



**REPUBLIC OF KENYA**

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

**ELC MISC. CASE NO. 10 OF 2019**

**AMALIA NUTRITIVE SUPPLIES ..... APPLICANT**

**VERSUS**

**FREDAH K. KIMANANI**

**KAKAMEGA LAND REGISTRAR .....RESPONDENTS**

**RULING**

The application is dated 19<sup>th</sup> February 2019 and is brought under order 51 (i) and sections 1 (A), 1 (B) of the Civil Procedure Act and section 78 of the Land Registration Act seeking the following orders;

1. That this application be certified as urgent and service of the same be dispensed with in the 1<sup>st</sup> instance.
2. That order does issue directing the Kakamega Land Registrar to lift the restriction registered to the parcel number Kakamega/Municipality Block 1/54.
3. That an order of injunction do issue permanently restraining the 1<sup>st</sup> respondent from interfering with the said parcel of land in any manner whatsoever either through herself and/or through her representative.
4. That costs be provided for.

It is based on the following grounds that the applicant is the bonafide owner of parcel number Kakamega/Municipality Block 1/54. That the said parcel of land was gifted by the late Erika Amaria Kimanani to the applicant in the year 2013 during her lifetime. The applicant's directors are Jael Makungu Kimanani who is the daughter of the late and Burton Indusa Indulaji who is the husband to Jael Makungu Kimanani. That the decision by the late Erika Amaria Kimanani to gift the applicant the said parcel of land is out of love and affection. That the parcel of land herein does not form part of the estate of the late Erika Amaria Kimanani since the same was transferred to the applicant before her demise on the 25<sup>th</sup> day of March, 2017 hence it cannot be subjected to succession proceedings. That the late Erika Amaria Kimanani did not need consent from any family members to transfer the subject matter since she was the bonafide owner. That the 1<sup>st</sup> respondent has been in the habit of registering restrictions to the subject matter herein the first one being in the year 2013 when the late was transferring the parcel of land to the applicant. That the first restriction was lifted after the late categorically stated that she has the right to transfer the subject matter to whoever she feels like. That the applicant wants to develop the subject matter to avoid the same being repossessed by the County Government but it cannot proceed due to the registered restriction. That this application has been brought promptly and in utmost good faith and the respondents will not be prejudiced in any way if the orders sought are granted.

The respondent submitted that he is a personal representative to the estate of Erica Amaria alias Elika Amalia alias Elika Amalia Kimanani who was the registered proprietor of L.R. No. Kakamega/Municipality Block 1/54. Annexed as "KSO1" is a copy of Limited Grant ad Litem. That Elika Amalia Kimanani who was her mother and mother to Jael Makungu Kimanani and other siblings died on 25<sup>th</sup> March, 2017 as clearly indicated in the certificate of death annexed as "JKM4" in the applicant's supporting affidavit sworn on 18<sup>th</sup> February, 2019. That the deceased was a partner of Amalia Nutritive Supplies which is a business name owned by her family. That being a business name and it is not a limited liability company, Amalia Nutritive Supplies is a non-entity which lacks locus standi to be sued or sue as it has done hence the application be dismissed. That Elika Amalia Kimanani transferred L.R. No. Kakamega/Municipality Block 1/54 to the name of Amalia Nutritive Supplies where she was a partner and since she passed on, her share that she held with the said Amalia Nutritive Supplies including L.R. No. Kakamega/Municipality Block 1/54 forms part of her estate to which all her children are entitled to a share. That the issues raised in this application cannot be resolved through a miscellaneous application as the applicant has done but a substantive suit hence it be dismissed. That Jael Makungu Kimanani who swore the supporting affidavit on 18<sup>th</sup> February, 2019 together with her husband Burton Indusa Indulaji have committed acts of fraud aimed at illegally acquiring L.R. No. Kakamega/Municipality Bloc 1/54 which forms part of the estate of the deceased Elika Amalia Kimanani hence disinherit the deceased's other children. That one of the documents he obtained from the registrar of companies is an alleged resignation as a proprietor by the said Elika Amalia allegedly written and signed by her dated 14<sup>th</sup> November, 2017. Annexed as "KSO2" is a copy of the resignation as a proprietor addressed to the Registrar of Companies. That he has perused the resignation as a proprietor of Amalia Nutritive Supplies by Elika Amalia (deceased) dated 14<sup>th</sup> November, 2017 annexed as "KSO2" above and it is alleged that she resigned from the said Amalia Nutritive supplies on 14<sup>th</sup> November, 2017 as clearly shown by the certificate of death annexed to Jael Makungu Kimanani's affidavit sworn on 18<sup>th</sup> February, 2019. Annexed as "KSO3" is a copy of the same certificate of death. That he has perused the affidavit annexed as "KSO4" above and discovered that it is a forgery by Jael Makungu Kimanani and Burton Indusa Indulaji because by the time Erika Amaria allegedly swore it on 30<sup>th</sup> November, 2017, she had long passed away on 25<sup>th</sup> March, 2017.

This court has considered the application and the submissions therein. It is clear this application is seeking to enforce a right. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. Order 3 Rule 1 prescribes the way

in which suits should be instituted. It specifically provides that “every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.” Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

*“It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings”.*

I concur with the authority above and the respondent’s submissions that a party cannot seek to enforce a right through a miscellaneous application like this one. It is my considered view that seeking an order directing the Kakamega Land Registrar to lift the restriction registered to the parcel number Kakamega/Municipality Block 1/54 and an order of injunction to issue permanently restraining the 1<sup>st</sup> respondent from interfering with the said parcel of land in any manner whatsoever either through herself and/or through her representative is an enforcement of a right. The facts are not before this court and there is no suit before me. I find this application has no merit and I dismiss the same with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**