



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC. MISCELLANEOUS CAUSE NO. 34 OF 2017**

**MUSA LICHUNGU.....APPLICANT**

**VERSUS**

**NAMISABU CHIBIEKO ARAP SITIENI.....1<sup>ST</sup> RESPONDENT**

**MUSA KIMARU RUGU.....2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR KAKAMEGA.....3<sup>RD</sup> RESPONDENT**

**RULING**

This application is dated 3<sup>rd</sup> August 2016 seeking the following orders;

1. That this honourable court be pleased to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to sign all relevant transfer documents for the applicant on parcels of land No. KAKAMEGA/CHEMUCHE/354 and KAKAMEGA/CHEMUCHE/355.
2. That this honourable court be pleas to give an order that cautions placed on the parcels of land No. KAKAMEGA/CHEMUCHE/354 and KAKAMEGA/CHEMUCHE/355 be removed by the 3<sup>rd</sup> respondent herein.
3. That in the circumstance order 1 is not complied with the deputy registrar be allowed to sign the said documents for the applicant.
4. That such orders as shall meet the ends of justice be made.
5. That the cost of this application be provided for

That the applicant submitted that he is the son of Lichungu Mwalati (deceased) who before his death had placed caution on the parcels of land NO.KAKAMEGA/CHEMUCHE/354 and KAKAMEGA/CHEMUCHE/355. That the deceased was his biological father and the purchaser of the above stated parcels. That the deceased had placed caution on the same parcels fearing for his security as a purchaser as the 1<sup>st</sup> and 2<sup>nd</sup> respondents had shown intentions of reselling the land without his knowledge. That applicant is to succeed his entire father's property the above parcel being no exception. That the applicant has done all relevant legal procedures including instituting succession proceedings for his late father but the 1<sup>st</sup> and 2<sup>nd</sup> respondent have declined and/or refused to sign the relevant documents as they are still alive. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents have all documentation at the 3<sup>rd</sup> respondent's office in their names and may easily interfere with the property easily and as such render the applicant homeless. That the applicant ought not to suffer in the hands of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as they are settled elsewhere. That the applicant is currently staying and making a living on the parcels and that what remains is only the paper work. That the applicants' father died before having the caution he had placed on the parcel KAKAMEGA/CHEMUCHE/355 removed and thus this court may order for the removal and subsequent orders. That the applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

The 2<sup>nd</sup> respondent submitted that, he is the first registered proprietor of the land parcel L.R. S.KABRAS/CHEMUCHE/354. Annexed is a copy of the official seal certificate marked "MK-1". That he has peacefully using his above said land parcel L.R. S.KABRAS/CHEMUCHE/354 without any problems. That the said land parcel S.KABRAS/CHEMUCHE/354 is located in Chemuche location in Kabras Division and Kakamega County which borders the Nandi county in the former Rift Valley Province. That there was an attempt to sell the applicant's father Lichungu Mwalati his land. That the applicant's father Lichungu Mwalati failed to honour his part of the bargain and pay the full and agreed consideration price. That this resulted to the cancellation of the intended sell and the said Lichungu Mwalati refunded his monies and or deposit he had paid. That sometime in the year 1992 the applicant herein took advantage of the tribal

clashes along the Rift Valley Province and Western Kenya to enter his land. That in the same year 1992 he was forced to temporarily leave his land and seek refuge elsewhere. That the applicant who borders his land and is the registered proprietor of land parcel L.R. KAKAMEGA/CHEMUCHE/354 took advantage and entered his land occupied the same. That the applicant herein started tilling and utilizing his land without his consent and or permission. That in the year 2003 or thereabout the applicant herein introduced another stranger and or person on to his land the said person was one Shisambula Shiundu. That same year 2003 he sought the intervention of the Provincial Administration to help him evict and get the applicant herein and the said Shisambula Shiundu out of his land. That he started with the area chief who referred me to the District Officer who advised me to file a reference to the Kabras Land Disputes Tribunal. That the Kabras Land Disputes Tribunal ordered the applicant herein and the said Shisambula Shiundu out of his land. That he later applied to the lower court to have the said decision of the Kabras Land Disputes Tribunal adopted as the judgment of the court vide Kakamega Chief Magistrate's Court Miscellaneous Award No.207 of 2003.

That the applicant herein later preferred an appeal against the decision of the trial magistrate dismissing his application for adoption to this court vide Kakamega High Court Civil Appeal No.119 of 2010. The applicant herein never prosecuted the said appeal Kakamega High Court Civil Appeal No.119 of 2010 and the same was dismissed by the Honourable court for want of prosecution.

That the application herein and the suit herein is therefore Res Judicata by virtue of Kakamega Chief Magistrate's Court Miscellaneous Award No.207 of 2002. That the applicant herein is therefore not entitled to any of the orders sought herein.

The 1<sup>st</sup> respondent submitted that, sometime in the year 1974 or thereabout I had intentions to sell the Applicant's father Mwalati Lichungu the suit property herein. That the said plans to sell him his land failed to materialize when the Applicant's late father failed to pay the agreed consideration and tried to have the said land transferred in his names without paying me for the same. That when he came to learn that the Applicant's father Mwalati Lichungu had transferred his land to his names before paying him for the same, he cancelled the said land sale agreement and refunded the Applicant's late father the little monies he had paid me as deposit.

That there is therefore no valid sale agreement between him and the Applicant's late father Mwalati Lichungu. That the purported land sale agreements relied to by that Applicant and annexed to the Applicant's application herein are therefore forgeries. That the Applicant has deliberately and knowingly withheld some crucial information necessary and important for the proper adjudication of this matter. That the Applicant has deliberately and knowingly not informed the court that they have been to this very Honourable court on numerous occasions over the suit property herein L.R.KAKAMEGA/CHEMUCHE/355 and in all previous occasions the Applicant herein lost. That he is the registered proprietor of the suit property herein L.R.KAKAMEGA/CHEMUCHE/355 measuring 12.2 hectares or thereabout. Annexed is a copy of the official search marked "MAS-1". That the suit property herein L.R. KAKAMEGA/CHEMUCHE/355 is in Kakamega North Sub County, Kakamega County along the volatile Nandi-Kakamega County boundary of the former Rift Valley Province and the former Western Provinces. That the said area where the suit land is situated is a hot bed of tribal clashes and prone to perennial tribal clashes between the neighboring Kalenjin Community and the Luhya/Kabras especially during electioneering circle and or years. That as result of the said perennial and never ending tribal clashes during every election cycle he being from the Kalenjin community and therefore minority community within Western Province became as easy and constant target during the said tribal clashes.

That sometimes in the year 1974 or thereabout he made up his mind to sell his said land and relocate and seek alternative land deep in my native Nandi County of the then Rift Valley Province. That the Applicant's late father Mwalati Lichungu from who the Applicant herein lays his claim was his immediate neighbor and the proprietor of land parcel L.R. KAKAMEGA/CHEMUCHE/356. That when the applicant's father Mwalati Lichungu learnt that he wanted to dispose off his land the suit property herein he showed deep interest and approached him to buy the same. That the Applicant's father Mwalati Lichungu being the most immediate neighbor he did offer to sell him his whole land. That the Applicant's father Mwalati Lichungu frustrated the said land sale agreement by failing to pay the agreed consideration price forcing him to rescind and cancel the said land sale agreement and refund him the little deposit and or down payment he had paid him. That after the Applicant's father Mwalati Lichungu failed to honour his part of the bargain and he refunded him the little monies he had paid me, he then made it known to the Applicant's father Mwalati Lichungu that he was no longer selling him my land and he was repossessing it. That little did he know that whilst he was waiting for the Applicant's father Mwalati Lichungu to pay and or clear the outstanding agreed consideration that the Applicant's father Mwalati Lichungu was planning and scheming against him. That sometimes in the year 1979 the Applicant's father Mwalati Lichungu took advantage of the then precarious security situation and his temporal absence from his land and secretly schemed and planned to have his said land secretly transferred in his names, before he could pay him the full and agreed purchase price. That sometime on 11.8.1979 the Applicant's father Mwalati Lichungu secretly and without his consent and or permission and informing him secretly applied to the Lurambi Land Control Board to have his land the suit property herein transferred to his names. That the Applicant's father Mwalati Lichungu in his absence on the aid 11.8.1979 vide minute 349/79 and without his consent obtained the necessary consent to have the suit property herein transferred in his names at the Lurambi Land Control Board. That it is the said minutes No.349/79 of 11.8.197 of the Lurambi Land Control Board that the Applicant herein is pegging his claim to my land. Annexed is a copy of the said minutes marked "MAS-2". That the said minutes of the Lurambi Land Control Board is marked as annexure/exhibit No.2 in the Applicant's affidavit in support of the application herein. That when he came to learn that the Applicant's father Mwalati Lichungu had without his consent and in his absence appeared at the Lurambi land Control Board and obtained consent to transfer his land to his names, he did lodge a protest at the Lurambi Land Control Board. That he was then advised to seek legal advice and have the said consent obtained by the Applicant's father Mwalati Lichungu rescinded and or withdrawn by the Land tribunal. That he then sought the services of a lawyer M/s Arap Tanui advocates who lodged an Appeal to the Western Province Appeals Committee against the decision of the Lurambi Land Control Board made in 1979 in respect of my land. That on 3.10.1984 he and his advocate M/s Arap Tanui Advocates appeared at the Western Province Appeals Committee in case (Appeal) No.1 of 1984 when the decision of the Lurambi Land Control Board sitting in the year 1979 over his land was rescinded. Annexed is a copy of the proceedings marked "MAS-3". That the Applicant herein is therefore hanging on minutes of the Lurambi Land Control Board which were cancelled and or overturned by the decision of the Western Province Appeals Committee sitting in case (appeal) No.1 of 84 on 3.1.1984. That the Applicant herein is therefore hanging on none existent orders and or minutes of the Lurambi Land Control Board to claim his land. That the Applicant herein is therefore a shameless cheat and fraudster just like his late father Mwalati Lichungu who wants to shamelessly misled the court by hanging and relying on none existent orders of the Lurambi Land Control Board. That after the failed sale of his land to the Applicant's father Mwalati Lichungu, the security situation within the area stabilized and he came back and reoccupied and resettled onto his land That thereafter the Applicant's father Mwalati Lichungu died sometime in the year 1979 or thereabout. That in the year 1988 during the famous mulolongo elections they experienced the same perennial tribal clashes along the Rift Valley-Western Province border forcing him to temporarily seek refuge away from his land. That the applicant herein then took advantage of his absence from his land and went on an ambitious expansionist mission. That the applicant herein removed and dismantled the common

boundary separating their two land parcels and forcefully occupied his land and that of his other immediate neighbor the 2<sup>nd</sup> Respondent herein Kimaru Arap Ragut.

That in the year 1990 when calm and tranquility had returned to the common boundary of the then Rift Valley and Western Provinces now Nandi and Kakamega Counties he then came back to reclaim his land from the Applicant herein Musa Lichungu. That the Applicant herein did not voluntarily oblige to remove himself and his family from his land forcing him to file suit against him. That he then filed Kakamega Chief Magistrate's Court Civil Case No.140 of 1990, Mamisabu Arap Sitienei versus Musa Lichungu against the Applicant herein, praying for the eviction of the Applicant herein and his family from his land. Annexed is a copy of the plaint marked "MAS-4" That the above case Kakamega Chief Magistrate's Civil Case No.140 of 1990 was on 16.1.1996 determined by the lower court in his favour. Annexed is a copy of proceedings and judgment and decree marked "MAS 5,6 and 7" respectively. That after the Applicant herein failed to have the said judgment in Kakamega CMCC No.140 1990 reviewed and set aside the Applicant herein and his two sons namely Japhether Mbakaya Lichungu and Joshua Lichungu then filed another suit against him with Kakamega High Court Civil Case No.108 of 2001 (O.S.) claiming to have acquired the suit land herein by adverse possession. That soon after filing the said originating summons in Kakamega High Court Civil Case No.108 of 2001, the Applicant herein for a period of over 9 years from the year 2001 to the year 2009 failed to prosecute their above said Originating Summons. That the said Originating summons and or suit Kakamega high court civil case No.108 of 2001 was on 8.11.2010 dismissed by the Honourable court (Justice Isaack Lenaola) as he then was for want of prosecution. Annexed is a copy of the dismissal order marked "MA-8" That when the said originating summons in Kakamega High Court Civil Case No.108 of 2010 was dismissed by the High Court or want of prosecution he then applied to the lower court to have the decree in Kakamega CMCC No.140 of 1990 executed by having the applicant herein and his family evicted. That the Applicant herein being served with the eviction notice then rushed back to the High court and filed another suit/Organizing summons wit Kakamega High Court civil suit No.178 of 2010 (O.S.) against him Annexed is a copy of the Originating Summons marked "MAS-9" That contemporaneously to filing the said originating in Kakamega High Court Civil Suit No.178 of 2010 (O.S.), the applicant filed two other applications, one in the lower court in Kakamega CMCC No.140 of 1990 and the other application dated 31/10/2010 in Kakamega High Court Miscellaneous Civil Application No.67 of 2011. That in his application dated 31.10.2010 to the High court in Kakamega High Court Misc Civil Application No. 67 of 2011 the applicant sought orders to stay execution of the decree in Kakamega CMCC No. 140 of 1990 pending the hearing of his application for leave to appeal out of time against the decision and ruling by Hon. W.M. Muiruri delivered on 6.8.2001 in Kakamega C.M.C.C. No.140 of 1990. That in the lower court Kakamega C.M.C.C. No.140 of 1990 in his application dated 3.10.2010, the Applicant herein sought the same orders he sought in the high court that is stay of execution of the decree in the said Kakamega C.M.C.C..140of 1990 pending the hearing and final determination of the said Kakamega H.C.C. No.178 of 2010. The application was dismissed by the High court Justice Luka Kimaru on 25.10.2011. Annexed is a copy of the aid ruling marked "MAS-10" That in dismissing the Applicant's application dated 31.10.2011, seeking to have the decree in Kakamega CMCC NO.140 of 1990 stayed pending finalization of Kakamega HCC No.178 of 2010 (O.S.),

Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

*"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"*

Section 7.

*"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Any issues submitted to be new issues raised in this matter ought to have been raised in the previous suit. This was held in the case of **John Omolo Oracha & 3 Others v Kenya Petroleum Refineries Ltd & 3 Others (2016) eKLR**.

I find that issues here are/were directly and substantially in issue in a former suits mentioned above. That the applicant herein comes to this court with another application the judgment and or decision of the Kabras Land Disputes Tribunal as adopted by the lower court in Kakamega CMC Misc Award No.207 of 2002 still stands. The said issues have been heard and finally decided by that court. (See Section 7 of the Civil Procedure Act Cap 21).

I find that litigation must come to an end. That the respondent should be allowed to enjoy fruits of his judgment in Kakamega CMCC No.140 of 1990. The Applicant is trying to reopen his this case through the back door. The applicant has come to court with unclean hands. That application herein is a waste of the court's precious judicial time. The respondent is entitled to enjoy the fruits of his judgment in Kakamega CMCC No.140 of 1990 which judgment has not been challenged by way of appeal or otherwise. That the suit herein and the application is res-judicata by virtue of the judgment in Kakamega CMCC 140 of 1990. The application herein is therefore an afterthought and an abuse of the court process.

For those reasons this application is res judicata and as this court lacks jurisdiction it cannot go into the merits of this application. I find that the plaintiff/applicant's application herein must be struck out for being incompetent as it offends the sound principals of res judicata. Consequently, I strike out the application dated 3<sup>rd</sup> August 2016 with costs to the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**