



Sanja (Suing as the Administrator of the Estate of Vincent Sanja Wapichi - Dcd) v Opicho & 3 others (Environment & Land Case E012 of 2023) [2024] KEELC 6763 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E012 OF 2023
EC CHERONO, J
OCTOBER 11, 2024**

BETWEEN

CHRISPINUS WAFULA SANJA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF VINCENT SANJA WAPICHI - DCD) PLAINTIFF

AND

DAVID OPICHO 1ST DEFENDANT

SIMON ADADA WASIKE 2ND DEFENDANT

HENRY WASIKE 3RD DEFENDANT

LAND REGISTRAR BUNGO 4TH DEFENDANT

RULING

1. What is before me for determination is the application dated 14th December, 2023 brought under Section 1,1A,3A &63 (c) and (e) of the [Civil Procedure Act](#) and Order 40 Rule 1(a) of the Civil Procedure Rules seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Land Registrar and Land Surveyor from visiting, determining and ascertaining the boundary between the parcels of land known as E.Bukusu/N.Nalando/255, E.Bukusu/N.Nalando/3283, E.Bukusu/N.Nalando/2076, E.Bukusu/N.Nalando2251 and E.Bukusu/N.Nalando/2078 pending the hearing and determination of the main suit.



- d. That this Honourable Court be pleased to issue an order of interim injunction restraining the Respondents, their agents, servants or assignees from interfering in any way whatsoever with the succession process and distribution of land parcel number E.Bukusu/N.Nalndo/255 pending the hearing and determination of the main suit.
- e. That the costs of this application be provided for.
2. The application is premised on eighteen (18) grounds on the face thereof which are explicated in the supporting affidavit of the Interested party/Applicant-Chrispinus Wafula Sanja sworn on 14th December, 2023.
3. It is the Applicant's case that Vincent Sanja Wapicho (the deceased) was the registered owner of land parcel number E.Bukusu/N.Nalndo/255 which is adjacent to land parcel number E.Bukusu/N.Nalndo/1599 belonging to one Jackson Wasike Opicho-now deceased. It is further deposed that both titles were issued during the land adjudication period and that when Jackson Wasike Opicho died, the 1st Respondent administered the estate and completed the process without any complaints as to the boundaries. The applicant stated that after distribution of the estate, some of the beneficiaries resorted to selling their portions to third parties causing the sub-division of land parcel number E.Bukusu/N.Nalndo/1599 to land parcel number E.Bukusu/N.Nalndo/3283, 2076, 2251 and 2078. The said third parties i.e the 1st to 3rd Respondents are said to have further sold part of their portions leaving them with smaller portions and they now wish to fix the boundaries afresh.
4. It is deposed that land parcel number E.Bukusu/N.Nalndo/255 which forms part of the estate of Vincent Sanja Wapicho who died on 2.2.1972 is yet to be shared amongst 35 beneficiaries of the estate and that the 1st to 3rd Respondents are now threatening to curve out part of the said parcel and tamper with the boundaries despite not issuing summons to all the beneficiaries of the estate of Vincent Sanja Wapicho. It is stated that this omission by the Respondents is aimed at denying the said beneficiaries an opportunity to protect their right to property. It is their case that the intended exercise to fix the boundaries is malicious and intended to cause unnecessary pandemonium.
5. The 1st, 2nd and 3rd Respondents filed their replying affidavit sworn by the 3rd Respondent dated 8th March, 2024. It is their case that the 3rd Respondent is the owner of land parcel no. E.Bukusu/N.Nalndo/2077 and 2078, the 1st Respondent is the owner of E.Bukusu/N.Nalndo/2076 while the 2nd Respondent is the owner of E.Bukusu/N.Nalndo/3283. The Respondents denied the Applicants claim stating that they have not approached by the 4th Respondent for the alleged exercise.
6. I have considered the instant Application and the responses thereto. I have also considered the arguments by and on behalf of the respective Parties. To enable the Honourable Court arrive at an informed, reasonable and fair decision, I find the following three (3) issues commend for determination:
- a. Whether the Notice of Motion Application dated 14th December, 2023 by the Plaintiff/Applicant herein has any merit.
- b. Who will bear the costs of the application?

Whether the Notice of Motion Application dated 14th December, 2023 by the Plaintiff/Applicant herein has any merit.

7. The Applicant has sought for injunctive orders to prevent the Land Registrar and surveyor from determining and ascertaining boundaries between land parcel no. E.Bukusu/N.Nalando/255, E.Bukusu/N.Nalando/3283, E.Bukusu/N.Nalando/2076, E.Bukusu/



N.Nalando2251 and E.Bukusu/N.Nalando/2078 in order to preserve the suit properties pending the hearing of the main suit.

8. Order 40 Rule 1 provides for the power of the court to grant temporary injunction as follows;

“Where in any suit it is proved by affidavit or otherwise –

- a. that any property in dispute in a suit is in danger of being wasted, damaged, alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

9. The import of the above provision is that, where there is a risk of any property in dispute being damaged, wasted, alienated or sold, or being removed from the jurisdiction of the court with the result that any ultimate decree passed in favour of the applicant may be obstructed from execution, the court has the discretion to grant temporary injunction so as to preserve the property pending determination of the suit.

10. Further, the principles for the grant of temporary injunction are well settled. In the case of *Giella vs. Cassman Brown & Company Limited* [1973] EA 358, the court set out the conditions for grant of temporary injunction as follows;

“first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

11. This position was restated in the case of *American Cyanamide Co. vs. Ethicom Limited* [1975] AER 504, where the court stated the three elements for grant of injunction as follows;

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

12. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* CA No 77 of 2012 [2014] eKLR, it was held that the three conditions for grant of injunction are to be applied as separate distinct and logical hurdles which the applicant must surmount sequentially.

13. A prima facie case was described in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd* [2003] eKLR as follows; “in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call or an explanation or rebuttal from the latter.”



14. The Plaintiff/Applicant in this case contends that the Defendant/Respondents intend to have the suit properties surveyed without issuing summons to the beneficiaries of the estate of the late Vincent Sanja who are the rightful owners of land parcel no. E.Bukusu/N.Nalando/255 therefore, he is apprehensive that the said beneficiaries will be prejudiced and denied an opportunity to protect their Constitutional right to land.
15. The Defendant/Respondents on the other hand contend that they have not engaged the land Registrar and land surveyor for fixing of any boundary as alleged by the Plaintiff/Applicant. Further, they do not deny the ownership of the various parcels of land as stated by the Plaintiff/Applicant.
16. It is however noteworthy that the Plaintiff/Applicant has attached letters dated 7/3/2023 and 26/10/2023 from the Land Registrar addressed to the parties herein with the subject being the intention to ascertain and fix boundaries relating to land parcel no. E.Bukusu/N.Nalando/255, E.Bukusu/N.Nalando/3283, E.Bukusu/N.Nalando/2076, E.Bukusu/N.Nalando 2077, E.Bukusu/N.Nalando/2078 and E.Bukusu/N.Nalando/2079. Although it is not clear who the Applicant or requesting party is, it is clear there is an intended exercise for the determination of boundaries between these parcels of land.
17. Now, the Land Registration Act 2012 like the repealed Registered Land Act, Cap 300 Laws of Kenya makes provisions for alteration and fixing of boundaries and it is the Land Registrar who has the mandate to determine disputes relating to alterations and fixing of boundaries. Section 16 of the Act provides for alteration of boundaries and provides as follows:-
 - 16.(1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, in accordance with any law relating to subdivision, of land that is for the time being in force.
 - (2) Notwithstanding subsection (1), any alteration made shall be made public and whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.
 - (3) The office or authority responsible for the survey of land may prepare new editions of the cadastral map or any part thereof, and may omit from the new map any matter that it considers obsolete.
18. It is also noteworthy that according to the certificate of grant attached by the Plaintiff/Applicant, the plaintiff/Applicant is named as the administrator of the estate of Vincent Sanja and it is in that very capacity that he has brought this suit. This leads this Honourable Court to ask what duties an administrator of an estate of a deceased person perform in normal circumstances? The powers and duties of personal representatives include that the property of deceased is to vest in personal representative. Section 7a of the Law of Succession Act (Cap 160 Laws of Kenya) provides:-

“ the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”
19. My understanding of the above provision is that the administrator of the estate of Vincent Sanja and in this case the Plaintiff/Applicant herein is mandated to undertake all the affairs of the said estate until conclusion of its distribution as per the certificate of grant so mandating him/her. Therefore, having



been summoned/cited to attend the fixing of the boundaries in the aforesaid parcels of land, the estate of the deceased is deemed to have been properly summoned. The Plaintiff/Applicant in this case has been summoned as the administrator of the estate of Vincent Sanja and not in his personal capacity as a beneficiary. Therefore, it is unreasonable and erroneous for the Plaintiff/Applicant to demand for the summoning of all the beneficiaries individually. It is incumbent upon him as the administrator to mobilize the other beneficiaries for the said exercise and ensure the estate of the deceased is heard during the exercise

19. Further, the duty to ascertain and fix boundaries is a statutory duty in law bestowed upon the Land Registrar and this Court cannot interfere with such powers as donated without any justifiable cause.
19. The Plaintiff/Applicant equally seeks and injunctive order against the Defendant/Respondents from interfering with the succession process and distribution of land parcel no. E.Bukusu/N.Nalando/255. On examination of the supporting affidavit and in light of my analysis above, I find that Applicants have not demonstrated how the Respondents are interfering with the distribution of the estate. Further, this court cannot issue orders with regards to Succession proceedings as such mandate is a preserve of that court.
19. In the premises, I am not satisfied that the Applicant has made out a prima facie case with a probability of success. Having found so, I see no need to interrogate whether the Applicant shall suffer irreparable injury which may not be compensated in damages or where the scale of convenience tilts.
19. The upshot of my finding is that the application dated December 14, 2023 has no merit and the same is hereby dismissed with costs.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Ms. Nekesa holding brief for Nechesa for plaintiff.
2. 1st defendant present.
3. 2nd defendant present
4. 3rd defendant present
5. 4th defendant absent
6. Bett C/A.

