



REPUBLIC OF KENYA



**In re Estate of Wanyama Saratuki (Deceased) (Succession Cause
19 of 2008) [2024] KEHC 10731 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 19 OF 2008**

REA OUGO, J

AUGUST 15, 2024

IN THE MATTER OF THE ESTATE OF WANYAMA SARATUKI (DECEASED)

BETWEEN

**CAROLYNE KITUYI WANYAMA 1ST APPLICANT
FLORENCE KHWAKA WANYAMA 2ND APPLICANT
ROBAI LUSANYA WANYAMA 3RD APPLICANT
JOHN MUCHAZI WANYAMA 4TH APPLICANT**

AND

**YOKABETH KHAMALA WANYAMA 1ST RESPONDENT
JANE NANYAMA WANYAMA 2ND RESPONDENT
CHRISTINE WANYAMA SARATUKI 3RD RESPONDENT
GEORGE NANNDOKHA WANYAMA 4TH RESPONDENT**

RULING

1. In a Chamber Summons dated 18.1.2024 brought under Rules 73 and 49 of the *Probate and Administration Rules* and Articles 48,50 and 159 of the *Constitution* of Kenya, the 1st, 2nd, 3rd, and 4th Applicants seek the following orders;
 - i. Spent
 - ii. That pending hearing and determination of the application, inter partes, this honorable court be pleased to issue restraining orders against the Respondents, from building, encroaching, or doing anything on Land Parcel No Bungoma/Township/377 which is registered in the name of the Administrators.



- iii. That this honorable court makes an order that the Bungoma Land Surveyor visit the disputed parcel of land parcel Bungoma/ Township/ 377 and plant beacons for purposes of distribution of the estate of the deceased as per the order issued on the 30th June 2022.
 - iv. That further the Respondents be ordered to account for monies withdrawn from Diamond Trust Bank Bungoma branch on account No 532XXXXXX which was meant to be shared to the applicant's household.
 - v. Costs of the application be provided.
2. The application is supported by grounds (a) to (i) on the face of the application together with the supporting affidavit of Carolyne Kituyi Wanyama (Carolyne) dated 18.1.2024 plus a supplementary affidavit dated 26.2. 2024 and a further supplementary affidavit dated 13.3.204 sworn by Carolyne.
 3. The application was opposed the Respondents filed a joint replying affidavit dated 27.2.2024 plus a reply to the applicants' supplementary affidavit dated 26. 2.2024.
 4. The 1st applicant deposes as follows; she is the 4th administrator and represents the 4th house in the estate of Eliud Wanyama Sarakuti. As per the confirmed grant issue on 26.7.2021, the 4th household was entitled to a half share of land parcel No Bungoma parcel No, Bungoma/ Township 377 (parcel No 377) and an equal amount of the monies deposited in Diamond Trust Bank. Kshs 1,200,000/- was deposited in Diamond Trust Bank account No 53223140001, Bungoma Branch. On 8.1.2024 the respondents without notice and a court order unilaterally unlawfully encroached on parcel No 377 with the help of goons, police officers, and chief Bungoma Township pulled down the perimeter wall around the premises and started to erect a perimeter wall across the said land parcel. The said perimeter wall erected curved out a large portion of land which the 4th house was entitled to and further, the 4th respondent dug trenches and blocked all access to the existing passage and their utilities. The respondents are planning to erect some more buildings on the premises and have the 4th house evicted from parcel No 377. Unless the court issues restraining orders to the surveyor to visit the land and take measurements for proper sharing as per the court order issued, the 4th house shall be disposed of its rightful share. Further, the respondents withdrew a sum of Kshs 1,200,000/- from the account at Diamond Bank and shared amongst themselves depriving the other beneficiaries of their share. The respondents should be ordered to refund the said monies and account for the same as rightful beneficiaries have not received their shares. The respondents have an ill intention to have the 4th house evicted from their portion of the land which they have used as their matrimonial house. The interest of justice demands that the orders sought be granted. In the affidavit dated 26.2.2024, Carolyne avers when the Respondents entered plot No 377 they hived off and blocked them from accessing the portion allowed to the 4th household and that the Respondents have disposed their share to One Antony Kingori Muthura but now wants the said purchaser to be granted lease for the entire plot without their consent to dispossess them of their share and eventually evict them from the suit land yet they have not sold it. The court should stop any sale process, ownership lease transfer, or dealings until the beneficiaries have their shares properly transferred. In the further supplementary affidavit, Carolyne depones that they were not present when funds were withdrawn and that the issue of Kshs 5,500,000/- is a pipe dream imaginary and more so has been litigated upon by the respondent and the court pronounced itself on it. They stopped collecting rent from the tenant after the respondents served them with a court order directing them to deposit the monies in the bank. The respondents have misled the court that land parcel No Bungoma Town/377 was subdivided and created No 377A Bungoma Town and 377B Bungoma Town when it was clear from the letter issued to the CEC of land Bungoma County that he proposed the issuance of the renewal lease on parcel No 377 Bungoma Town to Antony Kingori Muthura which automatically meant that the 1st and 3rd applicants would lose their



shares in the estate of the deceased. The mutation and drawing on the land parcel No 377 Bungoma Township and survey of the land No N malakisi/M Wamono/620 was done without inviting them and there and there is no shred of evidence that the said monies drawn from the bank of Kshs 252,000/- were ever paid to Geometric Services and Kshs 85000/- to Chrisa Real Estate Valuers to value land parcel No 377 Bungoma Township.

5. The respondents filed a replying affidavit dated 27.2.2024; they term the averments made by the applicant as being misleading, mischievous, and hypocritical and that the application should be dismissed. They aver that this court issued a certificate of rectification of the confirmation of grant on 26.7.2021 distributing the estate of the deceased's, plot No 377 Bungoma Town as follows; 1st widow- Yakobet Kahamala, 2nd widow Rabai Lusanya Wanyama, 3rd widow Jane Nyanyama Wanyama -1/2 plot to be shared equally and 4th widow Florence Khwaka Wanyama to get ½ plot. On 2.6.2022 they presented the conveyance documents to two applicants John Muchasi and Carolyn Kituyi for signing but they refused to sign the documents or cooperate with them to effect transmission of the properties, thus abdicating their legal mandate. Vide a court dated 30th June 2022, the 2nd and 4th petitioners/ applicants were ordered to execute documents of transfer of the properties to issue within 30 days failure to which the Deputy Registrar (DR) of the Court would execute the said documents. The DR in compliance with the said order signed all the Lands Registration forms and executed them and they executed the said documents and the properties were jointly registered in the names of all the 4 widows of the deceased. Subsequently their application for sub-division of plot No 377 Bungoma Township was approved by the County Physical Planner on 1.11. 2023 in line with the certificate of confirmation of the grant. The county surveyor visited Plot No 377 and established the beacons on 28.12.2023 to operationalize the certificate of confirmation of the grant and the distribution. on 8.1.2023 in the presence of the applicants with the help of the township chief and the police, they erected a security wall and gate around their premises in line with the beacons established by the county surveyor. On 14.2.2024 the 3rd and 4th applicants Robai Lusanya and John Muchasi themselves reached a unanimous decision to dispose of their half share of plot No 377 Bungoma Township and they sold the same to Antony Kingori Muthura thereby relinquishing their occupation and ownership to the buyer. They no longer hold any interest in the said plot and if the applicants are dissatisfied with the previous subdivision and beaconing of Plot 377 they are at liberty to redo the procedure without court orders.
6. On the distribution of the monies in the joint account it was averred that High Court issued a certificate of rectification of confirmation on 26.7.2021 distributing the rental collections approximated at Kshs,1200,000/- in account No 532XXXXXX of Diamond Trust Bank, each widow was to get 25% of the said sum. Before the certificate of rectification of the confirmation of grant, the court issued orders inter alia dated 15.12.2016 and 13.3.2017 to the effect that all income from the estate of the deceased beginning end of December 2016 be deposited in a joint account in the names of counsels on record for the parties until further orders. During the pendency of this succession cause the 2nd and 4th applicants Florence Khwaka and John Muchazi defied the aforementioned orders and collected an amount of Kshs 5,500,000/-. The 2nd applicant has an illegal tenancy agreement with a tenant during the pendency of this succession cause in defiance of the court orders. The 4 applicants have refused to cooperate with them in operationalizing the grant. The court issued an order on 30.6.2022 that the 2nd and 4th administrators appear before the Branch Manager Diamond Trust branch Bungoma for the distribution of the monies held therein within 30 days, failure to which either party shall be at liberty to apply. On 2 occasions in July, they visited the Branch Manager as directed but the 2nd and 4th administrators refused to appear even after the branch manager summoned them. The administrators being signatories in representation of the deceased's estate have a collective responsibility under section 83 (f)-(i) of the Law of Succession Act Cap 160 (LSA or the Act) and which responsibilities have been



halted by the two administrators John Muchasi Wanyama and Caroline Kituyi Wanyama. On the 4th of August 2022 after the 30-day timeline in compliance with the Court ruling, they applied to share the monies in the joint account payable to the 1st and 3rd widows Jakobet and Jane Nanyama and on the 19th of August 2022, they found out that the monies in the joint account were Kshs 988,000/- and not Kshs 1,200,000/-. The Branch Manager divided the amount in equal parts payable to each of the 4 widows in equal measure each widow got Kshs 246,400/-. Jakobet and Jane Nayanama utilized the proceeds for miscellaneous statutory fees for titling and subdivision of Agricultural parcel North Malakisis North Wamono and renewal of lease on estate No 377 Bungoma Town. On 16.5.2023 in compliance with the orders of 28.4.2023 Diamond Trust Bank Bungoma dispensed Kshs 85,000/- to Chrisca Real Estate Valuers and Kshs 394,000/- to Bungoma County Revenue Office. The applicants are fully aware of the said facts and therefore the application is nugatory and ought to be dismissed.

Analysis and Determination

7. I have carefully considered all the rival affidavits filed by the parties and the oral submissions by the parties. The issues for determination are;
 - i. Whether the court should issue a restraining order against the respondent from building encroaching or doing anything on land parcel No Bungoma/ Township/ 377
 - ii. Whether the court should make an order that the Bungoma Land Surveyor visit the disputed parcel of land parcel Bungoma Township/377 and plant beacons for purposes of distribution of the estate of the deceased as per the order issued on 30.6.2022.
 - iii. Whether the Respondents should be ordered to account for monies withdrawn from the Diamond Trust Bungoma branch on account No 532XXXXXXX which was meant to be shared to the applicant's house.
8. As I make this ruling I must state that the parties in this matter have been in court with various applications and various Rulings have been delivered by this court on the said applications. The deceased's estate was determined as per the certificate of confirmation of grant dated 26.7.2001. I note that none of the parties appealed thereafter. The issues that have arisen now are one of occupation and possession of plot No 377. This plot was shared between the applicants who got half and the 1st, 2nd, and 3rd widows were to share the other ½. The applicants are seeking orders to stop the respondents from building and encroaching or doing anything on the suit land. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased. This court lacks the jurisdiction to deal with matters of encroachment, occupation, and possession. The Court with the jurisdiction to deal with occupation encroachment and/or dispossession of land is the Environment and Land Court (ELC) which is established under the [Constitution](#) of Kenya 2010 and the [Environment and Land Court Act](#), No 19 of 2011. In my view, I cannot grant the order sought by the applicants.
9. On the 2nd issue this court did issue the order referred to on 30.6.2022. This order was issued after the respondents approached the court seeking a vesting order after the 2nd and 4th applicants failed to sign the transfer forms. The said order did not order the surveyor to visit the land. As per the order the 2nd and 4th administrators were to execute the documents of transfer of the properties within 30 days and they were also directed to appear before the Branch Manager of Diamond Trust Bank Bungoma for distribution. The prayer sought by the applicants was not part of the court order of 30.6.2022. The applicants are advised to move the ELC court on the last orders. I decline to issue this order too.



10. Lastly, on 3rd issue the applicants seek to have the respondents account for monies held in the account at Diamond Bank. The applicants were ordered to appear before the bank manager. They have failed to demonstrate that they did so. They have to do so being joint signatories to the account. If monies were withdrawn unlawfully, then they can sue the respondents on their alleged claim, if they have a valid claim. Seeking an order to have the respondents account for monies in the bank again without presenting themselves to the bank as was ordered, is an abuse of the court process. I decline to grant this order too.

11. In conclusion I find that the application dated 18.1.24 has no merit and is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 15TH DAY OF AUGUST 2024.

R.E. OUGO

JUDGE

In the presence of:

1st Applicant/ Absent

Florence Khwaka Wanyama / 2nd Applicant - Present

Robai Lusanya Wanyama/ 3rd Applicant - Present

John Muchanzi Wanyama/ 4th Applicant - Present

1st, 2nd and 3rd Respondent - Absent

George Nandokha Wanyama -For the Respondents

Diana - C/A

