



**In re Estate of Wanyama Mwolela & Malaba Mwolela (Deceased) (Succession Cause 67 & 66 of 2005 (Consolidated)) [2024] KEHC 10394 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 67 & 66 OF 2005 (CONSOLIDATED)**

**DK KEMEL, J  
AUGUST 23, 2024**

**IN THE MATTER OF**

**WYCLIFFE W. WANYONYI ..... 1<sup>ST</sup> PETITIONER**

**STANELY W. MWOLELA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MAURICE MANYASI WETILA ..... 1<sup>ST</sup> APPLICANT**

**COSMAS WAMBANI MARISININO ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. Vide a Notice of Motion application dated 27<sup>th</sup> August 2023, and filed in Court on 26<sup>th</sup> September 2023, the Interested Parties herein pursuant to Order 40 Rules (1) & (4) & Order 51 Rule (1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, CAP 21 Laws of Kenya and Articles 40 & 159 of the Constitution seek the following orders: -
  - a. Spent;
  - b. That leave be granted to the intended interested parties herein to be enjoined in the suit herein;
  - c. Pending hearing of this application interpartes, injunctive orders be granted restraining the Respondents/Petitioners whether by themselves, their agents, servants or otherwise from interfering with, or doing anything prejudicial to the Interested Parties quiet enjoyment and occupation of their purchased and well demarcated portions of land from land parcel E. Bukusu/E. Sang'alo/176 sub-divided into parcels E. Bukusu/E. Sang'alo/2980-3006;
  - d. Pending hearing and determination of this suit, injunctive orders be granted restraining the Respondents/Petitioners whether by themselves, their agents, servants or otherwise from interfering with already demarcated boundaries or doing anything prejudicial to the Interested



Parties quiet enjoyment and occupation of their purchased lands and well demarcated portions vide parcels E. Bukusu/E. Sang'alo/2980-3006;

- e. Pending hearing and determination of this suit, the status quo be maintained.
  - f. The costs be in the cause.
2. The application was supported by the grounds on the face of it and a supporting affidavit sworn by the 1<sup>st</sup> Interested Party herein, Chrispinus Waswa Wamalwa, on even date. He avers that the Interested Parties herein are interested parties in this matter as lawful purchases of parcels from land parcel E. Bukusu/E. Sang'alo/176. Their successful purchase brought about sub-division of LR NO.E. Bukusu/E. Sang'alo/176 into LR. NO. E. Bukusu/E. Sang'alo/2980 up to 3006 and that their occupation of this sub-divided portions has been peaceful. He avers that the recorded consent by the Petitioners and the Applicants that brought about to the revocation of the Grant dated 16<sup>th</sup> March 2007 was in error as the parties approached the court with unclean hands and that they did not involve the Interested Parties. He avers that the joinder of the Interested Parties herein will be crucial to the resolution of issues. He avers that their receipt of an order issued by this Court authorizing the immediate cancellation of their titles is unlawful and full of malice on the part of the Petitioners as the same were acquired vide a valid sale for value 13 years ago. He avers that unless restrained, the Petitioners move to effect the order of this Court will cause prejudice on the Interested Parties and caused breach of peace and cause them irreparable loss. He argued that it is in the interest of justice that the orders sought are granted.
  3. In response to the application, the Applicants herein swore a replying affidavit on 28<sup>th</sup> October 2023, wherein he averred that the application dated 27<sup>th</sup> August 2023, is a total abuse of the Court process and that the Petitioners and the Applicants recorded a Consent Order on 27<sup>th</sup> April 2023, which was duly adopted by this Court which cannot be set aside. They aver that the Interested Parties herein are duly captured in the mode of distribution as beneficiaries and liabilities of the estate of the deceased as per the copy of the consent mode of distribution availed and that the Petitioners proceeded to file Summons for Confirmation of Grant dated 9<sup>th</sup> June 2023 which is pending determination. They aver that the Interested Parties application is simply a derailment from the key issue at hand which is confirmation of the grant considering that this matter is an old one. He urged this Court to dismiss the application.
  4. Both parties opted to rely on their rival affidavits as filed.
  5. A brief history of this matter is that, the succession cause for the late Wanyonyi Mwolela was filed and that grant of letters of administration were issued on 9<sup>th</sup> November 2005 and subsequently confirmed on 16<sup>th</sup> March 2007. The Applicants herein vide Summons for Revocation/Annulment of Confirmed Grant approached this Court seeking to have the Grant revoked on the grounds that the same was obtained fraudulently by making of a false statement and concealment of material facts. Vide a Consent Order issued on 3<sup>rd</sup> May 2023 and duly adopted by this Court on 27<sup>th</sup> April 2023, this Court revoked the Grant issued on 16<sup>th</sup> March 2007 and subsequent Certificate of Confirmation; the new numbers emanating from land parcel number E. Bukusu/E. Sang'alo/176 were cancelled and that the same was to be registered in the joint names of Wanyonyi Mwolela and Malaba Mwolela; fresh summons for Confirmation of Grant and mode of sharing to be filed within 21 days. The Petitioners and Applicants complied as fresh summons were filed with the consent to the mode of distribution of the estate dated 18<sup>th</sup> July 2023 attached.
  6. The application, dated 27<sup>th</sup> August 2023, is one of those where a party seeks to be “enjoined” as an Interested Party. If the Court were to strictly take the word “enjoin” for what it means, the application would be struck out for making no sense at all. “Enjoin” means to “urge” or “injunct.” I am sure that is not what the applicant intended to ask the Court to order. The proper prayer should be for an order



to be “joined.” The word “enjoin” is not used in any of the provisions in the Civil Procedure Act, cap 21, Laws of Kenya, and the Civil Procedure Rules, for joinder or adding of parties to a cause.

7. The Law of Succession Act, cap 160, Laws of Kenya, and the Probate and Administration Rules do not provide for joinder of Interested Parties. That would leave room for whoever seeks intervention in a probate matter to just file their application, without seeking leave to be added as a party. There are no parties in a succession cause, for such cause is not a suit in the same vein with the suits envisaged in the Civil Procedure Act and the Civil Procedure Rules.
8. A perusal of the Court record reveals that upon revocation of the Grant issued on 9<sup>th</sup> November 2005 and subsequently confirmed on 16<sup>th</sup> March 2007, the Petitioners and Applicants are trying their best to ensure that their fresh summons and consent mode of distribution of the estate of the deceased is concluded to ensure that all parties continue to enjoy the peaceful enjoyment of their requisite apportioned portions. It is imperative to note that the Petitioners and Applicants herein are trying their best to regularize the issues with regard to the estate of the deceased and once they have the requisite Certificate of Confirmation, they can proceed to handle the issue of fresh titles under the newly issued and confirmed Grant. I have noted that the interests of the Interested Parties have been factored in the fresh summons and consented mode of distribution as filed.
9. The Application has also been brought by way of Notice of Motion and no provision of the Law of Succession Act has been cited as a basis thereof. However, Rule 49 of the Probate and Administration Rules provides as follows:

“ a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file summons supported if necessary by affidavit.”
10. I see no reason to grant the prayers (no. 2) as sought in the application, dated 27<sup>th</sup> August 2023, because it is needless. Let the interested parties file whatever application that they have in mind, the Court shall deal with it on its own merits.
11. On the injunctive and/or conservatory orders with regard to the title LR. No. E. Bukusu/E. Sang’alo/176, in the case of In re estate of Solomon Mwangi Waweru (deceased) (2018) eKLR, A.K. Ndungu J remarked as follows:

“ Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

.....

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.
12. The matter of maintenance of a status quo, enjoyment of title and land use by the Interested Parties herein are matters under the already revoked Grant that established their faulty titles cannot be



entertained. The only role of this Court, as a Probate Court, is the distribution of the property of a dead person. The law which governs this area of distribution of assets of a dead person is the Law of Succession Act, cap 160, Laws of Kenya. This entails distribution of assets that were undisputedly owned by the deceased. Assets that were unencumbered or the subject of ownership disputes were not undisputedly owned by the deceased, and were not available for distribution by the Court until the encumbrances were removed or the ownership disputes resolved. Prayers no. 3, 4 & 5 as sought in the application, dated 27<sup>th</sup> August 2023, as they are squarely within the province of the Environment & Land Court and not this Court. Article 162(b) of the Constitution gives to the Environment and Land Court the sole mandate and jurisdiction to determine issues of ownership, use and occupation of land.

13. As noted above, the parties herein had already entered into a consent which is still in force. The same has not been set aside and hence the parties should proceed to dispose the pending summons for confirmation of grant. I am in agreement with the Petitioners view that that the present application is meant to delay the finalization of this old matter. The interested parties ought to be patient with the process pursuant to the consent entered into. However, should they feel that they are unable to wait, then they should move to the Environment and Land Court for redress. It is perplexing for the Applicants to consent to the revocation of grant and cancellation of titles to turn around and claim that they were not consulted in the matter. This in my view smacks of double speak on the part of the Applicants. The application therefore is an abuse of the court process.
14. In view of the foregoing, it is my finding that the Interested parties' application dated 27<sup>th</sup> August 2023, lacks merit. The same is dismissed with no order as to costs. The parties are now directed to set down the pending summons for confirmation of grant for hearing as a matter of priority.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF AUGUST 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

No appearance Adongo for Petitioners/Respondents

Sabwami for Wachana for Interested Parties/Applicants

Kizito Court Assistant

