



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 736 OF 2007**

**IN THE MATTER OF THE ESTATE OF PHILIP MBAISA MACHIRU (DECEASED)**

**BETWEEN**

**SELINA MUMBOKA SHIVAVA ..... OBJECTOR/APPLICANT**

**AND**

**ENOCK ISIAHO MMBAITHA ..... PETITIONER/RESPONDENT**

**RULING**

1. Now before the Court is a Summons for Revocation of Grant in relation to the Estate of Philip Mbaisa Machiru and a parcel of land known as KAKAMEGA/SHIRU/902. The Summons for Revocation was filed by a Selina Mumboka Shivava. The Summons was filed in 29<sup>th</sup> October 2010. It seems the suit was dismissed for want of prosecution on 7<sup>th</sup> July 2015.

2. The matter still had not been resolved by 25<sup>th</sup> September 2019, when Philip Shibira Chibini filed an application for the suit to be reinstated and for him to be substituted as the Objector. The reason given for the delay was that Selina Momboka had passed away and therefore it was not correct to say they had lost interest in their application. Philip Shibira had also obtained Letters of Administration for the Estate of Selina Mumboka in ***Kakamega CM (Misc/Succ) 35 of 2019***

3. The Application for substitution was allowed on 16<sup>th</sup> December 2020. Thereafter the Parties were directed to file written submissions. The Respondent through his Advocate states that he will rely on his Replying Affidavit. The Applicant was directed to file submissions by 16<sup>th</sup> December 2020 and has not done so.

4. The Summons for Revocation is brought under ***Under Section 76 (a), (b) & (c) of the Law of Succession Act Cap 160 Laws of Kenya, Rules 44 and 73 of the Probate and Administration Rules***. The Applicant seeks the following Orders:

*1. That the Honourable Court be pleased to certify this application as urgent and hear the same on priority basis.(spent)*

*2. That the Honourable court be pleased to direct that the Grant of Representation issued to the Respondent/Petitioner herein 29<sup>th</sup> November 2007 and confirmed on 3<sup>rd</sup> August 2008 be annulled and/or revoked.*

*3. That any transfer and/or sub-division of Title to land parcel No. **KAKAMEGA/SHIRU/902** from the names of the deceased into the names of the Respondent/Petitioner or any third party be canceled and/or annulled.*

*4. That pending the hearing and determination of this application, an order of restriction be registered against the title to land*

parcel number **KAKAMEGA/SHIRU/902**; restricting any transfer to any third party by the Respondent/Petitioner or any other dealing in the said land by the Respondent/Petitioner.

5. That pending the hearing and determination of this application, the Honourable Court be pleased to stay proceedings in **Kakamega CMCC No. 184 of 2009 Enock Isiaho Mmbaita –Vs- Stephen Mulinya Anene and Gladys Keguti Likanga**.

6. That the costs of this application be provided for.”

5. The grounds relied upon which appear on the face of the Application are:

1. That the proceedings to obtain the grant were defective in substance.

2. That the Respondent/Petitioner obtained the grant through fraud and misrepresentation of fact.

3. That the Respondent/Petitioner obtained the grant by concealing from the Court the full and actual beneficiaries to the Estate.

4. That the Respondent/Petitioner has since transferred land parcel No. **KAKAMEGA/SHIRU/902** to his names.

5. That the Respondent/petitioner has since filed a case in Kakamega Law Courts vide **Kakamega CMCC No. 184 of 2009 Enock Isiaho Mmbaita –Vs- Stephen Mulinya Anene and Gladys Keguti Likanga** seeking orders to evict beneficiaries to the deceased estate.

6. That the Applicant/Objector and other beneficiaries stand to suffer if the orders prayed for are not granted.

7. That it is in the interest of justice that this application is allowed”.

6. The Application is supported by the affidavit of **SELINA MUMBOKA SHIVAVA** the Applicant/Objector. She sets out the history and says,

1. That I am the widow of the late Yohan Shivava Chivini who died on 23<sup>rd</sup> August, 1994. Annexed and marked “**SMS 1 (a) and (b)**” is a copy of the death certificate and beneficiary letter from the Chief.

2. That I know as of personal knowledge that my late husband was a son to the Angalushi Lutindi and his 2<sup>nd</sup> wife Nasenje Angalushi.

3. That I know as of personal knowledge that my late husband had one real brother namely Anene Angalushi (also deceased).

4. That when I got married to my husband he informed me which information I verily believed to be true that their father died in 1941 and that in 1948 together with his brother Anene Angalushi; they cleared off a section of their father’s land that borders the forest and started using it for cultivating crops.

5. That the said land was then sub-divided into two portions where his brother Anene took approximately 1.5 acres while the other 1 acre was taken by my late husband. The portions were clearly sub-divided and boundaries marked using sisal like plants.

6. That when I got married to my late husband in mid 1950’s we established our matrimonial house on the section where the father resided and we then used his portion of the cleared land for cultivation, the same applied to my late brother in-law Anene Angalushi. At that time the land was not registered.

7. That over the years we used the land for cultivation without any interference.

8. That sometimes in 1964 one Philip Mmbaita Machiru (the deceased herein) a timber vendor; who had a license from the Forestry Department asked my brother in-law Anene Angalushi to allow him to use part of his portion of the cleared land for

*purposes of storing his timber before transporting the same to designated areas.*

*9. That the said Anene Angaliushi allowed him to occupy part of his portion and even allowed him to use a structure he had constructed for storage of timber and his employee's residence. The other remaining portion Anene Angalushi and his family members continued to cultivate while my late husband and I continued to cultivate our portion.*

*10. That I know as of personal knowledge that my brother in law Anene Angalushi passed away 1982.*

*11. That I know as of personal knowledge that in 1982 after the death of Anene Angalushi the Clan elders and village elders summoned the deceased and asked if he wanted to resettled in the land he should pay the deceased beneficiaries and the land will be left to his family; the deceased agreed to the proposal and stated that he will inform his seven sons to give each Kshs. 1,000/= and the total of Kshs. 7,000/= will be paid to the family of Anene Angalushi.*

*12. That I know as of personal knowledge that without paying the consideration in 1983 the deceased herein moved into Anene Angalushi portion with his family and established a home. The deceased then denied late Anene Angalushi wife and children from using the land.*

*13. That I know as of personal knowledge that my late brother in-law's son Steven Anene and his mother Malida Ishilingi Anene immediately followed up with the Provincial Administration and the Land's office and learnt that the deceased had transferred the land in his name. They were advised to lodge a caution. The land was now known as **KAKAMEGA/SHIRU/902**.*

*14. That I was informed by the said Malida Ishilingi Anene and Steven Anene that at the Land's office Malida Ishilingi Anene thump printed on the necessary papers and was advised to return after one week.*

*15. That I am informed by nephew Steven Anene that upon his return to the Land's office he was issued with a pink card and was informed that the caution was successfully lodged and it would remain in effect for the next 50 years; he was advised to keep the card safely; the said Steven Anene being illiterate was not able to read the contents of the card and since he had no reason to doubt the Land official he did as was advised. That annexed and marked "SMS 2" is a copy of the said card from the Land's office.*

*16. That I am informed by Steven Anene which information I verily believe to be true that on 8<sup>th</sup> June 2009 he received summons in **Kakamega CMCC No. 184 of 2009**, which related to the land and he immediately visited the land office in Mbale and was informed that the information I had received in 1983 was not accurate as he should have been visiting the office after every six months, they then advised him to engage a lawyer to defend him in the case.*

*17. That I know as of personal knowledge that when my husband and I learnt about the registration in 1983 we reported the matter to the area Chief. On 22<sup>nd</sup> March 1983 a meeting was convened and in the presence of elders the deceased herein with his children confirmed that the boundary between where he occupied and my family occupied still existed as it was when the two brothers sub-divided the land. The assistant Chief later proceeded to verify the boundaries in person. Annexed and marked "SMS 3" is a copy of the letter from the village elder.*

*18. That with the assurances from the deceased in the aforesaid letter we believed that portion belonging to my late husband was not part of registered portion.*

*19. That I know as of personal knowledge that the deceased and my family continued to live in harmony without any problems.*

*20. That I know as of personal knowledge that the late Anene's son Steven Anene after registering the caution in 1983 and having assurances from the Land's office of the caution went back to his work place in Narok the same year and returned home in 1992 when the deceased had already passed away.*

*21. That I know as of personal knowledge that on several occasions prior the deceased promised to compensate Steven Anene on behalf of his late father and the same was never done.*

*22. That after the death of the deceased herein the Respondent/petitioner agreed on 24<sup>th</sup> September 1992 before the Chief and*

village elders to pay Steven Anene Kshs. 7,000/= being land debt. The same has never been paid. Annexed and marked "SMS 4" is a copy of the said agreement dated 24<sup>th</sup> September, 1992.

23. That I know as of personal knowledge that on 19<sup>th</sup> September 1992 my late husband sold part of his portion to Laban Liyai and Fredrick Liyai; the said Fredrick Liyai immediately established a home on the said part. Annexed and marked "SMS 5" is a copy of the sale agreement.

24. That I know as of personal knowledge that at the time of sale of the said portion my late husband and I were not aware that his portion was part of land parcel No. **KAKAMEGA/SHIRU/902**, as we had been assured by the deceased that the land belonged to my late husband as per annexure SMS.3.

25. That on the remaining portion I continue to conduct subsistence farming.

26. That the said Fredrick and his family members established their home without any complaints from the Respondent/Petitioner who were then residing on the other portion.

27. That sometimes in the year 1998 the area Chief was found murdered and the Respondent/Petitioner was arrested in connection to the murder; the villagers descended on his whole family and sent them away and brought down their home.

28. That I know as of personal knowledge that since the land was vacant my nephew Steven Anene approached the elders if he could be resettled back on his father's land since the deceased family had failed to compensate him. On 23<sup>rd</sup> June 1998 they resolved that since there was no compensation Steven should return back to the land. Annexed and marked "SMS 6" is a copy of the minutes for the meeting.

29. That since 1998 Steven has been residing on his late father's portion of land and no member of the deceased family has ever returned.

30. That after the release of the Petitioner herein, I was informed he was desirous of processing the title and I advised my son Philip Chibini to register a restriction. The said restriction was later removed by the Land Registrar without informing the relevant parties. Annexed and marked "SMS 7" is a copy of the green card.

31. That I know as of personal knowledge that Gladys Keguti Likanya (a widow to the buyer Fredrick Liyai) was served in April 2010 with an order relating to **Kakamega CMCC No. 184 of 2009 Enoch Isiaho Mmbaita -Vs- Stephen Mulinya Anene and Gladys Keguti Likanya**. Annexed and marked "SMS 8" is a copy of the order.

32. That in the case above mentioned the Respondent/Petitioner is the Plaintiff and he is seeking injunctive orders against the Stephen Anene and Gladys Likanya.

33. That I had a problem tracing the right Succession Cause File No. as the one indicated in green card was No. 936 of 2008.

34. That in view of the above the deceased took advantage of the kindness accorded to him by two brothers and went behind their backs and had the whole land registered in his names. None of the brother at the time of their deaths knew that the deceased had their portions registered in his names.

35. That I am informed by my advocate on record which information I verily believe to be true that even if my late husband and the brother were to file a suit against the deceased registration it would have been impossible to get appropriate orders due to the law relating to first registration.

36. That it is clear from the above that even if the deceased was the registered owner he did not evict/stop me or any of my immediate family members from utilizing the land that belonged to my late husband.

37. That even after his death the beneficiaries did not have a problem with me utilizing that land and they had agreed to compensate Anene's kin for occupying the land.

38. *That since the land is now registered in the names of the Respondent/Petitioner my beneficiary rights are under actual threats of being deprived of their ancestral land.*

39. *That at the time of filing this succession cause, the Petitioner was aware of the late Anene Angalushi's beneficiaries interest and my interest in the suit parcel and he concealed this very important matters from the court.*

40. *That I know as of personal knowledge that the outcome of his application will be key in determination of the subordinate case i.e. **Kakamega CMCC No. 184 of 2009 Enoch Isiaho Mmbaita –Vs- Stephen Mulinya Anene and Gladys Keguti Likanya** and I thus pray that the court does order that the proceedings of the case be stayed pending the hearing and determination of this cause.*

41. *That in view of the foregoing it is clear that the proceedings to obtain the grant were defective in substance and the Respondent/Petitioner misled the court by concealing important facts and obtaining the grant through fraud and misrepresentation of facts.*

42. *What the Applicant/Objector together with the other beneficiaries will be rendered destitute if this Application is not granted.....”.*

7. The Respondent, **ENOCK ISIAHO MMBAITHA** opposes the Application. He has filed a Replying Affidavit. In it he states:

1. *That the application lacks merit, the same has been overtaken by events, as the subject matter being land parcel number **KAKAMEGA/SHIRU/902** having been registered in my name, this Court lacks jurisdiction to entertain the same.*

2. *That it is within my knowledge that this Court sought to be challenged vide the application dated 29.10.20 being **Kakamega CMCC Number 184 of 2009** has already been heard and a decision made by a copy of competent jurisdiction way by the applicant is to be evicted therefrom. Annexed hereto is copy of judgment marked “E.I.M 1”.*

3. *That the applicant is guilty of laches no explanation has been given as to why he seems to reinstate an application dismissed more than 3 years ago for failure of being prosecuted.*

4. *That the applications are yet to challenge the judgment of the Environment and Land Court where the Applicant and his family were to be evicted from the said parcel of land when the court do by way of the current application herein.*

5. *That I therefore swear this affidavit in opposing the applicant's application dated 25<sup>th</sup> September, 2019 which ought to be dismissed and or struck out with costs.”.*

8. As can be seen from the above, the dispute relates principally to either **Land Parcel Number Kakamega/Shiru/902**, a part of it and/or adjoining land. It was said to comprise the Estate of the Late Philip Mbaisa Machiru who passed away in Ileho Sub-Location on 1<sup>st</sup> June 1992, however the succession cause was not commenced until 2007.

9. In substance, the Objector/the late Selina is objecting to the inclusion of the Land Parcel Number Kakamega/Shiru/902 as an asset of the Estate of the Deceased Philip Mbaisa. The Administrator/Respondent opposes the Application and states that it is superseded by events because the Environment and Land Court has ruled on the matter thereby excluding this Court's jurisdiction. The Respondent is also embroiled in proceedings in the lower court to evict other members of the Objector's wider family from the land parcel in dispute.

10. In summary, it is the Objector's case that the whole of the land parcel – or perhaps a larger portion, was initially (around 1940s) owned by one **ANGALUSHI LUTINDI**. Angalushi Lutindi and his Wife **NASENJE ANGALUSHI**, had two sons. One was the husband of the Objector Selina and the Father of the Objector, **PHILIP MBAITSA**. The other was **ANENE ANGALUSHI**. Angalushi Lutindi is said to have died in 1941 and by 1948 the two sons cleared that part of the land that bordered the forest and began planting crops. They also divided the land so that 1.5 acres was given the Anene and the remaining 1 acre was given to **YOHANA SHIVAVA CHIVINI**. Anene and his family including his wife Malida Ishilingi and son, **STEVEN ANENE** continued to live on their portion and Yohana and the Objector's family continued to live on and cultivate theirs. Around 1964 the Deceased who was a timber merchant with a licence from the Forestry Department, asked Anene to permit him to store the timber awaiting distribution on Anene's portion of the land. Anene gave him permission and also allowed him to construct a storage facility and a

residence for his employee. Anene and his family continued to reside on and cultivate the land. Anene Angalushi passed away in 1982. Around 1983 the Deceased entered into the land and established a home on Anene's portion and attempted to evict the family already resident there. It is said that the Clan Elders and the Village Elders summoned the Deceased and said that he could buy the land for KShs.7,000/= to be paid to Anene Angalushi's family. Philip never paid that money but he nevertheless moved in. Anene Angalushi's family were concerned so they lodged a caution against the property, for which they were given a receipt. By a process they do not understand, Philip Mbaisa Muchiru managed to transfer the land into his name and it was registered as **KAKAMEGA/SHIRU/902**. The next they knew was that Steven Anene received summons in ***Kakamega CMCC No 184 of 2009***. When he visited the lands office in Mbale for clarification, he was advised to instruct an Advocate to defend the claim. The Deponent of the Affidavit is adamant that the Deceased was to pay the heirs of Anene KShs.7,000/= which has never been done despite various promises. The Respondent disputes this version of events however, SMS 4 is an agreement where he, Enock I Mmbaitha recognizes that the Deceased had promised to pay and the debt was still outstanding in 1992. He then promised to make the same payment of KShs.7,000/=. The Respondent has failed to produce any evidence to demonstrate that such payment was made.

11. Meanwhile in ***Kakamega CMCC No. 184 of 2009***, the Respondent obtained judgment in default which appears to have been set aside. It appears that the suit was commenced on the strength of the title deed issued to Enock Isiaho Mmbaitha pursuant to this Succession Cause No. 937 of 2007. The Identity Card Number recorded in the Green Card is 3270655. The Identity Card Number set down in the Agreement and promise to pay dated 24<sup>th</sup> September 1992 was 3270655/66 demonstrating that the person who promised to pay, is the same person who then told the High Court that his Deceased Father owned the Property. It was further agreed that the payment would be made within 9 months. It seems even as late as 10<sup>th</sup> September 2007, the payment had not been made as Philip Shibira Chivini place a restriction on the property. According to the Petition, the Deceased passed away on 1<sup>st</sup> June 1992. That was 9 years after the first agreement to make the payment of KShs.7,000/=. Several months later, another agreement was made but there is no evidence before the Court that the payment was ever made. In his Replying Affidavit, the Respondent relies on the Judgment of the ELC in and the Chief Magistrate's Court in CMCC No 184 of 2009 which themselves rely on the Confirmed Grant in this Succession Cause. In particular, the Judgment of Lady Justice N.A. Matheka in ***ELC Case No. 124 of 2015*** states that ***"the plaintiff testified that he inherited the land from his father. PEx4 is the certificate of confirmation of grant in Kakamega Succession Cause No. 736 of 2007...."*** The Respondent also told the Court that he was imprisoned for 10 years in ***Kakamega High Court Criminal Case No. 24 of 1998*** and when he came out he found "the defendant's had invaded his land...". That corresponds with the Late Silvia's statement that the Respondent was considered to have some connection with the death of the Chief. In coming to its decision that Court relied on Section 26(1)(a) and(b) of the Land Registration Act which was elucidated by Hon Justice Munyao Sila as follows: "... the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title was acquired through a corrupt scheme. (Elijah Makeri Nyangw'ra -v- Stephen Mungai Njuguna & Anor (2013).

12. Consideration of the Petition demonstrates that the Petition contains a glaring error. It fails to record that the Deceased owed money to the Family of Anene. There is no evidence produced that the money was since paid. In the circumstances, the Letters of Administration and the Confirmation of Grant were obtained by the Respondent actively suppressing those facts.

13. The Objector also raises a valid point that although a portion was registered and that should be the portion previously owned by Anene, it would definitely not include the portion owned by Yohana as that was not sold and was occupied by the Objector and her son. Even the documents Exhibited by the Petitioner do not suggest and/or state that Yohana was a party to any sale and/or transfer. That, puts the exact parameters of the land Philip Mbaisa intended to purchase. This conclusion is supported by the fact that the Objector deponed that when the land was sub-divided into two portions Anene took approximately 1.5 acres and Yohan Shivava took 1 acre. The two brothers had clearly marked the boundaries using sisal-like plants. The Respondent registered his ownership of a portion of 0.6 hectares, that amounts to approximately 1.4 acres. Therefore, there is a clear indication that there had never been a sale or even an offer for sale of the full 2.5 acres. In the circumstances the acquisition of the whole parcel by the Respondent is even more irregular than the assertion that he, or his father, had purchased land for which they had never paid.

14. For those reasons the Letters of administration are cancelled and the grant is revoked, Further, any registration and/or any other consequence emanating from that grant is cancelled.

15. It is further ordered that:

(i) the County Surveyor shall visit the land and measure its size. He/She will prepare a plan showing which portion is claimed by the Objector and that which is claimed by the Respondent. Such plan shall be filed with the Court and served on the Parties not later

than 15th September 2022.

(ii) Thereafter, this matter shall be listed for further directions.

(iii) The Registrar of lands is directed to attend court on the next date and bring with him the file relating to the parcel of land in dispute.

(iv) List for Directions on 4<sup>th</sup> October 2021.

(v) Hon Deputy Registrar to serve orders on the Lands Registrar and Surveyor.

Order accordingly,

**FARAH S.M. AMIN**

**JUDGE**

Delivered dated and signed on this the 27<sup>th</sup> day of July 2021 at Kakamega on line and in Open Court

In the Presence of:

Court Assistant: Clement Okoit

Applicant/Objector:

Respondent/Administrator:



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