



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**ELC CASE NO. 65 OF 2017**

**MUGANDA MUKACHISILA :::::::::::PLAINTIFF/APPLICANT**

**VERSUS**

**JORAM MWANJE :::::::::::DEFENDANT/RESPONDENT**

**RULING**

This application is dated 28<sup>th</sup> February 2017 and is brought under section 82 & 83 Laws of Succession Act Cap 160, Order 40 Rules 1, 3, 4, 5, 10 of the Civil Procedure Rules, Sections 1A, 1, 3, 3A and seeks the following orders;

1. THAT this application be certified urgent and be heard at the first instance and service thereby be dispensed with.
2. THAT the respondent by himself, agents, servants, assigns and/or representatives or anybody claiming through him be and are hereby restrained by way of a temporary in junction from entering, cultivating, harvesting any crop, cutting trees, alienating, erecting any structure and/or carrying out any activity that would otherwise change the current status of Land Parcel Number SOUTH KABRAS/CHESERO/974 pending hearing and determination of this suit.
3. THAT the costs of this application be provided for.

The application is based on the following major grounds and upon further grounds adduced in the supporting affidavit of MUGANDA MUKACHISILA and at the hearing hereof. The grounds are briefly that the applicant is the legal representative of the estate of MUKACHISILA MAFUNGO which is comprised of L.R. NO. S/KABRAS/CHESERO/974. The respondent has no legal right whatsoever to use or inherit L.R. NO. S/KABRAS/CHESERO/974. The respondent has unlawfully and illegally without any color whatsoever trespassed unto the Land Parcel NO. S/KABRAS/CHESERO/974, cut down trees, ploughed and planted maize and is now harvesting the applicant's sugar cane and delivering the same for milling at West Kenya Company. The respondent has further prevented the applicant from utilizing her parcel of land. The applicant stands to suffer irreparable loss if the orders ought herein are not granted.

The applicant in her supporting affidavit and submissions stated that she is the administrator of the estate of the late MAFUNGO MUKACHISILA annexed herewith and marked MM 1 is a copy of the grant. That the said MAFUNGO MUKACHISILA was her husband. That upon his death, her co-wife DAMARA MUCHISA SILA petitioned the said estate of MAFUNGO MUKACHISILA which is comprised of L.R. SOUTH KABRAS/CHESERO/974 and got registered against the same as an administrator(Annexed marked MM2 is a copy of the search). That unfortunately the said DAMARA MUCHISA SILA passed on and she substituted her as the petitioner. That the respondent is not a beneficiary of the said estate and a total stranger to the same. That she has peacefully been using the said parcel of land to the total exclusion of respondent until the year 2007 when the respondent's family encroached unto the part of the said parcel and forcefully started cultivating maize and beans. That the

respondent's father then proceeded to court and filed a suit to be declared the owner of the said land vide KAKAMEGA HIGH COURT CIVIL CASE NO. 90 OF 2007, which suit was dismissed with costs to her annexed and marked MM 3 is a copy of the judgment. That through this judgment, it is clear that the respondent has no right whatsoever over land parcel number S. KABRAS/CHESERO/974. That the respondent has now embarked on harvesting the applicant's cane thriving on the said land without the applicant's permission. That the respondent has also cut trees and sold them in form of timber. That the respondent has further prevented the applicant from using her own parcel of land and has even caused her grandchildren to be charged for fictitious charges of malicious damage to property when she instructed them to plough for here (Annexed marked MM 3 is a copy of the charge sheet). That applicant is aged 93 years and the respondent actions have caused her immense psychological torture which has caused her health to deteriorate at an alarming state.

In his replying affidavit and submissions the respondent, **JORUM MWANJE** stated that his father Mwanje Shammala purchased the suit property in 1982 from Damara M. Musila and Samuel Kamwani, Simon Mbololo and Zablon Sanyia (copy of agreement annexed and marked JM-1). That they settled on the land and have been using the same to date. In 2007 they realized Damara Musila had obtained the title deed of the same property and transferred the same to Samuel Kakwani without their knowledge for the Samuel to sub-divide to his brothers. That the said Damara died in 2001 and it was surprising who transferred the said parcel of land to Samuel as the purported transferor was already deceased (copy of green card and transfer annexed and marked JM2 (a) and (b) respectively). That this prompted the respondent's father to move to court vide Kakamega HCC case Number 90 of 2007. That his father died in 2012 and he was substituted in his stead. That the said case was dismissed by the applicant. The said transfer according to the documents was done by Muganda Mukachisila purporting to be Damaris an act which is criminal. That in the said judgment the judge notes that the beneficiaries of the said parcel are free to transfer the portions purchased from them to me. That it is the respondent who is in occupation and use of the said land in exclusion of the applicant.

This court has considered both the applicant's and the respondent's submissions and the supporting affidavits therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial***
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
- 3. If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The applicant submitted that she is the administrator of the estate of the late MAFUNGO MUKACHISILA annexed and marked MM 1 is a copy of the grant. That the said MAFUNGO MUKACHISILA was her husband. That upon his death, her co-wife DAMARA MUCHISA SILA petitioned the said estate of MAFUNGO MUKACHISILA which is comprised of L.R. SOUTH KABRAS/CHESERO/974 and got registered against the same as an administrator. Annexed herewith and marked MM2 is a copy of the search. That unfortunately the said DAMARA MUCHISA SILA passed on and she substituted her as the petitioner. That the respondent is not a beneficiary of the said estate and a total stranger to the same. That she has peacefully using the said parcel of land to the total exclusion of respondent until the year 2007 when the respondent's family encroached onto the part of the said parcel and forcefully started cultivating maize and beans. That the respondent's father then proceeded to court and filed a suit to be declared the owner of the said land vide KAKAMEGA HIGH COURT CIVIL CASE NO. 90 OF 2007, which suit was dismissed with costs to her annexed and marked MM 3 is a copy of the judgment. That through this judgment, it is clear that the respondent has no right

whatsoever over land parcel number S. KABRAS/CHESERO/974. That the respondent has now embarked on harvesting the applicant's cane thriving on the said land without the applicant's permission. That the respondent has also cut trees and sold them in form of timber. That the respondent has further prevented the applicant from using her own parcel of land and has even caused her grandchildren to be charged for fictitious charges of malicious damage to property when she instructed them to plough for here. Indeed the respondent's father proceeded to court and filed a suit to be declared the owner of the said land vide KAKAMEGA HIGH COURT CIVIL CASE NO. 90 OF 2007, which suit was dismissed. I find that the applicant has shown a prima facie case with a probability of success at the trial. The applicant has also shown that unless the order is granted, she will suffer loss which cannot be adequately compensated in damages. I find that the application has merit and grant it on the following terms;

THAT the respondent by himself, agents, servants, assigns and/or representatives or anybody claiming through him be and are hereby restrained by way of a temporary injunction from entering, cultivating, harvesting any crop, cutting trees, alienating, erecting any structure and/or carrying out any activity that would otherwise change the current status of Land Parcel Number SOUTH KABRAS/CHESERO/974 pending hearing and determination of this suit. Cost of this application to be in the cause.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21<sup>ST</sup> DAY OF JUNE 2017.**

**N.A. MATHEKA**

**JUDGE**