



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT BUNGOMA.**

**ELC. CASE NO. 177 OF 2014.**

**CHRISTOPHER WANGA SIMITI.....PLAINTIFF**

**VERSUS.**

**DAVID WEPUKHULU KASAMBULA.....1<sup>ST</sup> DEFENDANT**

**GRACE NAMAKWA WEPUKHULU.....2<sup>ND</sup> DEFENDANT**

**RULING.**

[1]. This application is brought under Sec. 1a, 1b, 3, 3a, 38”a’ & “f”, 63”e” and 98 of the Civil Procedure Act, Chapter 21 Laws of Kenya and under Order 22, Rule 28 Sub rule 5 of the Civil Procedure Rules Chapter 21 Laws of Kenya and all any other powers of Provisions of the Law. It prays that the new titles created out of the initial title comprised in land reference number Ndivisi/Khalumuli/1326 that is titles 4198, 4199 4200 and 4201 be cancelled and be declared null and void. That the same do revert back to LR No. Ndivisi/Khalumuli/1326 to pave the way for the implementation of this courts Judgment of 10/3/2017 and that the Hon. Deputy Registrar of this Court do sign all documents in satisfaction and/or compliance with the Judgment of 10/3/2017.

[2]. This application is grounded on the fact that the respondents subdivided the suit land during the pendency of this suit. In spite of the express orders of the court. That on 14/1/2015, 14/9/2015 and 19/10/2015 they unlawfully subdivided the suit land and created new portions now called Ndivisi/Khalumuli/4198, 4199, 4200 and 4201 and transferred them into their own names and to the names of third parties. That this was done in fragrant breach of specific court orders. That status quo be maintained, and with the sole aim and purpose of extinguishing the suit land during the pendency of this suit and therefore defeating and rendering academic any orders on the suit land and therefore subverting the cause of justice.

[3]. The defendants opposed the application. They alleged that the applicant had filed an application on a non-existent piece of land. Further that by the time of filing of the Originating Summons there was no land known as Ndivisi/Khalumuli/1326 and that, the title had been closed on subdivision. He alleged that he was not aware of the court orders of 3<sup>rd</sup> October, 2014. He claimed that the orders of 13/10/2014 were interim and that they were abandoned by the applicant and were never revived and/or extended.

[4]. Is it true that the respondent was unaware and or ignorant of the court orders of 3<sup>rd</sup> October 2014? Was his action of extinguishing the title of the suit land during the pendency of this suit innocent and/or justified?

[5]. The respondents herein filed in Kimilili Succession Cause No. 15 of 2011 for the estate of their father Musa Kasambuli Murefu and named the heirs as Jacob Nakalia Mukhebi, David Wepukhulu Kasambuli and Grace Namakwa Wepukhulu as widow. The property was named as Ndivisi/Khalumuli/1326. They obtained the grant. An application for annulment of that grant was filed in Bungoma High Court P & A 387 of 2012 and is still pending in Court. The basis of that annulment was that the said land had been purchased by Christopher Wanga Simiti the original plaintiff herein. This application for annulment had been served to the respondents herein.

[6]. On 20<sup>th</sup> September 2014, the said Christopher Wanga Simiti filed a notice of Motion under Sec. 3, 3A of the CPA and under order 40 rule 1 sub rule 1(a) and (b) and under Sec. 76 of the land Registration Act praying that the Land Registrar Bungoma prohibit or restrict all dealings on land parcel Ndivisi/Khalumuli/1326 or any succeeding numbers created therefrom. He also prayed for an injunction from constructing or dealing, fencing off alienating leasing off wasting or in any other way disposing off land parcel North Ndivisi/Khalumuli/1326. On 30/9/2014 Lady Justice Ann Omolo certified the application urgent and granted the orders sought. She fixed it for hearing on 13/10/2014. She was then transferred to Mombasa and I replaced her in Bungoma. The said application was fixed for inter partes hearing on 13/10/2015. On that date the advocate for the parties attended, the case was fixed for hearing on 5/11/2015 and all applications pending were agreed to be argued in the suit, and so they were, and a Judgment was eventually handed down on 10/3/2017.

[7]. The respondent was clearly aware of the orders in the application of 13/10/2014. These orders therefore, and by the conduct of the parties herein vide their consent were extended to the determination of the suit. The argument that the respondent was unaware of those orders is mischievous and dishonest. Furthermore, the respondent were served with the orders to annul the grant they had earlier obtained in the Kimilili Magistrates Court as early as 2012. That a case was still pending in the Bungoma High Court for annulment of grant filed as P

& A 387 of 2012. I am told the same is still pending in that Court. The respondents used the grant they obtained in Kimilili Court to purport to sell portions of the suit land on 14/1/2015, 14/9/2015 and 19/10/2015. I am convinced that when they did that, they were aware of the Succession Cause in the High Court for annulment of grant filed by the applicant in 2012 and were aware of the court orders of 20/9/2014. This is a clear case of contempt of court orders and is attempt to extinguish the subject matter of the suit during the pendency of the case and an abuse of the process of the court. I am convinced that it was a deliberate act and that it was done on purpose to defeat the outcome of the application for annulment of grant aforesaid and the suit herein.

[8]. The purport of my Judgment in this case was that the beneficial interest passed along time ago before one David Wepukhulu Kasambula (the father of the respondents) died since he had entered into an agreement with the father of the applicant (one Christopher Wanga Simiti). The Land Control Board had given its consent and he transferred the land to the father of the applicants herein. At the death of the respondents father, the suit land was not part of his estate. Consequently anyway, as stated in my judgment aforesaid, there was nothing for the respondents to transfer in the alleged subdivisions made on Ndivisi/Khalumuli/1326.

[9]. This application has merit and it is allowed as prayed.

It is so ordered.

Judgment read in open Court in presence of Madam Isiye.

**Dated at Bungoma this 22<sup>nd</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Joy: Court Assistant

Isiye: For Madam Chungu for the Applicant

Firm of Were for the Respondent - Absent