



In re Estate of Wamalwa Vincent Nyukuri (Deceased) (Family Appeal E009 of 2024) [2024] KEHC 15615 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
FAMILY APPEAL E009 OF 2024
DK KEMEL, J
DECEMBER 6, 2024**

IN THE MATTER OF THE ESTATE OF WAMALWA VINCENT NYUKURI (DECEASED)

BETWEEN

WENSALOUS BARASA NYUKURI APPLICANT

AND

DENNIS WAMALWA NYUKURI RESPONDENT

RULING

1. The Appellant/Applicant filed a Chamber Summons dated 19th August 2024 seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That a temporary injunction do issue restraining Jacob Wanyama either by himself, his servants, or any other person acting under his instructions and control, from carrying out any activities on LR No. E.bukusu/S.Kanduyi/15486 that constitute intermeddling including demolishing any structures, constructing new structures, selling, leasing, remaining, or carrying out any business thereon pending the hearing and determination of this application.
 - d. That a temporary injunction do issue restraining Jacob Wanyama either by himself, his servants, or any other person acting under his instructions and control, from carrying out any activities on LR No. E.bukusu/S.Kanduyi/15486 that constitute intermeddling including demolishing any structures, constructing new structures, selling, leasing, remaining or carrying out any business thereon pending the hearing and determination of this appeal.



- e. That pending the hearing and determination of Bungoma Family Appeal No. E009 of 2024, there be a stay of execution of orders in Bungoma Chief Magistrate's Succession Cause No. 33 of 2017 issued on 15th August 2024.
- f. That the costs of this application be in the cause.
2. The summons are premised on the grounds on the face of it and the supporting affidavit annexed sworn by the Appellant/Applicant herein on even date. In a nutshell, the Appellants/Applicant herein has preferred an appeal against the ruling issued in Bungoma Succession Cause No. 33 of 2017 and delivered by Hon. T.M. Olando on 15th August 2024, vide Bungoma High Court Family Appeal No. E009 of 2024. In his ruling, the trial magistrate ordered the amendment of the Certificate of Confirmation of Grant to include land parcel number E. Bukusu/S. Kanduyi/15486 which is registered in the name of the deceased, Wamalwa Vincent Nyukuri. According to him, the execution of the said order will expose land parcel number LR No. E.Bukusu/S.Kanduyi/15486 to waste.
3. Further, before the ruling of the lower Court, Hon. Maloba Ruth B., on 24th July 2024, issued injunctive orders restraining Wilfredah Naliaka and Jacob Wanyama either by themselves, servants or any other persons acting under their instruction and control from intermeddling with the estate of the deceased by demolishing any structures, constructing any structure, selling, developing, on the leasing, or carrying out any activities land parcel number LR No. E.Bukusu/S.Kanduyi/15486.
4. He avers that despite knowledge and service of the said orders to Jacob Wanyama, he continues intermeddling with land parcel land parcel number LR No. E.Bukusu/S.Kanduyi/15486.
5. Opposing the summons, the Respondent filed his grounds of opposition dated 18th September 2024, wherein he stated that the summons is devoid of merit, frivolous, misconceived, baseless and incompetent; that the summons do not meet the legal threshold to warrant granting of the orders sought; that Jacob Wanyama is not a party to the appeal herein thus issuing the orders sought against him is tantamount to condemning him unheard.
6. The Respondent also swore a replying affidavit on 18th September 2024, wherein he averred that the Applicant is openly demonstrating an unwillingness to have the succession process of the estate of the deceased herein concluded by filing numerous applications and appeals, this appeal is one of them. He averred that the Appellant/Applicant is his co-administrator and that he has all along participated in the succession cause. Subsequently, the deceased left behind two assets land parcel number land parcel number LR No. W.Bukusu/N.Mateka/3428 and LR No. E.Bukusu/S.Kanduyi/15486, and that only land parcel number LR No. E.Bukusu/S.Kanduyi/15486 was distributed as LR No. W.Bukusu/N.Mateka/3428 was excluded as the same was non-contentious as the deceased had left behind an agreement on how it was to be shared. Further, he averred that the Appellant/Applicant has always been in the know about the agreement and has never raised any issue until this year. According to him, parties have been in occupation and utilization of LR No. E.Bukusu/S.Kanduyi/15486, in their respective portion, and that the Appellant/Applicant is aware that the portion allocated to Wilfrida Naliaka was sold to a third party one Jacob Wanyama who has used the said portion to develop and offer essential health services thus the allegations that Jacob Wanyama is intermeddling with the estate of the deceased is false.
7. The Appellant/Applicant swore a supplementary affidavit on 26th September 2024, further to the supporting affidavit sworn on 19th August 2024, wherein he averred that he had opposed the mode of distribution as contained in the application dated 17th July 2024 vide his replying affidavit sworn on 3rd August 2024, and that before the filing of the application dated 17th July 2024, he had moved the



lower Court seeking restraining orders against Jacob Wanyama from continuing to intermeddle with land parcel LR No. E.Bukusu/S.Kanduyi/15486.

8. The application was canvassed by way of written submissions. Both parties duly complied.
9. Having read the application, the grounds in the supporting affidavit, the grounds opposing it and the replying affidavit filed in response thereto, and the supplementary affidavit, the issue that arises for determination is whether the Applicant has met the conditions set to warrant the orders sought.
10. Section 47 of the *Law of Succession Act* provides: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this *Act* and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may, for the purpose of this section, be represented by Resident Magistrates appointed by the Chief Justice.”

11. On the other hand, rule 73 of the *Probate and Administration Rules* provides that: -

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

12. From the summons, it is clear that the Appellant/Applicant seeks orders to be executed against a person who is not a party to this suit. In the case *Kiai Mbaki & 2 others v Gichubi Macharia & Another* [2005] eKLR the Court stated as follows,

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

13. It follows that the Court cannot issue orders against a person who is not a party to the suit. Further to the foregoing, the main purpose why a party may be joined to a suit is to claim some relief from such a party.
14. The irresistible conclusion in this matter is that the prayers as sought cannot be issued. They are also directed at a non-party and therefore totally misplaced.
15. The only order that commends itself is that the application dated 19th August 2024 is devoid of merit and is hereby struck out. The Appellant is directed to file and serve the record of appeal as a matter of priority and to work towards having it set down for hearing. As the parties are administrators of the estate, I order each party to bear their costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Maloba for Appellant/Applicant



Olonyi for Mukhooli for Respondent

Kizito/Ogendo Court Assistant

