



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiberenge v Warunga & 2 others (Environment & Land Case  
E004 of 2024) [2024] KEELC 6743 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6743 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E004 OF 2024  
EC CHERONO, J  
OCTOBER 11, 2024**

**BETWEEN**

**BENEDICT MASIKA KIBERENGE ..... PLAINTIFF**

**AND**

**SIMIYU WENANI WARUNGA ..... 1<sup>ST</sup> DEFENDANT**

**JOICE NASIMIYU WANYAMA ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Applicant's Notice of Motion application dated 19<sup>th</sup> March 2024. The said application is expressed to be brought under Section 63(e) of the *Civil Procedure Act*, Order 42(6) (1) and 46 Rule (16) (b) of the *Civil Procedure Rules* 2010 seeking the following Orders:
  - a. Spent.
  - b. That this Honourable Court be pleased to issue an order of stay of execution and all proceedings and consequential orders in the above case (Webuye case No. ELC No. E006 of 2022) pending the hearing and determination of this suit.
  - c. Spent.
  - d. That the costs hereof be provided for.
2. The application is based on the grounds on the face of the said application supported by the affidavit of Benedict Masika Kiberenge sworn on the 19<sup>th</sup> March, 2024.
3. It is the Applicants case that he is a son and thus a beneficiary of the estate of Wanyama Walusaka Wambulwa-deceased while the 2<sup>nd</sup> Defendant/Respondent is a widow to the said deceased person and the 2<sup>nd</sup> Defendant/Respondent is the 1<sup>st</sup> Defendant/Respondents aunt. It is stated



that the 1<sup>st</sup> Defendant/Respondent acquired a grant ad-litem for the estate of Wanyama Walusaka Wambulwa-deceased while the 2<sup>nd</sup> Defendant/Respondent has transacted with Land Parcel No. Ndivisi/Makuselwa/406 without engaging the beneficiaries. It is also deposed that Wanyama Walusala Wambulwa was found to be the legitimate owner of the suit land by the Ndivisi Land Tribunal and Webuye Magistrates Court in Misc. Civil Application No. 13 of 2006.

4. It is further stated that despite the aforementioned findings, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents have now entered into a contest to distribute the suit land without involving the beneficiaries of the estate and have subsequently entered into a consent in Webuye Magistrates Court ELC Case No. E006 Of 2022 to distribute land and disinherit the bona fide beneficiaries therein. It was argued that if allowed to proceed, the substratum of this suit would be wasted and the beneficiaries thereof shall suffer irreparable losses.
5. In his response to the said application, the 1<sup>st</sup> Respondent filed a replying affidavit sworn on 25<sup>th</sup> March, 2024 in which he deposed that the applicant in this application has made similar prayers as sought by one Aluminah in Bungoma ELCOS No. 2 of 2023. It was stated that the Applicant made a similar applications in Webuye ELC Case No.E006 of 2022 where he was listed as an interested party which application was dismissed. It was stated that this application has been made in bad faith and is an afterthought aimed at wasting the courts judicial time. The 1<sup>st</sup> Respondent averred that the Applicant made a similar order in Bungoma ELCOS No. 2 of 2023 and by this application, she is asking the Court to sit on appeal of its own decision. He urged the Court to dismiss the application.
6. In his response, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 25<sup>th</sup> March, 2024 and stated that she is the widow of the deceased and that the Applicant herein obtained letters of administration ad litem for the estate of Wanyama Walusaka Wambulwa in Kimlili MISC Sucs No. E010 of 2024 irregularly. She stated that the applicant herein has unsuccessfully filed various applications for stay against the order and decree of Webuye SPM-ELC Case No. E006 of 2022 in Webuye Succ Cause No. E003 of 2022. Webuye Misc Civil Appl No. E012 of 2023 resulting to orders of protection to ensure the implementation of the said orders. The 2<sup>nd</sup> Respondent accused the Applicant of being untruthful as he has been involved in other cases which were dismissed and he had never appealed against the decisions.
7. Parties took directions and agreed to canvass the application by way of written submissions. The Applicant had not filed his submissions at the time the court withdrew to consider this application.
8. The 1<sup>st</sup> Respondent filed his submissions dated 25<sup>th</sup> March 2024 on 10<sup>th</sup> July, 2024 wherein he submitted on three issues. On the first issue, he sought to answer whether the Court can determine this application which is said to be a duplicate of another filed in Bungoma ELCOS No. 2 of 2023. The 1<sup>st</sup> Respondent contends that the Applicant is the one behind the application made in Bungoma ELCOS No. 2 of 2023 which is similar to the present application and as such, he should not be heard in this current application. On the second issue on whether this application is merited, the 1<sup>st</sup> Respondents submitted on the negative. On the third issue on a notice of preliminary objection raised by him, the 1<sup>st</sup> Respondent argued that the Court ought to determine the same before proceeding with the matter.
9. The 2<sup>nd</sup> Respondent filed submissions dated 9<sup>th</sup> July, 2024 where she reiterated the averments contained in her replying affidavit.

### **Legal Analysis and Decision**

10. I have considered the application, the affidavits in support and in opposition thereto as well as written submissions and in my view, the singular issue for determination is whether stay of execution of all



proceedings and consequential orders in Webuye PMCC ELC 6/21 Simiyu Wenani Werunga v. Joyce Nasimiyu Wanjalaought to be issued.

11. The Applicant in this matter has sought for stay of execution of all proceedings and consequential orders in Webuye PMCC ELC E006/2022 claiming that the parties in the said case are in the process of sharing Land Parcel No. Ndivisi/Makuselwa/406 without engaging the beneficiaries. The Respondents on their part have denied the Applicants allegations and have opposed the application stating that the same has been previously heard and disallowed in various forums.
12. It is important to note that the Applicant herein who was also the applicant in Webuye ELC Case no E006 of 2022 filed an application dated 7<sup>th</sup> November, 2022 seeking for orders of inter alia stay of the orders and decree in the said suit, to be included as an interested party therein and for setting aside of the orders and decree therein to allow him and other intended interested parties to file a defence. The Trial Court in determining the said application disallowed the same in its ruling dated 9<sup>th</sup> June, 2023. There is no evidence that the said ruling was appealed against. It should be noted that the applicant has not filed this suit as an appeal but is seeking to stay execution in a different matter involving different parties thereto. Since the Applicant is not a party in the proceedings in which he seeks for stay of execution, he is precluded from agitating any action in it.
13. Further, it is trite law that every Application must be predicated on the prayers in the suit and in this case, there is clearly a disconnect between the cause of action and the prayer for stay of execution.
14. In the end I find that the application dated 19<sup>th</sup> March 2024 lacks merit and the same is hereby dismissed with costs.
15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON.E.C CHERONO**

**JUDGE**

In the presence of;

1. Mr. H.P Wamalwa for Plaintiff/Applicant.
2. Defendant/Respondent-absent.
3. Bett C/A.

