



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 210 OF 2017**

**ABRAHAM NYONGESA MULATI :::::::::::PLAINTIFF/APPLICANT**

**VERSUS**

**MAINA EDWIN MUNYASA**

**ALPHONCE MAINA MARINDI ::::DEFENDANTS/RESPONDENTS**

**RULING**

This application is dated 23<sup>rd</sup> June, 2017 and is brought under order 40 rule 1 and 2 of the Civil Procedure Rules and section 63e of the Civil Procedure Act seeking the following orders;

1. THAT the present application be and is hereby certified urgent and the same be heard exparte in the 1<sup>st</sup> instance.
2. THAT restriction be placed against title number KAKAMEGA/MALAVA/3107 pending the hearing of this application/application.
3. THAT the respondents, their agents and/or assigns be and are hereby restrained by an order of temporary injunction from receiving rent proceeds deposited at the rent Tribunal vide Tribunal case No. 69 of 2015 pending the hearing of this suit and this application inter parties.
4. THAT pending the hearing of this suit the respondents, their agents and/or assigns be restrained by an order of temporary injunction from intermeddling, collecting rent, disposing of, alienating and/or in any other manner interfering with land parcel No. KAKAMEGA/MALAVA/3107.
5. THAT costs of this application be provided for.

The applicant submitted that, he is the legal representative of the estate of Beatrice Kanusu Holscher. (Annexed and marked "AM-1" is a copy of the grant) That he is the only surviving child of the late Beatrice Kanusu Holscher. That he had a sister by the name Jane Tunai who passed on through a road traffic accident. That the said Beatrice Kanusu Holscher died on 18<sup>th</sup> November, 2009 as indicated in the letters of administration. That at the time of her death she was the registered owner of land parcel NO. KAKAMEGA/MALAVA/3107. (Annexed and marked "AM-2" is a copy of the register.) That his late mother had constructed commercial residential houses on the said parcel of land. That he has been collecting rent form the premises up to May, 2015 when the 1<sup>st</sup> respondent went to the tenants demanding rent. That the confusion led to one of the tenants filing a suit at the rent tribunal. (Annexed and marked "AM-3" and "AM-4" are copies of the pleadings). That the 1<sup>st</sup> respondent was staying with his sister Jane Tunai who is deceased. That the said Jane Tunai caused the suit land to be registered in her name

on 15<sup>th</sup> July, 2010 as indicated in the register – “AM-4”. That he has learnt of these changes when he visited the land office and obtained the register in May, 2015 after he had problems in collecting rent. That the changes in issue are fraudulent as they were effected after the death of his mother and without administering her estate. Therefore land parcel NO. KAKAMEGA/MALAVA/3107 cannot form part of the estate of Jane Tunai as she obtained it fraudulently. That the respondents cannot be in the circumstances of this case be beneficiaries of the estate of his late mother’s estate though they are now proprietors by transmission. (Annexed and marked “AM-5” is a copy of the title deed.) The respondents have no right to collect rent from tenants on the suit land as they are not beneficiaries of the estate of his late mother. That he has a good case with high chances of success. The respondents are scaring tenants from the premises which act is likely to cause irreparable loss to him as he may lose future tenants due to the confusion caused by the respondent. That he relies on the rent proceeds to sustain himself and family and at no time during the lifetime of his sister and even after have the respondent collected rent from the tenants.

The plaintiff/applicant further submitted that, the he filed this suit against the defendants jointly and severally seeking the cancellation of the defendants’ registration as owners of the suit land. The plaintiff filed this suit as an administrator of the estate of BEATRICE KANUSU and has amended a copy of grant in Kakamega High Court succession Cause No. 103 of 2015.

The 1<sup>st</sup> defendant stayed with the sister of the plaintiff who is now deceased. She was known as JANE TUNAI KANUSU. BEATRICE KANUSU who was the mother of JANE TUNAI and the applicant died on 18<sup>th</sup> November, 2009. At the time of her death she was the registered owner of land parcel NO. KAKAMEGA/MALAVA/3107. (a copy of the register annexed to the affidavit in support). On 15<sup>th</sup> July, 2010 the deceased, JANE TUNAI KANUSU fraudulently caused the parcel of land to be registered into her name. (See entry No. 4 in the Register).

It is indicated that she had bought the land at Ksh. 200,000/=. The transaction of 15<sup>th</sup> July, 2010 was made as if the mother of the applicant, BEATRICE KANUSU had executed transfer documents posthumously and it presupposes that she attended the relevant Land Control Board. Based on the fraudulent transaction, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed Succession Cause No. 24 of 2015 and succeeded the estate of JANE TUNAI which at the time included the suit land. They were then registered as owners on transmission. The change of the suit land into JANE TUNAI was made without letters of administration of the estate of BEATRICE KANUSU. The said BEATRICE KANUSU had developed the property as there are several rental residential houses. There are tenants on the plot as brought out by the amended plaint in rent restriction case No. 69 of 2015.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants cannot be beneficiaries of the estate of BEATRICE KANUSU. Their administration of the estate of JANE TUNAI is limited to property that she legally acquired and not the present one. JANE TUNAI did not acquire legal title over the suit land and cannot equally pass it to the respondent through transmission or otherwise. This court has no jurisdiction to challenge the grant issued by the High Court. Equally the respondents would lack locus as they are not heirs to the estate of JANE TUNAI and therefore cannot challenge the grant of letters of administration issued to him. At the time BEATRICE KANUSU died, 2009 she had already developed the plot and the houses on the suit land had already been constructed. The receipts annexed to the replying affidavit are merely meant to hoodwink the court that the 1<sup>st</sup> respondent indeed participated in the construction of the houses.

This court has jurisdiction to determine ownership of land. The applicant has demonstrated clearly that land parcel NO. KAKAMEGA/MALAVA/3107 was registered in the name of BEATRICE KANUSU at the time she died on 18<sup>th</sup> November, 2009. The change in title was effected on 15<sup>th</sup> July, 2010. The consideration was Ksh. 200,000/=. The only explanation as to how JANE TUNAI got registered as the owner of land parcel NO. KAKAMEGA/MALAVA/3107 is found in paragraph 13 of the replying affidavit. The 1<sup>st</sup> respondent depones that JANE TUNAI was given the land during the life time of BEATRICE KANUSU. This contradicts entry No. 4 in the register which shows that JANE TUNAI bought the land at Ksh. 200,000/=. It was not a gift. It is clear from the afore going that JANE TUNAI got the land unprocedurally and illegally and/or fraudulently obtained the suit land and they urge you to

so find and grant the orders sought.

The respondents submitted that, the instant application brought by way of Notice of Motion dated 23<sup>rd</sup> June, 2017 supported by an affidavit sworn on the same day by the applicant herein ABRAHAM NYONGESA MULATI is a replica and similar to the application dated 24<sup>th</sup> April, 2017 in KAKAMEGA HC SUCCESSION CAUSE NO. 24 OF 2015 seeking similar orders herein. The application dated 24<sup>th</sup> April, 2017 is annexed and marked "MEM 8 a" to the respondents said replying affidavit.

The applicant herein obtained ex parte orders misleading the honourable court vide his application dated 24<sup>th</sup> April, 2017 which were set aside and vacated on 25<sup>th</sup> May, 2017 by Hon. Justice Njagi. The extracted order amended and marked "MEM 7" pursuant to the application dated 22<sup>nd</sup> may, 2017 by the respondents herein on the main grounds that the applicant herein had obtained the ex parte orders on 27<sup>th</sup> April, 2017 without being truthful, candid and disclosing full material facts to the court. The applicant's said application was tainted with falsehoods and thus amounted to an abuse of the due process of the court and therefore should be dismissed with costs.

The applicant herein likewise in the instant application has deliberately failed to disclose to this court that he had already filed an application dated 24<sup>th</sup> April, 2017 seeking similar orders herein in which he obtained ex parte orders on 27<sup>th</sup> April, 2017 and later the orders made on 27<sup>th</sup> April, 2017 were set aside and or vacated. The applicant's application in KAKAMEGA HC SUCCESSION CAUSE NO. 24 OF 2015 is still pending hearing and final determination. The applicant has abandoned the same and file a fresh suit herein seeking similar orders.

Failure by the applicant to disclose to this court existence cause in KAKAMEGA HC SUCCESSION CAUSE NO. 24 OF 2015 is fatal for non disclosure of full material facts and other previous suits filed by the applicant in KAKAMEGA RENT RESTRICTION CASE NO. 69 OF 2015 and KAKAMEGA HCCC NO. 16 OF 2014. The applicant is a mere busy body determined to frustrate the respondents herein by shopping spree for courts to unjustly and unfairly obtain orders with unclean hands. The principle of equity dictates that he who seeks equity must come with clean hands. They relied on the legal authority in **AVIATION & AIRPORT SERVICES WORKERS UNION (K) VERSUS KENYA AIRPORT AUTHORITY & ANOTHER (2014) eKLR**

Secondly, that the law firm of M/S AKWALA & COMPANY ADVOCATES is improperly and irregularly on record thus it has no audience. The applicant's written submissions dated 23<sup>rd</sup> October, 2017 filed by the said law firm should be expunged from the record and or struck out. An omission to file and serve Notice of appointment of advocates is fatal and incurable under the provisions of Civil Procedure Rules 2010 under order 9 Rules 1 & 7. They relied on the above cited case of **AVIATION & AIRPORT SERVICES WORKERS UNION (K) VERSUS KENYA AIRPORT AUTHORITY & ANOTHER (2014) eKLR** supra in which **HON. JUSTICE M. MBARU** quoted and relied on the case of **KENYA NATIONAL SECURITY WORKERS UNION VERSUS TOTAL SECURITY SURVEILLANCE LIMITED, CAUSE NO. 1404 OF 2012**.

Thirdly, the orders being sought by the applicant herein cannot be granted at the interlocutory stage since there will be nothing to be heard and determined at the main suit. Similar orders were sought and granted ex parte and later set aside and or vacated by Hon. Njagi in KAKAMEGA HC SUCCESSION CAUSE NO. 24 OF 2015 still pending hearing and final determination. The applicant is in directly seeking to review or appeal against the orders made on 25<sup>th</sup> May, 2017. If at all the applicant is dissatisfied by the orders made on 25<sup>th</sup> May, 2017 he ought to have filed an appeal in the Court of Appeal instead of wasting the previous time of this honourable court to review or sit on appeal on a decision made by a court of equal jurisdiction with this court. That there is nothing new that has changed for the applicant to convince your ladyship to grant similar orders it will simply amount to gross abuse of the due process of court. The applicant will continue to file multiple suits unless he is barred by this honourable court by dismissing his instant suit with costs. Litigation must come to an end.

Lastly, the applicant has failed miserably to demonstrate that he is entitled to the orders sought on injunctions. It is trite law that for a party to succeed in obtaining the orders on injunction he/she must establish the following set out principles that:-

It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.

The applicant has simply failed to establish any of the said principles thus he is not entitled to the orders of injunctions as prayed. They relied on the celebrated case of **GIELLA VS. CASSMAN BROWN** to fortify our arguments.

This court has carefully considered both the applicant's and the respondents' submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. first American Bank of Kenya Ltd & 2 others {2003}** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter .....

Further he goes on to state that “..... *a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.*”

The application is grounded on the annexed affidavit of ABRAHAM NYONGESA MULATI, the applicant and the following grounds; that the respondents are interfering with rent collection in respect of premises on the suit land. That the applicant is the sole beneficiary fo the estate in issue being a son to the deceased. that the late Beatrice Kanusu died on 18<sup>th</sup> September, 2009. That Jane Tunai changed ownership of the property on 15<sup>th</sup> July, 2010 after the death of Beatrice Kanusu. That the suit land was changed into the names of Jane Tunai without administration of the estate of Beatrice Kanusu. That the respondent lived with Jane Tunai now deceased. That the change of ownership was thus fraudulent as it was effected after the death of the proprietor without administration of the estate. That there are commercial residential premises on the plot occupied by tenants and the respondent is interfering with rent collection. That the applicant wants to fully administer the estate but due to the fraudulent change of ownership the same. That the change in ownership was discovered in 2015 when the 1<sup>st</sup> respondent used proxies to stop. That the respondents have been registered by transmission. That the applicant has a good case with high chances of success.

I find that, allowing the prayers sought at this stage will amount to denying the respondent an opportunity

to tender or adduce their evidence on how they acquired the suit land known as KAKAMEGA/MALAVA/3107 which the 1<sup>st</sup> respondent has been in actual occupation and utilization in total exclusion of the applicant herein. It is not enough for the applicant to allege that the title of the suit land was obtained through fraud. The applicant has the onus to demonstrate and prove his allegation and even cross examined on his allegations. Ingredients of fraud must be particularized and proved the applicant has failed miserably to prove his case at this stage thus the orders sought cannot be granted. The applicant has not shown a prima facie case with a probability of success and that he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

On the issue of legal representation by M/S. AKWALA & COMPANY ADVOCATES, I agree with the applicant's submissions. I have perused the court file and find that indeed on 5<sup>th</sup> October 2017 when the case herein came up for inter parties hearing of the instant application Ms Rauto appeared for the applicant and informed the court that she was holding brief for Mr Munyendo Advocate for the applicant. They proceeded to take directions that the said application be disposed off by way of written submissions. She never indicated that the firm of M/S. AKWALA & COMPANY ADVOCATES was on record. They therefore wonder when the firm of M/S. AKWALA & COMPANY ADVOCATES came on record and in what capacity did they file the said applicant's written submissions dated 23<sup>rd</sup> October, 2017. In any case Mr Munyendo Advocate was also improperly placed on record for failure to file and serve Notice of Appointment of Advocates since the pleadings herein were drawn in person by the applicant. The law firm of M/S AKWALA & COMPANY ADVOCATES is improperly and irregularly on record thus it has no audience. An omission to file and serve Notice of appointment of advocates is fatal under the provisions of Civil Procedure Rules 2010 under order 9 Rules 1 & 7 which stipulates that:-

Order 9 rule 1 "Any application to or appearance to act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf ....."

I advise the respondents' to regularize their representation to avoid their pleadings being struck out in future. For the above reasons I find this application has no merit and dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JANUARY 2018.**

**N.A. MATHEKA**

**JUDGE**