



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 194 OF 2017

ELIZABETH PAMELA NECHESA.....PLAINTIFF/RESPONDENT

VERSUS

ROSALIA ITALIA.....DEFENDANT/APPLICANT

RULING

The application is dated 26th February 2018 and seeks the following orders;

1. THAT this application be certified urgent and service be dispensed with at first instance.
2. THAT there be stay of execution of the eviction order issued on 14/12/2017 pending hearing and determination of this application.
3. THAT the honourable court be pleased to set aside the ex parte proceedings and judgment dated 14/12/2017 and all consequential orders therein.
4. THAT there be stay of proceedings in this suit pending hearing and determination of Kakamega High Court Succession Cause Number 316 of 2015.
5. THAT costs of this Application be provided for.

The applicant submitted that, the respondent herein is the 4th widow to Samwel Lusichi – Deceased. That the deceased had 4 wives namely:-

- (1) Delina Imbuhili (Deceased).....1st wife.
- (2) Marita Khavere Lusiji.....2nd wife.
- (3) Bilha Marina (deceased).....3rd wife.
- (4) Elizabeth Pamela Nechesa4th wife.

That the deceased SAMWEL LUSICHI had various parcels of land being:-

- (1) L.R. NO. TIRIKI/SEREM/887.
- (2) L.R. NO. KAKAMEGA/SEREM/5.
- (3) L.R. NO. KAKAMEGA/SEREM/4
- (4) L.R. NO. KAKAMEGA/SEREM/10
- (5) PLOT NO. 9 CHEPTECHI MARKET.

That all the 4 widows occupy their parcels as allocated to them by their deceased husband, Samwel Lusichi and clan elders. That L.R. No.

KAKAMEGA/SEREM/10 was allocated to the family of the 3rd widow, BILHA MARANA – Deceased who are in occupation of the same. That she is an agent of the family of BILHA NARINA – Deceased and she takes care of L.R. NO. KAKAMEGA/SEREM/10 on their behalf as they work far from home. That upon the death of Samwel Lusichi, the family appointed MARTHA KHAVERE LUSIJI to be the administrator. That the said Succession Cause is still pending before the honourable court for determination. That the respondent secretly and without the consent of the beneficiaries herein and with the knowledge of the existence of the Kakamega High Court Succession Cause Number 316 of 2015 filed another succession cause in Hamisi in relation to the same estate as that in Succession No. 316 of 2015. That the respondent misled the court by stating that the deceased had four dependents yet deceased was survived by 16 dependants as shown in annexure RI 1. Annexed and marked RI 2 is a copy of the affidavit in support of the Petition of Letters of administration sworn by the respondent indicating that the deceased was survived by 4 dependants. That after misleading the court, the respondent obtained a certificate of grant which certificate was then used to effect transfer of L.R. NO. KAKAMEGA/SEREM/10 from the name of the deceased to the respondent herein, Annexed and marked RI 3 is a copy of green card for L.R. NO. KAKAMEGA/SEREM/10. That the respondent did not serve the applicant with the pleadings and hearing notices of the case herein. That the applicant was shocked to see an eviction order against her in proceedings where she was never invited to participate. That after being served with the order, the respondent immediately approached the lawful administrator of the estate of Samwel Lusichi Makanga one MARTHA KHAVERE LUSIJI and informed her of the order. That the said MARTHA KHAVERE LUSIJI has since approached the court in Kakamega High Court Succession Cause No. 316 of 2015 and filed an application seeking for cancellation of registration of the respondent herein as the proprietor of the subject land herein and that the same be reverted back to the name of the deceased for distribution. Annexed and marked RI 4 is a copy of the said application. That if the court vide Succession Cause No. 316 of 2015 would cancel the title as issued to the respondent and order for the same to be reverted back to deceased, then this honourable court shall not be seized with jurisdiction to determine this matter thus need for stay of proceedings. That enforcing the order herein shall result to evicting the rightful beneficiaries of L.R. NO. KAKAMEGA/SEREM/10 and leaving them destitute without a place to go to.

The respondent submitted that, the application is misconceived, bad in law and an abuse of the due process of this honourable court and is merely intended to frustrate the plaintiff herein from enjoying the fruits of her judgment. It is not true that the defendant and her family were at any time allocated L.R. No. Kakamega/Serem/10 neither at any time was she appointed the administrator of the late Samuel Lusichi's estate. That at all material times, the defendant was properly served with the pleadings and hearing notices of the case herein through a licensed court process server and return of served filed in the court thereafter. That she stand to suffer irreparable losses if the orders sought herein are granted because, the defendant herein is infringing on her right to enjoy her suit property to date. That in any event the defendant and her family have an alternative land where she lives with her family.

This court has carefully considered both the applicant's and the respondent's submissions and annexures herein. This application is premised on the grounds that, the Plaintiff/Respondent obtained registration of Kakamega/Serem/10 by fraud. That the property L.R. NO. KAKAMEGA/SEREM/10 was at all material times registered in the name of SAMWEL LUSICHI - Deceased. That there is a succession cause being Kakamega 316 of 2015 relating to the estate of Samwel Lusichi whereby L.R. NO. KAKAMEGA/SEREM/10 forms part of the estate under administration while the Plaintiff/Respondent herein is listed as one of the beneficiaries. That the said succession cause is pending confirmation. That the Plaintiff/Respondent despite being a heir to the estate does not have any right over Kakamega/Serem/10 as it belongs to the family of the third wife to the deceased on BILHA MARINA- DECEASED. The Plaintiff/Respondent secretly filed Hamisi Succession Cause Number 13 of 2015 and obtained a certificate of grant despite being aware of the existence of Kakamega High Court Succession Cause NO. 316 of 2016. The Administrator in Kakamega High Court Succession Cause No. 316 of 2015 has since applied for revocation of the grant issued in Hamisi Court. The Defendant/Applicant was never served with summons, plaint and/or any other pleadings in relation to this case by the Plaintiff/Applicant. The Defendant/Respondent stands to suffer irreparable loss if the orders sought are not granted.

I have perused the court file and I indeed find that the applicant was duly served but failed to attend court nor file any papers in defence. I see no reason to stay the orders of this court. Be that as it may, the applicant has not adduced any evidence of any beneficial interest on the property and claims to be an agent. No evidence of the latter has been adduced. I find that this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31ST DAY OF MAY 2018.

N.A. MATHEKA

JUDGE