



**Juma & another v Wepukhulu & another (Both being administrators of the Estate of Wepukhulu Wanambisi Maundende) (Environment & Land Case E010 of 2021) [2023] KEELC 18693 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18693 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E010 OF 2021**

**EC CHERONO, J**

**JULY 4, 2023**

**BETWEEN**

**WANAMBISI STEPHEN JUMA ..... 1<sup>ST</sup> PLAINTIFF**

**TERESA NAKHUNGU WATI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID WAFULA WEPUKHULU ..... 1<sup>ST</sup> DEFENDANT**

**MOSES MAUDENDE WEPHUKHULU ..... 2<sup>ND</sup> DEFENDANT**

**BOTH BEING ADMINISTRATORS OF THE ESTATE OF WEPUKHULU  
WANAMBISI MAUNDENDE**

**RULING**

1. The application before me is the Notice of Motion dated November 9, 2022 seeking the following orders:
  1. This Honourable court be pleased to enter judgement in this suit in favour of the plaintiffs against the defendants who have admitted the plaintiff's entire claim.
  2. This honourable court be pleased to enter judgment in the following terms.
    - a. An order of specific performance be issued ordering the defendant herein to subdivide land parcel No. E Bukusu/N. Sangalo/661 and transfer 9 ½ acres therefore to the plaintiffs.
    - b. An order do issue ordering the defendants to execute documents of transfer in order to effect the transfer of 9 ½ acres out of land parcel E. Bukusu/N Sangalo/661 to the



plaintiffs and in default the Honourable Deputy Registrar of this Honourable court be authorized to execute the same on behalf of the defendants.

- c. In Alternative to prayer No (a) and (b) above that there be a declaration that the plaintiffs have acquired title to the portion of 9 ½ acres in land parcel No. E. Bukusu/N Sangalo/661 under their occupation by virtue of adverse possessions under section 7 and 38 of the *Limitation of Actions Act* cap 22 and further declaration be made that the Defendants hold the said 9 ½ acres in E. Bukusu/N. Sangalo/661 as trustees only of the plaintiffs.
  - d. Costs of this application be provided for.
2. The application is supported by the affidavit of Wanambisi Stephen Juma, the 1<sup>st</sup> plaintiff/applicant herein and grounds apparent on the face of the said application. By way of a response, the 2<sup>nd</sup> defendant/respondent through the firm of M/s Fwaya Masakhwe Were & Advocates drew/prepared Grounds of opposition dated March 10, 2023 and filed in court on March 14, 2023 respectively. The 1<sup>st</sup> defendant/respondent did not file any response to the application.
  3. When the application came up for directions on the April 25, 2023, the parties agreed by consent to canvass the same by written submissions.

#### **Plaintiffs/applicants Written Submissions**

4. The plaintiffs through the firm of M/s Njiru Boniface & Co. Advocates filed their submissions on May 18, 2023. According to the plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are joint administrators of the Estate of Wepukhulu Wanambisi Maundede appointed by the High Court in Kakamega HC Succession Cause NO. 184 of 1986.
5. The applicants also contend that the first defendant/respondent in this suit has filed an affidavit admitting the entire claim of the plaintiffs. They submitted that the affidavit of David Wafula Wepukhulu, the 1<sup>st</sup> defendant herein which constitutes admission of the Plaintiffs' claim should be taken as binding upon Moses Maundede, the 2<sup>nd</sup> administrator herein because they are joint Administrators. They further submitted that the defendants being administrators of the Estate of Wepukhulu Wanambisi Maundede are tasked with administering the Estate of the deceased and one administrator has admitted to the fact that the parcel of land was sold. They averred that both administrators cannot act in divergent ways and that an admission by one Administrator mean that the other administrator is bound by the same admission and that this honourable court ought to enter judgment binding both administrators the same way they are bound by the grant issued by the court.
6. They relied on the following cases and citations:
  1. Section 79 of the *Law of Succession Act* Order 13 Rule 2 *CPR*
  2. *Re- Estate of Makokha Idris Khasabuli (deceased)* 2019 eKLR

#### **2<sup>Nd</sup> Respondent's Submissions**

7. The 2<sup>nd</sup> respondent submitted in opposition to the application that the defendants were sued separately as defendants. They submitted that having been sued as distinct and separate parties, the 2<sup>nd</sup> defendant filed separate pleadings as of right, denying the plaintiff's claim. He submitted that the plaintiffs cannot chose the position taken by the 1<sup>st</sup> defendant as binding on the 2<sup>nd</sup> defendant and not that taken by the 2<sup>nd</sup> defendant. Since each defendant has a right to choose how they want to respond to the plaintiff's claim, it therefore becomes necessary to take evidence for the court to determine whose



position between the two is in the interest of the estate of the deceased. He submitted that evidence can only be obtained upon hearing the parties in the main suit and not through interlocutory applications. He relied in the following cases and David authorities.

1. [\*Sironga Ole Tukai v Francis Kiprotich Arap Kirui & 2 others\*](#) (2014) eKLR
2. Section 22 (b) of the [\*Land Control Act\*](#).

### **Analysis And Decisions**

8. I have considered the notice of motion dated November 9, 2022, application under review dated November 9, 2022, the supporting affidavit sworn by Wanambisi Stephen Juma, grounds on the face of the application. I have also considered the grounds of opposition by the 2<sup>nd</sup> defendant/respondent as well as the rival submissions by the applicants and the 2<sup>nd</sup> defendant/respondent. The application under consideration is brought under order 13 Rule 2 [\*CPR\*](#) which stipulates as follows:

“2 Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or orders as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties; and the court may upon such application make such order, as the court may think just.”

9. The 2<sup>nd</sup> defendant who is sued separately as a party has filed a statement of defence dated November 14, 2022 denying the plaintiff's claim. The 1<sup>st</sup> defendant on his part filed an affidavit sworn on October 14, 2022 admitting the plaintiff's claim. Based on the admission by the 1<sup>st</sup> defendant, the plaintiffs want this honourable court to treat the said admission by the 1<sup>st</sup> defendant binding as against the 2<sup>nd</sup> defendant/Respondent herein as well. Though the defendants who are administrators of the Estate of Wepukhulu Wanambisi Maundende have been sued jointly, the law allows the two administrators to either take common or different positions. Where the two administrators take different positions, the position taken by one administrator cannot be taken as the position taken by the second administrator. In such scenario, the trial court will require the parties to tender evidence to determine the position that is in the best interest of the estate of the deceased person. position is obtained in the circumstances of this case. Since the 1<sup>st</sup> defendant has taken a divergent position to that of the 2<sup>nd</sup> defendant regarding the claim by the plaintiffs, this court takes the view that this case is suitable to proceed to hearing to determine the best interest of the Estate of Wepukhulu Wanambisi Maundende (deceased).
10. The upshot of my finding is that the Notice of Motion application dated November 9, 2022 is without merit and the same is hereby dismissed with costs. It is so ordered.

**READ, DELIVERED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 4<sup>TH</sup> JULY, 2023.**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:

M/s Mugo holding brief Boniface Njiru

2<sup>nd</sup> defendant – present

1<sup>st</sup> defendant – present

Joy – C/A

