



**Wepukhulu v Khauka (Being sued as Administrator of the Estate of the Late Luka Masakha)  
(Environment & Land Case 11 of 2014) [2023] KEELC 15806 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15806 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 11 OF 2014  
EC CHERONO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**GEORGE WEPUKHULU ..... APPLICANT**

**AND**

**ALFRED WAFULA KHAUKA (BEING SUED AS ADMINISTRATOR OF THE  
ESTATE OF THE LATE LUKA MASAKHA) ..... RESPONDENT**

**RULING**

1. By a Chamber Summons application dated September 19, 2022, the applicant moved this Honourable Court seeking the following orders;
  1. That this court do order the Deputy Registrar to sign mutation and transfer form and partition form in regard to land parcel No EAST BUKUSU/SOUTH KANDUYI/121 on behalf of the applicant herein and as per the judgment and decree issued on July 30, 2015 by Hon Justice Mr S Mukunya.
  2. Costs be in the cause.
2. The application is based on grounds apparent on the face of the said application and the supporting affidavit of the applicant sworn on even date. The supporting affidavit is further supported by numerous annexures thereto including the Judgment and Decree of this Honourable court delivered by Hon Justice Mukunya on July 30, 2015. Also annexed to the said supporting affidavit is mutation form, a sketch or development plan and a field diagram and observations on site.
3. In his affidavit, the applicant states that in the judgment and Decree of this Honourable court, he was to be transferred three and a half acres from land parcel NO EAST BUKUSU/SOUTH KANDUYI/121. He further stated that after he presented the duly executed documents, mutation and transfer form as



well as the partition forms, the respondent, blatantly refused to execute the same and has with threats trespassed and encroached on his parcel of land with intention to disinherit him from his land.

4. By way of a response, the respondent filed a replying affidavit and grounds of opposition. In his replying affidavit, the respondent deposed that he had filed a Succession cause vide Bungoma HCC Succession Cause NO 15 of 1999 and the Grant was confirmed on January 30, 2013. However, when the certificate of confirmed grant was presented, they found restrictions had been placed by the applicant on the land but they went back to the probate court and obtained an order for the removal of the same. The respondent further stated the respondent again registered the decree of this Honourable court on the transmitted parcels thereby causing a total stalemate. He said that they have lodged appeal at the court of Appeal in Kisumu vide CA NO134 of 2019

### **Analysis and Decision**

5. I have considered the Chamber Summons application dated September 19, 2022 and the affidavit evidence as well as the submissions by counsel and the applicable law. What falls for my determination in the said application is whether there is a judgment and Decree by a court of competent jurisdiction and whether the applicant is deserving of the orders sought. It is not in dispute that there is a valid judgment and Decree issued by this Honourable court on July 30, 2015. It is not also in dispute that the respondent attempted to set aside and/or review the said Judgment and Decree vide a Notice of Motion dated September 25, 2018. However, the said application was dismissed by Hon Justice Boaz Olao vide a Ruling delivered on May 9, 2019.
6. The Respondent contends that he has preferred an Appeal to the Court of Appeal at Kisumu being CA No 134 of 2019 (Kisumu). With tremendous respect, an appeal itself cannot operate as a stay. An aggrieved party must make an application for stay either before the trial court or the court in which the Appeal has been preferred. The respondent has not deposed in his replying affidavit that he made an application for stay pending Appeal pursuant to Order 42 Rule6(2) CPR.
7. The other issue that has been raised by the respondent both in his supporting affidavit and grounds of opposition is whether this Honourable court was seized with jurisdiction to determine the dispute and grant the orders now under review considering that there was a Succession cause before the Probate court being HCC Succession Cause No 15 of 1999. From the Ruling by my brother Hon Justice Boaz Olao delivered on May 9, 2019, those issues arose and were analysed by the learned Judge blow by blow. At page 5 of his Ruling, Hon Justice Olao observed as follows;

' What I gather from the submissions by Mr Sichangi Advocate is that since the suit land was registered in the names of the deceased and was part of the subject in Bungoma Succession Cause-no 15 Of 1999, then Mukunya J should not have determined this case. This is what Mr Sichangi has submitted;

' Your Lordship our big argument is that the land Court is essentially the Court that deals with those parcels of Land that are registered in the names of living persons. When this Honourable Court heard and determined a suit in respect of land registered in the names of a deceased person even if Succession was pending, it was an error.'

The answer to that submission is that a claim for adverse possession can be instituted against the estate of a deceased person. This was confirmed in



*Karuntimi Raiji V M'makinya M' Itunga, Civil Appeal No 325 OF 2009 (2013) eKLR.* See also Section 2(1) of the *Law Reform Act* which provides that;

'Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate;

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the grounds of adultery.'

8. See also *J Makokha & Others V Ferdinand Mufutu & Another Bungoma Elc Case No 21 OF 2009 (2019) eKLR.* Those authorities and the Law should answer the issue raised by Mr Sichangi when he submits further that;-

' Our final submission is if no review is done, how will the Judgment herein be effected to subdivide and transfer land measuring three and a half acres from the names of a deceased person to the decree holder's name.'

9. Having elected not to appeal the judgment of Mukunya J delivered on July 30, 2015, the Defendant/Applicant, as the Administrator of the Estate of the deceased, has no option but to abide by the decree that followed.'
10. I agree with the evaluation and analysis by OLAO J on the issue raised which are applicable to the present application. The arguments raised by the respondent that there are two parallel decisions causing confusion only exist in the figment of his imaginations.
11. The upshot of the above is that the Chamber Summons application dated September 19, 2022 is merited and the same is allowed as prayed.
12. Orders accordingly

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 23<sup>RD</sup> FEBRUARY, 2023**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

Juma Waswa for Applicant.

Oyando holding brief Sichangi for Respondent

