



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.173 OF 2014**

1. **ANTHONY ISAAC MWARO** (*suing as the Legal Administrator of the Estate of the Estate of*  
**FERDINAND KAHINDI MWARO (Deceased)**)

2. **EMILY KADEMU MWARO.....PLAINTIFFS**

**VERSUS**

1. **DIAMOND TRUST BANK KENYA LIMITED**

2. **SWALEH MOHAMED HEMED**

3. **REGISTRAR OF TITLES, MOMBASA.....DEFENDANTS**

**R U L I N G**

1. What is before me is the 2<sup>nd</sup> Plaintiff's Application dated 4<sup>th</sup> January, 2016 in which she is seeking for the following orders:-

(a) **THAT pending the hearing of this application the Defendants be restrained from proceeding on with the intended public auction sale of all that property known as Kilifi/Ngerenyi/909 scheduled for sale on 11<sup>th</sup> January 2016.**

(b) **THAT the court be pleased to review the Ruling delivered herein on 26<sup>th</sup> June, 2015 and in lieu thereof issue a temporary injunction order restraining the Defendants from selling, through a public auction, all that property known as Kilifi/Ngerenyi/909 while this suit is pending determination.**

(c) **THAT costs of this Application be provided for.**

2. In support of the Application, the 2<sup>nd</sup> Plaintiff has deponed that subsequent to the Ruling of 26<sup>th</sup> June, 2015, she joined in the suit as the 2<sup>nd</sup> Plaintiff; that the 1<sup>st</sup> Defendant has advertised the suit property for sale and that the proposed sale is highly improper and illegal because her husband was buried on the land and that no valuation has been done for over a year now thus rendering the intended sale illegal.

3. According to the 2<sup>nd</sup> Plaintiff, the circumstances under which the suit property changed hands from her late husband to the 2<sup>nd</sup> Defendant are highly questionable; that her family does not have another land

to live on and that in any event her husband's grave is on the suit land.

4. In response, the 1<sup>st</sup> Defendant's Debt Recovery Officer deponed that the Application is an abuse of the court process; that a similar application dated 23<sup>rd</sup> September, 2014 was filed by the Applicant herein seeking for injunctive orders and that the said Application was dismissed by this court.

5. According to the 1<sup>st</sup> Defendant, the Application before the court has not introduced any new issues; that the allegations raised in the application contradicts the contents of paragraphs 6 and 7 of the Plaintiff and that the charge was registered after the Land Control Board gave its consent.

6. The advocates for the parties appeared before me on 4<sup>th</sup> April, 2016 and made oral submissions.

7. The 2<sup>nd</sup> Plaintiff's advocate submitted that when the first application for injunction was argued, the court was not informed of the presence of a grave yard on the suit property; that the court should look at the bigger picture other than the commercial transaction *per se*; that the issue of the fraudulent transfer of the title should be considered and that a valuation report has never been done in respect of the suit property for the past one year.

8. The 1<sup>st</sup> Defendant's counsel submitted that having lodged an appeal in respect to the first Ruling, the Applicant cannot file an Application for review; that the Applicant has not annexed on the Application the copy of the order that they seek to review and that the grounds in the current Application are the same grounds which were in the first Application that was dismissed by this court.

9. The 2<sup>nd</sup> Plaintiff was enjoined in this suit vide her Application dated 10<sup>th</sup> September, 2015. In the said Application, the Applicant sought for injunctive orders restraining the 1<sup>st</sup> Defendant from selling the suit property by public auction in exercise of its statutory power of sale.

10. In the said Application, the Applicant relied on the grounds that she is a necessary party and that she has spousal rights over the suit property.

11. The Applicant also relied on the ground that her late husband's signature on the instrument of transfer conveying the land to the 2<sup>nd</sup> Defendant who later on charged it to the 1<sup>st</sup> Defendant was forged.

12. By the consent of the parties, the court enjoined the Applicant as a party to the proceedings but proceeded to dismiss her claim for an order of injunction.

13. Before then, this court had dismissed the Application dated 23<sup>rd</sup> September 2014 and filed by the 1<sup>st</sup> Plaintiff.

14. In the said Application, the 1<sup>st</sup> Plaintiff pleaded that the suit property was fraudulently transferred to the 2<sup>nd</sup> Defendant and that the suit property is the only land belonging to the deceased.

15. This court dismissed the two Applications seeking for injunctive orders on 26<sup>th</sup> June, 2015 and 20<sup>th</sup> November, 2015 respectively.

16. Indeed, the 1<sup>st</sup> Plaintiff filed a Notice of Appeal dated 6<sup>th</sup> July, 2015 challenging the Ruling of this court.

17. The 2<sup>nd</sup> Plaintiff has now filed a third Application seeking to review the Ruling of 20<sup>th</sup> November, 2015 on the ground that her husband was buried on the suit property; that she actually resides on the suit property and that the transfer of the suit property from her late husband to the 2<sup>nd</sup> Defendant was fraudulent.

18. The issue of whether the suit property was transferred by the deceased to the 2<sup>nd</sup> Defendant or not was dealt with by this court in the two Rulings that I have already alluded to. That issue is therefore res judicata and can only be raised on appeal.

19. The Applicant all along knew that her husband was buried on the land. The issue of her husband having being buried on the land cannot therefore be said to be a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge of the Applicant.

20. In any event, I have not been shown any law or legal precedent that says that a bank cannot exercise its statutory power of sale over a property that has a grave.

21. For those reasons, I find that the application does not meet the threshold required for review of a Ruling.

22. Consequently, the Application dated 4<sup>th</sup> January, 2016 is dismissed with costs.

Dated, signed and delivered in Malindi this 23<sup>rd</sup> day of **September**, 2016.

**O. A. Angote**

**Judge**