



Wanyama (Suing as administrator/personal representative of the Estate of Hentry Wanyama Simiyu - Deceased) v Simiyu (Environment and Land Appeal E003 of 2024) [2025] KEELC 490 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELC 490 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E003 OF 2024
EC CHERONO, J
FEBRUARY 6, 2025**

BETWEEN

SUSY WANYAMA (SUING AS ADMINISTRATOR/PERSONAL REPRESENTATIVE OF THE ESTATE OF HENTRY WANYAMA SIMIYU - DECEASED) APPELLANT

AND

ROSE NALIKA SIMIYU RESPONDENT

(Being an appeal from the decision and/Ruling delivered by the Principal Magistrate HON. T. M. OLANDO on 14/12/2023)

JUDGMENT

1. The Appellant, Henry Wanyama Simiyu was the 1st Defendant in the former suit being Bungoma CM-ELC case NO. E028 of 2022 while the Respondent, Rose Naliaka Simiyu was the plaintiff therein. Vide a Plaint filed contemporaneously with a Notice of Motion under certificate of urgency dated 24th March 2024, the Plaintiff/Respondent sought orders for inter-alia, subdivision of the land into three equal portions into three houses, a temporary order restraining the defendants jointly and severally with their families/agents or any one working under their instructions from utilizing, cultivating or ploughing or doing any development/works on the portion that may fall under the plaintiff until the matter is heard and determined. The Plaintiff also sought similar orders in the Notice of Motion application.
2. The 1st defendant filed a statement of defence and Notice of Preliminary objection in opposition thereto dated 17/7/2023 and 19/7/2023 respectively. After the close of pleadings and before the suit would be set down for pre-trial conference, the parties agreed to have the Notice of Preliminary objection dated 19thOctober 2023 heard first before the main suit. By consent of the parties, the said Preliminary objection was agreed to be canvassed by written submissions. In a Ruling delivered on 14th



December 2023, the trial magistrate found the Preliminary objection lacks in merit dismissed the same with costs to the plaintiff. Aggrieved by the said decision, the 1st Defendant preferred the present appeal vide a Memorandum of appeal dated 2nd January, 2024 on the following grounds;

1. The Ruling was oppressive, illegal and miscarriage of justice.
2. The learned trial Magistrate erred in law and fact by entertaining a suit without the requisite jurisdiction as the suit property L/R NO. Bokoli/Misikhu/680 is situated in Misikhu within Webuye West where the parties resides and the matter ought to have been adjudicated upon in the nearest court seized with jurisdiction which should have been Webuye law court.
3. The learned trial Magistrate erred on point of law and facts by failing to cognize the fraudulent circumstances under which the Respondent in collusion with the officers from land registry caused the title deed of the suit property L/R NO. Bokoli/Misikhu/680 to be registered in the names of herself, Appellant and the late David Barasa Simiyu without the Appellant's knowledge and institute a suit against them.
4. The learned trial Magistrate erred on point of law and facts by failing to hold that the Respondent has No locus standi to institute a suit against the Appellant over the suit property L/R NO. Bokoli/Misikhu/680 which is registered in the names of Simiyu Simwenyi (Deceased).
5. The learned trial Magistrate erred on point of law and facts by ignoring the letter dated 11th April 2023 from the land Registrar Bungoma County which indicated that it will be prudent if the family of the late can be allowed to proceed with succession as the registration is illegal.
6. The learned trial Magistrate erred on point of law and facts by failing to hold that the Respondent relied on forged documents while instituting the suit against the Appellant.
7. The learned trial Magistrate erred on point of law and facts by writing and delivering ruling when he was out of mind.
8. The learned trial Magistrate erred in law and facts in disregarding the formidable Appellant's evidence tendered in both the application dated 17th July 2023 and the preliminary objection dated 19th October 2023.
9. The learned trial Magistrate erred in law and facts in failing to hold that the Respondent's suit offends Sections 4, 82 (a), 45 of the law of Succession Act.
10. The learned trial Magistrate erred in law and in facts by failing to evaluate the evidence tendered by the Appellant judiciously.

Appellant's Submissions

3. The Appellant through the Firm of M/S G.M Maengwe & Co. Advocates submitted that when the Respondent filed the former suit being CM-ELC NO.E028 of 2022, he filed his statement of defence under protest contending that the suit Land parcel NO. Bokoli/Misikhu/680 was registered in the name of simiyu Simwenyi whose estate was yet to be administered in law. He submitted the Respondent is neither a legal representative nor an administrator of the estate and therefore the suit against him is fatally defective on grounds of want of locus standi.
4. The Appellant further submitted that the Respondent annexed to his witness statement a certificate of official search of the suit property dated 13/3/2020 indicating that the same was registered in the names of Rose Naliaka Simiyu, Henry Wanyama Simiyu and David Barasa Simiyu. He stated that



upon receipt of the Summons and annexures thereto, he wrote to the Land Registrar on 3rd April 2023 requesting to be supplied with certified copies of the documents were used to effect the transfer of the suit land to the registered owners namely Rose Naliaka Simiyu, Henry Wanyama Simiyu and David Barasa Simiyu. In a letter dated 11th April 2023, the Land Registrar stated that he was unable to trace the documents which should be transfer by transmission as the owner had been indicated in entry 4 as deceased. The Land Registrar further stated that even the same would not be traced in their presentation book and going by above, that leaves entry 6 as insertion not registration and that it would be prudent if the family of the deceased can be allowed to proceed with succession as above registration is illegal. He submitted that upon receipt of the said letter, he conducted an official search on land parcel NO. Bokoli/Misikhu/690 on 2/5/2023 and the same showed that the suit land was still registered in the name of Simiyu Simwenyi (deceased) with a restriction lodged on 5/10/2016. Based on the foregoing, the Appellant submitted that it was not possible for the Respondent to register the property of the deceased in her name and 2 others prior to succession proceedings being initiated.

5. The Appellant further submitted that after discovering that the suit land was still in the name of Simiyu Simwenyi (deceased), he filed an application dated 17/7/2023 seeking to strike out the plaintiff/ Respondent's pleadings for intermeddling with the estate of the deceased, suing a dead person and for lack of cause of action. He stated that the trial court dismissed the said application. He stated that thereafter, he filed the Notice Preliminary Objection dated 19/10/2023 which is the subject of this Appeal. The Appellant relied in the following cases and Authorities; Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1969)E.A 696; Owners of Motor Vessel Lilian 'S' V Caltex Oil Kenya Limited (1989) KLR; Nairobi Succession Cause NO. 1731 of 2000, In the matter of the Estate of Moraji Bhanji Dhanak (deceased); Julian Adoyo Ongunga V Francis Kiberenge Abano Migori Civil Appeal NO. 119 of 2015; Trouistik Union International & Anor v Jane Mbeyu & Another (2008) 1KLR (G&F)730; Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1KLR; Morjaria v Abdalla (1984) KLR 490; Section 82(a) & 45 of the *law of Succession Act* and Section 15 CPA.

Respondent's Submissions.

6. The Respondent through the Firm of Makokha Wattanga & Luyali Associates submitted that the Appellant only appealed against the ruling on a preliminary objection dated 19/10/2023 and not the Ruling on the application dated 17/7/2023 which was delivered on 4/10/2024. She referred to ground No.2 of the memorandum of appeal where the trial Magistrate in his ruling delivered on 4/10/2023 stated that the issue of whether the suit property was situated in Webuye or Bungoma was an issue of fact and law which could not be canvassed by way of preliminary objection.
7. The Respondent further submitted that after he filed an application dated 29/3/2023 to set aside the interlocutory judgment, the trial court allowed the Appellant to file his defence and compliance documents. She submitted that in his Amended defence dated 17/7/2023, the Appellant admits the Jurisdiction of the court and that the preliminary objection is therefore an afterthought. She relied on the following cases; Mukisa Biscuits Manufacturing Limited v West End Distributors (1969) E.A 696; Avtar Singh Bhamra & Another v Oriental Commercial Bank, Kisumu HCCC NO.53 of 2004; Oraro v Mbaja (2005) 1KLR 141; John Maraka v Patrick Wafula Otunga (2005) eKLR; Betty Nyamusi Machora v Betty Nyanduko Makori, (2018) KLR; Section 5 of the Magistrates Courts Act, 2015

Legal Analysis And Determination

8. I have considered the Memorandum of appeal, the record of appeal, the pleadings and proceeding in the original trial court file, the decision by the trial Magistrate and the authorities relied by the parties.



This arises from a ruling in respect of a preliminary objection raised by the Appellant delivered on 14/12/2023. In his brief that ruling, the trial Magistrate noted that issue whether the land is in Webuye or Bungoma is an is of fact which cannot be canvassed by way of preliminary objection.

9. I have looked at the said notice of preliminary objection dated 19/10/2023 which stated as follows;

“Take Notice That the 1st defendant herein shall raise preliminary objection on a point of law at the hearing hereof on the following grounds;

1. That this court lacks the geographical jurisdiction to hear and determine this suit as the property known as L/R NO. Bokoli/Misikhu/680 fall under the jurisdiction of Webuye Law courts and not Bungoma Law courts thus offends Section 15 of the Civil Procedure Act.
2. That the plaintiff has no locus standi to institute this suit against the 1st defendant over property known as L/R NO. Bokoli/Misikhu/680 which is registered in the name of Simiyu Simwenyi (deceased) thus the suit offends Section 4, 82(a), 45 of the law of Succession Act”

10. The Appellant in the said notice of preliminary objection raised two issues, one on jurisdiction and locus standi.

11. On whether the trial court was seized with the requisite territorial jurisdiction to hear and determine the former suit, the Respondent filed a list of documents which include a certificate of official search dated 13/3/2020 indicating that the suit property land parcel NO. Bokoli/Misikhu/680 is registered in her name and two others. In his statement of defence dated 17/7/2024, the Appellant/1st Defendant at Paragraph 10 thereof averred as follows;

“10. The defendant further states that after the death of their late father Simiyu Simwenyi the plaintiff colluded by the area chief and some of the officers from the office of Registrar of lands Bungoma and fraudulently forged the land register manipulate the green card, insert illegal entries and register her names and the names of the defendant as the co-owners of the land NO. Bokoli/Misikhu/680 without the knowledge of the defendant.”

12. He proceeded and set out numerous particulars of fraud thereunder. From the averments contained under paragraph 10 of his statement of defence therein, the Appellant admits that the Respondent/Plaintiff acquired title to the suit land in a fraudulent manner which particulars he set out thereunder. Section 25 of the Land Registration Act provides that the rights of a proprietor shall not be liable to be defeated except as provided in the Act. Section 26 of the same Act stipulates that a certificate of title issued by the Registrar upon registration, or to a purchaser person named as proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions in the certificate, and the title of that proprietor shall not be subject to challenge except on grounds of fraud, misrepresentation, illegality, unprocedurally or through a corrupt scheme.

13. The Appellant in his statement of defence is challenging the manner in which the Respondents acquired the title to the suit property on grounds of fraud. Until the matter is heard and determined, allegations of fraud on the acquisition of title to land cannot be determined in a summary procedure through a notice of preliminary objection. It can only be determined in a full hearing.

14. The second issue raised in the Notice of Preliminary objection relates to the allegations that the trial court was bereft of territorial jurisdiction to hear and determine the dispute as the suit property L.R



NO.Bokoli/Misikhu/680 is situated in Misikhu within Webuye West and that the matter ought to have been adjudicated upon in the nearest court seized with jurisdiction which should have been webuye law court. In his ruling, the trial Magistrate observed that the issue whether the suit land is in Webuye or Bungoma is an issue of fact which cannot be canvassed by way of a preliminary objection. I agree with the learned Magistrate that the geographical location of a court is not an issue that can be raised as a pure point of law. It is a matter that can be contested and may require the production of evidence.

15. It is also to be noted that in his statement of defence dated 17/7/2023, the Appellant/1st defendant at paragraph *para 14 14* admits the jurisdiction of the court. I also agree with counsel for the Respondent that having admitted the jurisdiction of the court, the Respondent cannot now turn around and raise the issue of jurisdiction. It is also my view that lack of territorial jurisdiction is a procedural technicality which is not fatal to a suit and that superior courts may transfer such cases to the appropriate courts for hearing and determination under Article 159(2) (b) of *the Constitution* of Kenya, 2010.
16. The upshot of my finding is that this appeal is devoid of merit and the following consequential orders are hereby issued;
 1. This appeal is hereby dismissed.
 2. The original court file is remitted back to the Chief Magistrate Bungoma for hearing and determination.
 3. Mention on 14/02/2025 before the CM Bungoma for directions.
 4. The Costs of this appeal to be borne by the Appellant.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 6TH DAY OF FEBRUARY, 2025.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr Wanjala for the Respondent.

Mr. Maloba for the Appellant.

Bett C/A.

