



**Wekesa & 2 others v Simiyu & 2 others (Environment & Land Case 42 of 2019) [2025] KEELC 363 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 363 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 42 OF 2019**

**CK NZILI, J**

**FEBRUARY 5, 2025**

**BETWEEN**

**EVERLYNE WEKESA ..... 1<sup>ST</sup> PLAINTIFF**

**WHITNEY FARIDA WAFULA ..... 2<sup>ND</sup> PLAINTIFF**

**PETER PRESTON WAFULA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**TIOOTHY WAFULA SIMIYU ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR TRANS-NZOIA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**RITA NALIAKA (DECEASED) ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before the court is an application dated 20/12/2024, seeking for temporary injunction restraining the 1<sup>st</sup> defendant from interring the remains of Rita Naliaka, the 3<sup>rd</sup> defendant, on parcel No. Kiminini/Matunda Block 4/Cheptarit/246. The reasons are contained on the face of the application and in a supporting affidavit of Everlyne Wekesa, the 1<sup>st</sup> plaintiff, sworn on her behalf and also of her children, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, on 20/12/2024.
2. It is averred that this suit is part-heard at defence stage and that the 3<sup>rd</sup> defendant, a wife to the 1<sup>st</sup> defendant, who passed on 16/12/2024, was joined as a 3<sup>rd</sup> defendant since they both reside on the suit land. The applicants aver that the suit property was purchased for the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and 89% of the purchase price, that is Kshs.670,000/= was paid by the 1<sup>st</sup> plaintiff. The plaintiffs aver that the 1<sup>st</sup> defendant took possession of the land, and he brought his wife, now deceased, into the land. The plaintiffs aver that burial arrangements were underway as per a copy of a letter annexed as EW'2' by the area chief Sikhendu Location, with the intention of burying her in the suit land, commonly known as Muugano Farm.



3. The plaintiffs aver that the burial of the deceased by the 1<sup>st</sup> defendant in the suit property, while the ownership dispute is partly heard, would be highly prejudicial to them, as they may subsequently be forced to apply for exhumation proceedings, if their claim in this suit succeeds.
4. The application is opposed through a Preliminary Objection dated 30/12/2024 and an affidavit sworn by the 1<sup>st</sup> defendant, Timothy Wafula Simiyu, on 24/12/2024. He admits that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are his children, whom he sired with the 1<sup>st</sup> plaintiff during his short stint of marriage for 10 years with her. The 1<sup>st</sup> respondent avers that his late wife used to reside on the suit land, which belongs to him, as the original owner since 2010 until she passed on.
5. The 1<sup>st</sup> respondent denied that the suit land was purchased for the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, even though he admits that the 1<sup>st</sup> plaintiff paid 89% of the purchase price of Kshs.760,000/=, while he only paid 11% of the amount.
6. The 1<sup>st</sup> defendant avers that he has no problem with the 89% share of the land demanded by the plaintiff and only requests this court to set aside the order issued on 20/12/2024 to the extent of his 11% share for the burial of his late wife; otherwise she has stayed on the land since marrying him with the full knowledge of the 1<sup>st</sup> plaintiff, but out of an afterthought and perhaps being misled by third parties, she filed this suit ten years down the line.
7. The 1<sup>st</sup> defendant denied that he fraudulently registered the land in their joint names. The 1<sup>st</sup> defendant deponed that notwithstanding the lion's share contribution, the fact remains that they married in 1997 but separated in 2010, and 13 years down the line, the suit was being filed. The 1<sup>st</sup> defendant avers after the separation; he decided to marry the 3<sup>rd</sup> defendant to help him stay in the suit land, which was idle because he had a small fraction of it to share with the deceased; otherwise, the body was lying in St. Michael Kiminini Cottage awaiting burial.
8. The 1<sup>st</sup> defendant avers that there will be no prejudice to bury her there even if the suit is part-heard, as the court will still pronounce itself on the lion's share of the plaintiffs' claim depending on the evidence tendered once the matter is concluded; otherwise, he has nowhere else to bury his beloved wife. The 1<sup>st</sup> defendant avers that his share of the land is 0.272 acres, which qualifies to accommodate the grave of the deceased wife, which need not await the conclusion of the main suit.
9. The applicant relies on a written submission dated 22/1/2025. It is submitted that the preliminary objection is not well raised since, as per the amended plaint dated 26/7/2021, there was admission that no marriage was in existence between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant; hence, the land is not matrimonial property. Secondly, it was submitted that the preliminary objection is based on contested facts requiring evidence. Thirdly, it was submitted that objections No. 1, 2, 4 and 5 are misplaced, limitation was not pleaded and that Section 4 and 7 of the *Limitation of Actions Act* does not apply.
10. The applicant submitted that the replying affidavit was clear that the 1<sup>st</sup> defendant intended to inter the deceased on the Suitland, which will prejudice their claim; the hearing can be fast-tracked and that the court should allow the application in terms of prayers Nos. 3 and 4.
11. In paragraphs 4C and 4D of the further amended plaint filed on 7/11/2023, the plaintiffs acknowledged that the 3<sup>rd</sup> defendant, now deceased, was the lawfully wedded wife of the 1<sup>st</sup> defendant. In paragraphs 10B and 11 thereof, the plaintiffs admitted that the 1<sup>st</sup> and 3<sup>rd</sup> defendants have been cohabitating and living in the suitland, where they had erected permanent structures and settled. In the reliefs sought, the plaintiffs have raised an alternative prayer for a subdivision of the Suitland into equal portions of one acre each in favour of the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant also relied on an affidavit filed on 24/2/2024.



12. From the evidence so far tendered and without making definitive findings, the plaintiffs admit that the deceased has been living on the Suitland as a bonafide wife of the 1<sup>st</sup> defendant for over ten years with the full knowledge of the plaintiffs. From the copy of records and the affidavit of the 1<sup>st</sup> defendant filed on 24/12/2024, he admits that the suit land is jointly registered under his name and that of the 1<sup>st</sup> plaintiff. He terms the reliefs sought by the plaintiffs as an affront to his wishes and those of the deceased wife, who had made her home in the Suitland, which he also contributed to build.
13. The 1<sup>st</sup> defendant avers that after separation from the 1<sup>st</sup> plaintiff, she got married elsewhere and left him free to remarry. Further, the 1<sup>st</sup> defendant avers that it would be against Luhya customs for a man to bury a deceased wife away from her home since the dead spirits will torment the family forever. The 1<sup>st</sup> defendant avers that there will be no substantial loss or damage to the plaintiffs if the burial takes place.
14. Having set the background of this matter as regards pleadings only, what the applicants are seeking are temporary injunctive orders, stopping the 1<sup>st</sup> defendant from interring the remains of his late wife, the 3<sup>rd</sup> defendant on their matrimonial home situated in the suit premises registered in equal shares with the 1<sup>st</sup> plaintiff, alleged to be in trust solely for the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs as beneficial owners.
15. Section 91 of the [Land Registration Act](#) defines co-tenancy as the ownership of land by two or more persons and includes joint tenancy or tenancy in common. The Section states that where the instrument of transfer to two or more persons does not specify the nature of their rights, there is a presumption that they hold the interest as tenants in common in equal shares.
16. Further, the Section provides that if the land is occupied jointly, no tenant is entitled to any separate share of the land. The Section further provides that no tenant in common shall deal with their share in favour of any other person other than another tenant in common except with the consent, in writing, of the remaining tenant, but the consent shall not be unreasonable withheld. Tenants in common under Section 94 are also entitled to share their joint ownership. They may also partition and or subdivide the land through an agreement.
17. In *Cornella Nasbangala Wabwana -vs- Edward Vitalis Akuku & Others* [2017] eKLR, the court observed that no one in joint tenancy has a better right to the property than another so that an action for trespass or for rent or for money received or on an account will not automatically lie. See *Isabel Chelangat -vs- Samuel Tiro Rotich & Others* [2012] eKLR.
18. The suit land was registered in the names of the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant in 2009. The applicable law was Section 102(1) of the Registered [Land Act](#) (repealed). The law provided that where the land is owned jointly, no proprietor is entitled to any separate share in the land. In *Cyrus Muchia Nzambiri -vs- Faitha Wanjiru Nzambiri* [2020] eKLR, the court observed that Section 91(8) of the [Land Registration Act](#) could not operate retrospectively. See also *Mukazitori Josephine -vs- Attorney General* [2015] eKLR.
19. The bottom line from the caselaw is that the 1<sup>st</sup> defendant has beneficial ownership of the suit land in which he has lived with his late wife uninterrupted by the plaintiffs since 1997 and has founded a home. See *Isabel Chelangat -vs- Samuel Tiro Rotich & 5 Others* [2012]eKLR. In this application, the 1<sup>st</sup> defendant and the 1<sup>st</sup> plaintiff agree on the shares each contributed towards acquiring the land, though in the copy of records, the same is not indicated. The 3<sup>rd</sup> defendant, in her statement of defence dated 6/3/2024, averred that she married the 1<sup>st</sup> defendant under Luhya Customary Law on 14/2/1984 and solemnized her marriage through a church wedding after the 1<sup>st</sup> plaintiff left the 1<sup>st</sup> defendant. She averred that the suit land was their matrimonial home, where they all lived under one roof before the 1<sup>st</sup> plaintiff, a co-wife, left in 1997.



20. The 3<sup>rd</sup> defendant averred that she was aware that the 1<sup>st</sup> defendant purchased the entire land and constructed a permanent house on it, with no assistance from the 1<sup>st</sup> plaintiff, where they have been living as their matrimonial home. The 3<sup>rd</sup> defendant filed a witness statement dated 6/3/2024. She attached a copy of a bank slip to show the contribution in acquiring and developing the land by the 1<sup>st</sup> defendant.
21. Looking at the foregoing material, the burden of proof is on the plaintiffs to show that their proprietary rights have been infringed upon by the 1<sup>st</sup> defendant to call for a rebuttal from the opposite party going by *Mrao Ltd -vs- First American Bank of Kenya Ltd* [2003] eKLR. Secondly, the applicant's share has to prove that they will suffer irreparable loss or damage, which may not be compensated by way of damages. Third, the applicants have to prove that the inconvenience of not granting the injunction would be more significant to them than the 1<sup>st</sup> defendant if the injunction is not granted and the suit ultimately is allowed in their favour and vice versa. See *Pius Kipchirichir Kogo -vs- Frank Kimeli Tenei* [2018] eKLR.
22. In *Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & Others* [2016] eKLR, the court observed that where any doubt exists as to the applicant's right or if the right is not disputed, but if the violation is denied, the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of consequences to the parties and the nature of the injury, which the respondent, on the other hand, would suffer, if the injunction is granted and he should ultimately turn out to be correct.
23. In this application, the deceased has been on the land as a bonafide spouse of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has averred that he has no other matrimonial home where the deceased's remains can be interred. He says burying her from her home would be against Luhya culture. The harm that the 1<sup>st</sup> defendant is likely to suffer is more significant if an injunction is granted and the court ultimately finds that he is entitled to a share of the suit land. In any event, the 1<sup>st</sup> plaintiff has admitted that the 1<sup>st</sup> defendant was a contributor of 11% to purchase the land. Therefore, the court opts to maintain the status quo in determining where the balance of convenience lies. It would be a travesty of justice, in my view, to require that the deceased, who has lived with the 1<sup>st</sup> defendant as husband and wife since 1984, to be relocated to an unknown place after her death, where she had established a home together with the 1<sup>st</sup> defendant. See *Jerusa Basweti Ogeisia -vs- Jennifer Nyamaita Achoki & Another* [2018] eKLR.
24. In a burial dispute of this nature, what matters is whether the deceased is to be buried at her home or not and, if so, why. I think she had a defined interest in the land, even if the same is to relate to the ultimate share her husband may get at the full hearing of the case. The plaintiffs have allowed or acquiesced to her occupation of the land alongside her husband since 1984 and afterwards.
25. The upshot is that I disallow the application dated 20/12/2024. The burial of the 3<sup>rd</sup> defendant by the 1<sup>st</sup> defendant is allowed confined only within the designated matrimonial home where she has been living with her husband. The Preliminary Objection by the 1<sup>st</sup> and 3<sup>rd</sup> defendants is dismissed. There will be no orders as to cost.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 5<sup>TH</sup> DAY OF FEBRUARY 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:



Court Assistant - Chemutai

1<sup>st</sup> plaintiff present

1<sup>st</sup> defendant present

Mr. Kiarie for the Plaintiffs

Mr. Samba for the 3<sup>rd</sup> Defendant

Miss Odeyo for the 2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant (deceased)

