



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 343 OF 2017

FRED MARTIN SIMBILI.....PLAINTIFF/RESPONDENT

VERSUS

ESTERAMMBONE LUSASI.....DEFENDANT/RESPONDENT

AND

EUNICE MORAA LUSASI.....INTERESTED PARTY/APPLICANT

RULING

This application is dated 7th December 2017 and is brought under section 3, 3A and 80 of the Civil Procedure Act, order 1 rule 10 and Order 45 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. This application be certified urgent on the basis of the certificate of urgency filed herewith and be heard *exparte* in the first instance.
2. That an *exparte* order be issued enjoining the applicant as an interested party to this suit.
3. The interested party/applicant and her family members be allowed forthwith back on land parcel NO. 51 SHAVIRINGA SETTLEMENT SCHEME (hereinafter suit land) and the plaintiff and the defendant thereafter whether by themselves, their servants and or agents be jointly and severally restrained from interfering whatsoever with the applicant's occupation of the suit land pending the inter parties hearing of this application and or until further orders of the court.
4. On inter parties hearing and final determination of the application hereto, the orders in paragraph 3 above be confirmed pending the hearing and final determination of the main suit.
5. The order of the court issued herein on 14th of November, 2017 and all other subsequent orders thereto be set aside, reviewed and or varied upon such terms and conditions as the court would deem fair and just in the circumstances of this case.
6. The costs of this application be provided for.

The applicant submitted that, defendant named herein is her co-wife by virtue of both of us having been married to SAMWEL LUSASI MENGESA who died interstate on 5th April, 1999, as first and second wives respectively. That she knows the plaintiff as a result of a dispute over the suit land that has been raging since 2002. The said deceased died interstate living behind the following parcels of land.

(a) Land parcel No. NYANG'ORI/HAMISI 'B'/207 being ancestral land inherited from his late father LUSASI MENGESA.

(b) Land parcel NO. NYANG'ORI/HAMISI 'B'/578 purchased land.

(c) Land parcel NO. TIRIKI/SELENDE/750 purchased plot.

That the deceased left behind in his family herself and seven children who are still surviving namely: ROSE LUSASI, ESINAS LUDEMULE, LEAH AVISINWA, BERNARD MENGESA, WILSON AYODI, NANCY KWAMBOK and BONFACE NDORI. The deceased exchanged land parcel NO. NYANG'ORI/HAMISI 'B' 578 with KABINJARI PRIMARY SCHOOL with land in SHAVIRINGA (the suit land) on 5th of February, 1996 as evidenced by a copy of the handwritten agreement annexed hereto and marked 'EML-1'. That at the time of the said exchange the deceased had settled them (the second family) on the land that was being exchanged with the school. That it is further within her knowledge that after the said exchange the deceased moved them to his small plot on land parcel TIRIKI/SELENDE/750 where they started residing in one of the shops build by the deceased on the said land. That the deceased allocated the SHAVIRINGA (suit land) to their house in 1996 and allowed them to be tilling it as he prepared to construct a homestead for them on the suit before they could move in however he died before accomplishing this. That the deceased got involved in an accident on 6th of April, 1996 while riding on his bicycle from the suit land with her as a passenger where they had gone to weed the maize which the deceased and she had planted on the whole o the suit land. That it is after the death of the deceased that they learnt that the plaintiff herein had allegedly purchased the SHAVIRINGA land, when in 2002 the plaintiff chased away a tenant from the suit land to whom she had leased the whole suit land. That on learning of this she went and reported the matter to the chief Shaviringa location. The said chief summoned both the plaintiff and the defendant and her to his office however both the plaintiff and the defendant defied the order of the chief. She then decided to refer the case to the D.O Shamakhokho and again the plaintiff and the defendant herein failed to comply when summoned by the said D.O. Thereafter she did not pursue the matter further because of lack of finances. Her son BENARD MENGESA LUSASI took over the matter and informed her that the suit land was still the property of her said late husband that was allocated to them and there was no sale transaction of which he would have been aware had taken place. That said son with the authority of the chief within the area where the suit land is located built on the land they started residing on the suit land. The defendant on the other hand has never resided on the suit land because the deceased settled her and the first family on land parcel No. NYANG'ORI/HAMISI 'B'/207 which measures approximately 3 acres in which land the defendant and her family reside to date. They resided on the suit land after a case before the chief in a baraza over the suit land where both the plaintiff and the defendant were fully involved and it was decided and resolved in her favour whereby the defendant was ordered to refund to the plaintiff the money she had received from the plaintiff as purchase price for the suit land since she had unlawfully sold the suit land which belonged her. The decision of the chief was upheld by the D.O. Tambua and the D.O. Shaviringa on 29th September, 2010. In 2015 the defendant sued her vide HAMISI PMCC NO. 52 of 2015 for allegedly trespassing on the suit parcel. The case was dismissed. The plaintiff took out a Citation Cause No. 52 of 2016 in the Resident Magistrate's court at Hamisi against both the defendant and herself seeking leave to be given letters of administration to succeed the suit land. The case was also dismissed and the court ordered the defendant to file a proper succession of the deceased. The defendant filed succession cause No. 2 of 2017 in the Resident Magistrate's Court at Hamisi and that on 9th of November, 2017 and the matter is pending before the said succession court. On 4th of December, 2017 while lawfully engaged with her routine domestic chores on the suit land, she was shocked to see a police land rover pull up on the road near her homestead and two police officers in the company of the plaintiff came up to where she was. The plaintiff showed her a court document a copy whereof is annexed hereto and marked. 'EML-2'. That the plaintiff claimed that the court document referred to above required her to move out of the suit land the following day i.e. on 5th of December, 2017. That they had perused the relevant court file and established as follows:- That on 27th of September, 2017 the plaintiff instituted the suit herein through a plaint dated 27th of September, 2017 against the defendant in which he mainly sought for an order for permanent injunction against the defendant from trespassing, cultivating, intermeddling and/or interfering in any way on the suit land whether herself and or her workers, agents,

servants or any other persons pending the hearing and determination of this suit and or confirmation of grant of letters of administration intestate issued to the defendant vide Hamisi Law Courts Succession Cause No. 2 of 2017. On the same date the plaintiff filed a Notice of Motion seeking the same order under a certificate of urgency and purported to indicate therein that the same was to be served upon her as an interested party. A copy of the said motion application is annexed hereto and marked 'EML-3'. Subsequently on 14th of November, 2017 the consent order was issued.

On 5th of December, 2017 at around 11.00 a.m. while at her said advocate's office she learnt that the plaintiff in the company of police officers had invaded the suit land and were demolishing their houses. The defendant has demolished their houses comprising of a permanent shop where she had put up a posho mill machine. Annexed hereto and marked 'EML-4' are photographs of the demolished houses and shop. They have reported the incident at Cheptulu Police Patrol Base vide OB: 18/5/12/2017. Annexed hereto and marked 'EML-5' is the OB number issued to her at the said police patrol base. The plaintiff and the defendant conspired to enter into the said consent so as to fraudulently evict them. The suit property is still the estate of the deceased subject to succession and neither the plaintiff nor the defendant have any rights superior to theirs on the suit land. A copy of what purports to be a sale of land agreement between the plaintiff and her deceased husband was filed in this court. A copy whereof is annexed hereto and marked 'EML-6'. The purported sale of land agreement above is a forgery because it is purportedly signed by the deceased who was illiterate and used to sign documents by thumb printing them. That in proof of her assertion above she has annexed the agreement between the school and her deceased husband annexure EML-1 by which her said deceased husband acquired the suit land in which it clearly shows that the deceased thumb printed the agreement.

That she is an interested party who should have been enjoined to this suit since the orders issued adversely affect me and my family. That the plaintiff is not an heir to the estate of the deceased and his action herein amounts to intermeddling in the estate of the deceased which act is criminal and punishable under the law. That she be given a chance in this suit to be heard on merit by being enjoined in this suit and by this suit being heard afresh.

The plaintiff/respondent submitted that, he bought a parcel being Land Parcel No. 51 SHAVIRINGA SETTLEMENT SCHEME measuring approx. 2 acres from one SAMUEL MENGESA LUSASI. (Annexed and marked "SA- 1" is a copy of the said sale agreement.) That one, SAMUEL MENGESA LUSASI also surrendered to him the original land exchange agreement with Kabinjari Primary school which documents the interested party/Applicant herein has fraudulently obtained a copy marked EML – 1 as evidence and/or proof of ownership of the suit land.(annexed "LE-1" is a scanned original copy of the said land exchange document). That he indeed went ahead and built a permanent house and utility structures on the suit parcel of land after he had cleared the agreed sale price of Kshs. 450,000/=. That he proceeded to occupy and settle his family on the suit land for 10 years before the Interested Party/Applicant conspired and purportedly obtained illegal authority and orders from the area chief sharing (Josephine Khalwale) and D.O. Tambua (Linet Orina) to invade the take possession of the suit land in his absence while he was hospitalized for a surgical operation in Nairobi. The same area chief Shaviringa is currently hosting the Interested Party/Applicant in her offices to create the impression that Interested party/Applicant has nowhere else to dwell after the eviction despite having an alternative homestead at SENENDE where her late husband settled her before his demise (Annexed and marked "HM – 1'). That he filed this suit seeking inter-alia orders for permanent injunction against the Defendant/Respondent who is the Administrator of the deceased estate whether acting by herself, servants and/or agents or any other persons, jointly and severally restraining them from interfering whatsoever with my occupation of the suit land pending inter-parties hearing of the application and/or confirmation of Grant or further order of the court. It is indeed true that interested party/applicant has all along known that he, the plaintiff/respondent herein bought a parcel of the suit land from the deceased one SAMUEL MENGESA LUSASI. That the Interested Party/Applicant has her own parcel of land situated in SENENDE being Land parcel number TIRIKI/SENEDE/750 Measuring 0.3ha (hectares) where she still maintains a homestead and a tea plantation. (Annexed and Marked "TD-1" is a copy of her land parcel title). The interested party/application has been allocated additional land by the co-wife from part of their ancestral land No. NYANGORI/HAMIS b/207. (Annexed and marked "AL-1" are photos of the additional land.) The interested party/applicant has either neglected, and/or adamantly refused to give

vacant possession of the suit land to the plaintiff/respondent thus displacing him and his family who have been rendered homeless and destitute thus necessitating the instant suit. He has sought legal redress vide Hamisi Law Courts citation Cause No 52 of 2016 seeking to compel the widows to the deceased's estate to file succession proceedings. The court established beyond doubt that he had purchased land from the deceased but he lacked locus standi is a liability in the citation and the court advised him to file suit under an appropriate statute. (Annexed and marked "CR1" is a copy of the court ruling). That one ESTERA MMBONE LUSASI did file succession proceedings vide Hamisi Law Courts Succession Cause No 02 of 2017 which is pending confirmation of the grant. That despite filing the succession suit stated above, the interested party/applicant never objected to the making of the said grant. The assertions by the interested party/applicant that the said land sale agreements were done by her illiterate husband are untrue and unfounded since the said late husband was a trained Land Surveyor (Leveler) in the ministry of Agriculture and knew what he was getting engaged in. The interested party/applicant has never, at any time summoned him through the local administration for arbitration proceedings. The decision and action of the interested party/applicant to occupy the suit land by purporting to seek intervention, orders and authority of the chief Shaviringa Location and the D.O Tambua Division were not binding on the plaintiff/respondent as the said officers have no powers to adjudicate on land dispute. The decisions of the said officers on 29th September, 2010 through a public baraza were immaterial and not binding on the parties herein as they had no powers in law to give such directions and/or orders. That the interested party/applicant has illegally rented out his house and the amenities he built on the suit land 17 years ago and while his family remains homeless and destitute. (annexed and marked "HS-1" is a photo of his house on the suit land.) The allegations by the interested party/applicant that the plaintiff/respondent conspired with the defendant/respondent to fraudulently and illegally use consent orders of injunction to evict her are baseless, vexatious and does not hold water. This is because the defendant/respondent who is the 1st widow is well versed with all the land sale transactions that took place between the deceased and the plaintiff/respondent.

The interested party/applicant has at one time approached him seeking to refund or purchase back the suit land which he had no objection but she reneged on the agreement. This proposal was witnessed by the County Commissioner 1 – Hamisi Sub-County and the Chief Banja Location (annexed and marked EM- 1 is a copy of the proposal agreement.) The defendant/respondent herein through a meeting convened by the area Chief Banja attended by the family and clan members has allocated and given the interested party/applicant additional land from part of the ancestral land being land parcel no. NYANG'ORI/HAMISI"B"/207 annexed and marked "ME-1"are excerpts from the said minutes. The application herein by the interested party/applicant is made in bad faith as it is untrue, unfounded, and unjustifiable and a total abuse of the processes of this the honourable court and should be dismissed with costs.

The defendant/respondent submitted that, it is indeed true that the interested party/applicant herein is her co-wife, both of them having been married to one, the late SAMUEL MENGESA LUSASI who passed away on 6th April, 1999. That the deceased did enter into a land sale agreement with the plaintiff/respondent, one FRED MARTIN SIMBILI for the sale of his parcel of land being Land Parcel No. 51 SHAVIRINGA SETTLEMENT SCHEME. The plaintiff/respondent cleared the balance of the agreed land sale price upon the demise of her late husband. (Annexed and marked "SL-1" is a copy of the said agreement.). That the plaintiff/respondent built a permanent house, toilets, a makeshift kitchen, planted trees and erected a barbed wire fence on the suit land where he resided with his family for 10 years. That the interested party/applicant who is her co-wife abandoned her rightfully inherited parcel/homestead and trespassed to the suit land with the conspiracy and illegal authority of persons known only to her. That the interested party/applicant has her own parcel of land being Land Parcel No. TIRIKI/SENENDE/750 measuring 0.3 HA (hectares) where her late husband built a house, a posho mill, grew a tea plantation and settled her in the year 1996. That pursuant to a meeting convened by the family, the entire clan members and presided by Area Chief Banja and the local administration, she allocated the interested party/applicant additional land from the ancestral Land Parcel No. NYANG'ORI/HAMISI 'B'/207. (annexed and marked "MN-1" and MB-2 are copies of the said minutes and area chief's letter respectively). That for purposes of equitable distribution of the estate of her late husband SAMUEL MENGESA LUSASI, the interested party/applicant was in attendance and fully participated in the erection of beacons. (Annexed and marked 'AL-1' is a photo of the said additional land). The interested

party/applicant has flatly defied, neglected or refused to give vacant possession of the suit land to the plaintiff/respondent to his detriment, mental anguish or monetary loss. That she entered into consent agreement with the plaintiff/applicant her own volition, without duress or undue influence because she is well versed with the sale of the suit land and as administrator she could not run away from the transaction nor incur costs consequent to the suit. She has undertaken to faithfully administer each estate according to law and render a just and true account whenever required by law.

This court has carefully considered the submissions and annexures from all the parties. This application is based on the affidavit of EUNICE MORAA LUSASI filed herewith as well as the general grounds that the plaintiff has conspired with the defendant herein to fraudulently, illegally and oppressively use the consent order of this court issued on 14th of November, 2017 to evict the applicant and her family members from the suit land including demolishing all the houses of the applicant on the suit parcel where the applicant and family members have been eking out their livelihood since 1996 to date. The plaintiff and the defendant have deliberately concealed material facts from this court namely: That the suit land comprises the estate of SAMWEL LUSASI MENGESA where the applicant and other family members were allocated this land by the said deceased and are therefore the lawful heirs and beneficiaries of the suit land and that at such the use and transfer of the suit parcel must therefore be subject to succession laws. That the applicant and her family members reside on and utilize the suit land. The suit land was never sold and transferred to the plaintiff by the said deceased. The plaintiff and the defendant have no legal authority to transact on the suit parcel without complete succession. That the defendant does not and has never resided on the suit land. The Notice of Motion giving rise to the impugned consent orders though naming only the plaintiff and defendants as parties purported to indicate that it was to be served upon the applicant as an interested party yet it was never served on her and neither was she involved in the consent in question. That there has been a dispute over this suit land between the plaintiff and the defendant on one hand and the applicant and her family members on one hand which dispute was resolved by the local administration in favour of the applicant and her family members. The actions of the defendant are criminal and punishable in law. The orders issued by this court adversely affect and have adversely affected the applicant who ought to have been enjoined in this suit. In keeping with the constitution and cardinal principles of natural justice it would be fair and just to enjoin the applicant in this suit and have the suit determined afresh and upon merits after a full hearing. The applicant and her family members are unlawfully out in the cold, without shelter, their livelihoods completely devastated and have been subjected to inhuman and degrading treatment thus suffering and continue suffering irreparable loss and damage and should immediately be reinstated on the suit land.

On perusal of the court file I note that on 27th of September, 2017 the plaintiff instituted the suit herein through a plaint dated 27th of September, 2017 against the defendant in which he mainly sought for an order for permanent injunction against the defendant from trespassing, cultivating, intermeddling and/or interfering in any way on the suit land whether herself and or her workers, agents, servants or any other persons pending the hearing and determination of this suit and or confirmation of grant of letters of administration intestate issued to the defendant vide Hamisi Law Courts Succession Cause No. 2 of 2017. On the same date the plaintiff filed a Notice of Motion seeking the same order under a certificate of urgency and purported to indicate therein that the same was to be served upon her as an interested party. Subsequently on 14th of November, 2017 the consent order was issued in the registry by the Deputy Registrar to evict the applicant and her family members from the suit land including demolishing all the houses of the applicant on the suit parcel where the applicant and family members have been occupying since 1996 to date. It is not disputed that the suit property is still the estate of the deceased and subject to succession. It is also a finding of fact that the interested party/applicant resided there prior to her eviction after the consent order. That the defendant does not and has never resided on the suit land. It is established that there has been a dispute over this suit land between the plaintiff and the defendant on one hand and the applicant and her family members on the other hand. The consent orders issued by this court adversely affect and have adversely affected the applicant who ought to have been enjoined in this suit. As per the cardinal principles of natural justice it would be fair and just to enjoin the applicant in this suit and have the suit determined afresh and upon merits after a full hearing. I find the application has merit and I grant the following orders;

1. That an order be issued enjoining the applicant as an interested party to this suit.

2. The order of the court issued herein on 14th of November, 2017 and all other subsequent orders thereto be set aside.

3. The costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE