st</sup> respondent – deceased as a sole proprietor for the correct entering of succession.
4. That the cost of this application be borne by the respondents/interested parties.

The grounds are that, the applicant entered citation cause no. 25 of 2018 to succeed the 1<sup>st</sup> respondent which was not objected by the 2<sup>nd</sup> respondent. That the applicant purchased the whole of land parcel No. E/WANGA/ELUCHE/808 and immediately took possession by staying in peaceful and the same developing it extensively without any interruption from the respondents from 1976 up to date. That the 1<sup>st</sup> respondent died in 2013 and her remains buried in the land parcel E/WANGA/ELUCHE/907 where the 2<sup>nd</sup> respondent stayed with the whole of his family and have no interest in applicant's land. That the applicant was allowed by senior principal magistrate court to proceed with succession of the properties of the 1<sup>st</sup> respondent as administrator of land parcel No. E/WANGA/ELUCHE/808. That it is in the interest of justice that the substitution allowed to make this case proceed.

The 2<sup>nd</sup> respondent opposed the application with following main reasons that, Joseph Osundwa Otipa is not the legal administrator of Kunai Wakungwi and no evidence of such has been annexed, as such he cannot be substituted. That prayer (3) is identical to prayer (c) in the application dated 21/5/2013, which application is determined, thus rendering the present application res judicata. That the application is misconceived and incompetent. That the reliefs sought in prayer (3) are substantive, similar to the reliefs in the plaint and can only be granted after evidence has been taken. That the application is an abuse of the court process and calculated to prejudice the respondent.

This court has carefully considered the application and the submissions therein. The grounds are that, the applicant entered citation cause no. 25 of 2018 to succeed the 1<sup>st</sup> respondent which was not objected by the 2<sup>nd</sup> respondent. That the applicant purchased the whole of land parcel No. E/WANGA/ELUCHE/808 and immediately took possession and developing it extensively without any interruption from the respondents from 1976 up to date. I find that the applicant has not produced any evidence to show he is the administrator of the 1<sup>st</sup> respondent now deceased and hence he cannot be substituted. The applicant needs to take out letters of administration. The rest of the prayers can only be considered once the 1<sup>st</sup> respondent has been substituted. This application lacks merit and the same is dismissed with costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27<sup>TH</sup> DAY OF FEBRUARY 2019.**

**N.A. MATHEKA**

**JUDGE**