



**Wephukhulu (Suing on behalf of the Estate of Isaiah Masaba Khauka) v Khauka  
(Environment & Land Case E006 of 2024) [2024] KEELC 5186 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5186 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E006 OF 2024**

**EC CHERONO, J**

**JULY 4, 2024**

**BETWEEN**

**JAMIN WEPHUKHULU (SUING ON BEHALF OF THE ESTATE OF ISAIAH  
MASABA KHAUKA) ..... PLAINTIFF**

**AND**

**ELIUD WEPHUKULU KHAUKA ..... DEFENDANT**

**RULING**

1. The application that is the subject of this ruling is the Notice of Motion dated 28<sup>th</sup> March, 2024 filed by the Plaintiff/Applicant seeking the following orders; -
  - a. This application be certified as extremely urgent and service be dispensed with in the first instance.
  - b. That pending the hearing and determination of this application inter parties this Honorable Court be please to issue an order of injunction restraining the Defendant/Respondent from selling /disposing all land known as Bokoli Chwele 2459, Bokoli Chwele 2460, Bokoli Chwele 2461, Bokoli Chwele 2462 which is ancestral land.
  - c. That pending the hearing and determination of this application the above title deeds which arose from Bokoli/Chwele/250 be cancelled to allow other beneficiaries to get rightful shares of their ancestral land.
  - d. That any other relief the court may deem fit to grant.
  - e. The costs of this application be borne by the Defendants/Respondent.
2. The application is premised on the grounds on the face of the application supported by the affidavit of Jamin Wephukulu, the Applicant herein.



3. It is the applicant's case that he is the administrator of the estate of the late Isaiah Masabo Khauka who was brother to the respondent herein. He deposed that his grandfather Paulo Khauka Sirengo was the registered owner of Land Parcel No. Bokoli/Chwele/250 which is their ancestral land. He deposed that the Respondent obtained title to the said land and that when the said Paulo Khauka died, he therefore holds it in trust of all the beneficiaries. He stated that the Respondent has intermeddled with the property of the late Paulo Khauka by selling portions of it to third parties. It is the Applicants position that he is entitled to a share of Land Parcel No. Bokolo/Chwele/250 which belongs to his father Isaiah Masaba-deceased as beneficiary of the estate of Paulo Khauka.
4. The Applicant further filed a supplementary affidavit dated 15<sup>th</sup> May, 2024 where he asked the court not to consider the Defendants arguments which are based on technicalities but instead apply the saving provisions under Article 159 of *the Constitution*.
5. The application is opposed by the Respondent who filed grounds of opposition dated 16<sup>th</sup> April, 2024 and a replying affidavit sworn on even date where he stated that the proceedings are a nullity, non-starter and fatally defective given that the suit has no substantive plaintiff. It was further stated that the issues raised in this application have previously been litigated upon in a former suit and that the land in issue was sub-divided over 12 years ago.
6. The parties agreed to canvass the said application by written submissions. The Applicant filed his submissions dated 15<sup>th</sup> May, 2024 where he urged the Court to find that the application is merited.

#### **Legal Analysis and Decision.**

7. I have carefully considered the Application, the affidavits in support and in opposition thereto, the submissions of the parties as well as the relevant law.
8. For the purposes of this ruling, I have looked at the prayers sought in the application and find that there is no substantive suit filed by the plaintiff. The Applicant has only annexed a copy of a draft plaintiff to the supporting affidavit. Without a substantive plaintiff being filed, I find the present application misconceived and incompetent.
9. I agree with the Respondent that the present application is not anchored on a proper plaintiff and that it can therefore not stand. On his part, the Applicant urged the court to apply the provisions of Article 159(2)(d) of *the constitution* and dispense justice without undue regard to procedural technicalities. Upon considering the documents submitted by the Applicant, it is noted that there is a document labeled as a draft plaintiff. I also note that the said draft plaintiff is not accompanied by a verifying affidavit, rendering its purpose and intent unclear. Had this document been accompanied by a verifying affidavit, the court could have excused the Applicant by applying the provisions of Article 159(2)(d) and inferred that the intention was to present it as a formal plaintiff, notwithstanding the use of the term "draft." In its current form, the court is uncertain concerning the Applicant's intention. Further, this court is left pondering on the implications of issuing any orders at this stage. Specifically, the court wonders what would follow if any orders were to be issued and whether there would be any remaining issues for the court to determine under the present circumstances.
10. In *Francis Muiruri v. Benard Gatbuku Ngugi [2007]* eKLR the court was faced with a similar conundrum and observed as follows: -

“It is trite law that an interim application has to be anchored on an existing suit.



11. Further in *Khadar Developers Limited v. Diamond Trust Bank Limited [2020]* eKLR, the court held: -

“This Court takes cognisance of the fact that, *the constitution* requires the courts under Article 159 to render justice without undue regard to procedural technicalities. However, where a party fails to comply with express provisions of the law on how to move the court, the court has no discretion by way of the oxygen principle to breathe life to a proceeding that is contra-statute. That will be illegal. Courts are there to apply and protect the law. They only tamper the application of the law with fairness and justice. Courts cannot encourage parties to act outside the law.

The procedure on how to move the court for relief is not a technical procedural issue. It is a substantive issue because, it enables the parties to present their respective cases with certainty and convenient manner. With certainty of procedure, prejudice is avoided. This is what the procedural law and rules are for”.

12. In the end, I find that the Notice of motion dated 28<sup>th</sup> March, 2024 lacks merit and the same is hereby dismissed with costs to the Respondent.

13. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 04<sup>TH</sup> DAY OF JULY, 2024.**

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**HON.E.C CHERONO**

**JUDGE**

In the presence of;

1. Mr Bwonchiri H/B for M/S Masengeli for the Applicant.
2. Mr. Sichangi for the Respondent.
3. Bett C/A.

