



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 275 OF 2017**

**MERCY KAWIRA BUNDI.....PLAINTIFF/APPLICANT**

**VERSUS**

**AMOS MBAE KANAMPIU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ALICE KATHURE JUSTUS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Preliminary Objection filed by the 2<sup>nd</sup> defendant is dated 7<sup>th</sup> September, 2017. It reads as follows:

**NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTICE** that the 2<sup>nd</sup> defendant raises a Preliminary Objection against the entire suit and the application dated 7.9.2017 on the following grounds:

1. The suit as currently constituted is barred by statute by dint of article 162 (2) of the Constitution of Kenya as the subject matter is a subject of probate and administration division of the High Court are (sic) not a subject of Environment and Land Court to the extent that it affects the estate of the deceased **KANAMPIU KIBIRU LR. MWIMBI/CHOGORIA/2400**.

2. The suit is Res judicata and barred by statute by dint of S. 7 of the Civil Procedure Act Cap 21 Laws of Kenya. As (sic) the same parties having formerly litigated in Chuka High Court Misc. Succ. 26/2017 where a final decision was rendered on 17.5.2017

3. The suit as currently constituted is an abuse of the due process and court process as the plaintiff was a party in Chuka High Court Misc. Succ. 26/2017 and also a party as against the 2<sup>nd</sup> defendant in Court of Appeal at Nyeri App. 97/2017 and the 2<sup>nd</sup> defendant prays the suit be struck out under Order 2 r 15(d) of the Civil Procedure Rule (sic) 2010 as an abuse of the court process.

**Dated at Chuka this 7<sup>th</sup> day of September, 2017**

**P. M. MUTANI ADVOCATE**

**FOR THE 2<sup>ND</sup> DEFENDANT**

2. The Preliminary Objection was canvassed by the parties orally on 2<sup>nd</sup> October, 2017. Mr. Mutani for the Preliminary Objection's proponent by and large re-stated the issues raised in the Preliminary

Objection's grounds. He pointed out that there was a typographical error where the Preliminary Objection wrongly cited the Succession Cause apposite to this matter as No. 26 of 2017 instead of No. 26 of 2016. This information was noted.

3. Mr. Mutani asserted that all issues pertinent to what the plaintiff has brought to court were heard and determined in Chuka Succession Cause No. 26 of 2016. He referred the court to the courts' judgment annexed to this Preliminary Objection. He also proffered to court that the judgment in Chuka Succession 26 of 2016 is subject to Nyeri Court of Appeal No. 97 of 2017.

4. For the reasons he has canvassed in support of the Preliminary Objection Mr. Mutani for the 2<sup>nd</sup> defendant prays that the suit be struck out under **Order 2 rule 15 of the Civil Procedure Rules, 2010**, as an abuse of the court process. In support of his assertions Mr. Mutani proffered the case of **"Owners of the Motor Vessel "Lilian S" [1988] KLR 1**, for the proposition that the court lacked jurisdiction.

5. Mr. Mutunga, the plaintiff's advocate came to court very late after Mr. Mutani had closed his prosecution of the 2<sup>nd</sup> defendant's Preliminary Objection. Before he came to court, the plaintiff had told the court that she had bought her land and that she had a title. She also told the court that she had extensively developed the portion she occupied.

6. Mr. Mutunga for the plaintiff told the court that she was an innocent purchaser for value. He told the court that she deserved protection.

7. In her plaint in this suit, the plaintiff seeks judgment against the defendant for:

1. An order to the 2<sup>nd</sup> defendant to revert the plaintiff title being title No. Mwimbi/Chogoria/4243 excised from Mwimbi/Chogoria/2400 or pay back all the developments done therein by the plaintiff at current market price.

2. An order that the defendants to compensate the plaintiff of the development done on land parcel No. Mwimbi/Chogoria/2400 as per a recent valuation report.

3. The 1<sup>st</sup> defendant be condemned to pay the plaintiff the general and special damages she has suffered in the estate of Kanampiu Kabiru in particulars on land parcel No. Mwimbi/Chogoria/2400 by reason the 2<sup>nd</sup> defendant is the administrator and the 1<sup>st</sup> defendant is a beneficiaries (sic) therein.

4. Cost of the suit and interest at court rates.

8. In his ruling delivered on 17<sup>th</sup> May, 2017 after intimating misrepresentation, irregularity and activities bordering on fraud including wrong citation of the 2<sup>nd</sup> defendant's name allowed the apposite application in Chuka Succession Case No. 26 of 2016 in the following terms:

- (i) The grant issued on 16<sup>th</sup> June, 2004 to ALICE KATHURE KANAMPIU and confirmed on 16<sup>th</sup> January, 2006 is hereby revoked or annulled. A fresh grant in respect to the administration of the estate of the late KANAMPIU KABIRU (deceased) is hereby given to the applicant ALICE KATHURE JUSTUS. She shall henceforth administer the estate in accordance with the law and in view of the age of this cause and her own age I grant her liberty to apply for confirmation of grant before the expiry of the statutory period of six months.

- (ii) I further order the cancellation of all titles emanating from L.R. MWIMBI/CHOGORIA/2400 that is MWIMBI/CHOGORIA/4243, 4605, 4606, 4799, 4929, 5318 and 5319 and restoration of the original title L.R. MWIMBI/CHOGORIA/2400 in the name of deceased KANAMPIU KABIRU. The registrar of Lands Tharaka Nithi County is hereby directed to comply with this order forthwith.

- (iii) The respondents shall pay costs of this application.

9. I do note that there is an inexorable nexus between the plaintiff's prayers in her plaint and the orders issued in Chuka Succession No. 26 of 2016. This is more so especially in regard to prayer number 1 in the plaint which seeks an order directed to the 2<sup>nd</sup> defendant to revert the plaintiff's title being title No. Mwimbi/Chogoria/4243 excised from Mwimbi/Chogoria/2400 or pay back all the developments done therein by the plaintiff at current market prices. It is clear that title No. Mwimbi/Chogoria/4243 was one of the titles cancelled by Chuka Succession No.26 of 2016. The fact that she has consolidated a prayer for damages with a prayer for restoration of her title does not save her claim. She wants this court to sit as an appellate court regarding a decision made by a judge of similar horizontal and concurrent jurisdiction. I opine that I have no such jurisdiction. I also add that this is forum shopping at its worst. I wish to add that my decision in this matter has taken into account the contents of the plaintiff's Reply to the Preliminary Objection dated 7<sup>th</sup> September, 2017 but filed on 2<sup>nd</sup> October, 2017 which is wrongly headed as "Defendant Reply to Preliminary Objection dated 17<sup>th</sup> September, 2017"

10. The plaintiff has not controverted the fact that Nyeri Court of Appeal No. 97 of 2017 is pending. The claim for restoration, to the plaintiff, of parcel No. Mwimbi/Chogoria/4243 cannot be entertained when an appeal is in existence. I state it simply: I lack jurisdiction.

11. I have considered the pleadings in this suit and juxtapositioned them against the orders issued in Chuka Succession Case No. 26 of 2016. I find that the Preliminary Objection is meritorious. I find it necessary to dismiss this suit.

12. I wish to add that the plaintiff can claim damages against those she perceives to have caused her loss and damages. However, this is not tenable in this suit as it is framed.

13. This suit is dismissed.

14. Although generally, costs follow the event, I exercise my discretion and award NO costs to the defendants.

15. It is so ordered.

Delivered in open court at Chuka this **11<sup>th</sup> day of October, 2017** in the presence of:

CA: Ndegwa

Mutani present for 2<sup>nd</sup> defendant

Mercy Kawira Bundi – Plaintiff/Applicant present

**P.M. NJOROGE**

**JUDGE**