



**REPUBLIC OF KENYA**

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

**MISC. CIVIL NO. 7 OF 2017**

**MASIKA MUTIE.....APPLICANT**

**VERSUS**

**KANYIVA NZUNGI.....1<sup>ST</sup> RESPONDENT**

**NDAKI KISIU MITE..... 2<sup>ND</sup> RESPONDENT**

**JOSEPHINE NZULA MULI.....3<sup>RD</sup> RESPONDENT**

**THOMAS MUSAU KITONYO.....4<sup>TH</sup> RESPONDENT**

**TANATHI WATER SERVICES BOARD**

**NATIONAL LAND COMMISSION..5<sup>TH</sup> RESPONDENT**

**RULING**

- 1) What is before me for ruling is the Plaintiff's/Applicant's amended notice of motion application dated 24<sup>th</sup> April, 2017 and filed in court on the 25<sup>th</sup> April, 2017.
- 2) The application is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Rules, Orders 40 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules and all other enabling provisions of the law for orders:-
- 3) The application is predicated on the grounds on its face and is supported by the supporting affidavit of Masika Mutie sworn at Machakos on the 24<sup>th</sup> April, 2017. It is opposed by the first, second and the third Defendant/Respondents vide their replying affidavit sworn at Machakos on the 14<sup>th</sup> December, 2017 by the third Respondent with the authority of his co-Respondents.
- 4) On the 7<sup>th</sup> November, 2017 the fourth Respondent filed its grounds of opposition dated 31<sup>st</sup> October, 2012 as well as a replying affidavit sworn by Nicholas Muthu, its CEO, on the 31<sup>st</sup> October, 2017.
- 5) The court gave directions that the application be disposed off by way of written submissions. The Applicant was granted leave to file supplementary affidavit and submissions in view of the fact that by the time when he filed his submissions dated 11<sup>th</sup> December, 2017 the application had not been opposed by the Respondents. By the time of writing this ruling, the Applicant had not filed such supplementary affidavit and submissions.
- 6) The submissions by the Applicant's counsel were that it is evident from the supporting affidavit sworn by the Applicant, there is a pending judicial review proceedings being Miscellaneous Civil Application number 55 of 2004 which is not disputed by any of the Respondents. The counsel went on to submit that the same arose out of the decision by the District Commissioner Makueni which granted the suit property to the Respondents herein. The counsel added that leave was granted to the Applicant herein to institute judicial review proceedings which leave would operate as stay of the decision of the District Commissioner. The counsel further submitted that the effect of the order of stay is that title to the suit property being Mavindini/Mavindini/1263 could not be issued in favour of the Respondent.
- 7) The counsel further submitted that despite of the stay order, Kanyiva Nzungi went ahead and fraudulently obtained title to land parcel number Mavindini/Mavindini/1263, an issue not disputed by the Respondents. The counsel termed the acquisition of the title in the subsistence of the order remains illegal and highly contemptuous.
- 8) It was the Applicant's counsel's submissions that before the proceedings could be determined, the government of Kenya indicated its

intention to acquire certain parcels of land for the development of Thwake Multipurpose Dam, and such compensation was and still is due to the registered owners of the affected properties, the suit property herein being one of them.

9) The counsel further submitted that the Applicant seeing that he would be completely disadvantaged filed this application where he seeks that compensation to either party be halted until the issue of ownership of the suit property is determined.

10) The counsel for the first to the third Respondents cited section 7 of the Civil Procedure Act which provides as follows;

***“ 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 same parties, or between parties under whom they or any of their claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which issue has been subsequently raised and has been heard and finally determined by such court.”***

11) The counsel was of the view that the ruling in Makueni SPMCC 107/2016 has met the above threshold, and therefore the application by the Applicant should be dismissed with costs to the first to the third Respondents. The counsel went on to submit that it is not in dispute that the title deed to suit land Mavindini/Mavindin/1263 was obtained in the names of Kanyiva Nzungi Mue now deceased and the three Respondents legally acquired letters of administration in Makueni Succession Cause number 107/16 upon which a title deed was issued to them.

12) The counsel further submitted that the Applicant tried to challenge issuance of the grant but he failed and as such the Respondents remain the legal administrators, beneficiaries and owners of Mavindini/Mavindini/1263. The counsel pointed out that the bona fide and legal owners are capable of receiving compensation of the compulsory land acquisition from the fourth and the 5<sup>th</sup> Respondents.

13) Finally, the counsel submitted that the issue of fraudulent obtaining of title deed does not apply since the Applicant had knowledge of the issuance of the title deed more than 10 years ago. The counsel added that this application is prompted by the monetary compensation.

14) The counsel for the fourth Respondent in his submissions told the court that the Respondent does not have a problem with the application save for the fact that the fourth Respondent does not held money to do with the settlement and compensation of Thwake Multipurpose Project. The counsel added that it would be superfluous and nugatory to issue injunctive orders against party who is, despite its willingness, not able to observe the terms and conditions of such an injunctive order.

15) The counsel further submitted that it is unnecessary for the fourth Respondent to critically analyze and consider whether the conditions for the grant of injunctive orders set out in *Giella Vs Cassman Brown & Co. Ltd [1973] EA 358* and other similar cases that have interrogated conditions for grant of injunctive remedies are met.

16) The counsel urged the court not to grant those orders against the fourth Respondent.

17) Having evaluated the evidence on record, I do note that although the Applicant did file Machakos High Court Miscellaneous Civil Application number 55 of 2004 and got leave to institute judicial review proceedings which leave operated as stay, he has not explained whether or not he filed the substantive application for judicial review within 21 days as is indicated in the order issued by the court on 8<sup>th</sup> July, 2004. It is not enough for the Applicant to say that the judicial review proceedings are yet to be determined without proffering evidence on the status of the proceedings in question.

18) The Applicant is silent on the fact that he unsuccessfully tried to challenge the limited grant of letters of administration ad colligenda bona issued to the first to the third Respondents. By virtue of the said grant, the three Respondents are entitled to receive compensation on behalf of the estate Kanyiva Nzungi and also on their own behalf.

19) I also note that the Applicant has not rebutted the depositions by the fourth Respondent that it does not hold any money to do with compensation for compulsory acquisition of land related to Thwake Multipurpose Dam Project.

20) The upshot of the above is that the application has no merits and same is dismissed with cost to the first to the third respondents. It is so ordered.

**Signed, dated and delivered at Makueni this 23<sup>rd</sup> day of November, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

Mr . Hassan holding brief for Mr. Mulei for the Applicant

No appearance for the Respondents

Mr. Kwemboi Court Assistant

**MBOGO C.G, JUDGE**

**23/11/2018**