



**Wabwire (Suing as the Legal Representative of Marisiana Nabwire  
Wabwire – Deceased) v Ayienga & 2 others (Environment & Land Case  
E008 of 2024) [2025] KEELC 116 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 116 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E008 OF 2024**

**BN OLAO, J  
JANUARY 23, 2025**

**BETWEEN**

**FRANCISCA NABWIRE WABWIRE (SUING AS THE LEGAL  
REPRESENTATIVE OF MARISIANA NABWIRE WABWIRE –  
DECEASED) ..... PLAINTIFF**

**AND**

**JOSEPH AMOLO AYIENGA (THE DIRECTOR) ..... 1<sup>ST</sup> DEFENDANT  
REMEMBER NHU-KENYA ..... 2<sup>ND</sup> DEFENDANT  
THE CENTRE CHAIRMAN REMEMBER NHU-KENYA, BUSIA  
BRANCH ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are three (3) applications in this file. These are:

1. The Notice of Motion dated 6<sup>th</sup> May 2024 filed by Francisca Nabwire Wabwire (the Plaintiff).
2. The Notice of Motion dated 14<sup>th</sup> May 2024 filed by Joseph Amolo Ayienga the (1<sup>st</sup> Defendant).
3. The Notice of Motion dated 5<sup>th</sup> July 2024 also filed by the Plaintiff.

On 8<sup>th</sup> July 2024, I struck out the Plaintiff’s Notice of Motion dated 5<sup>th</sup> July 2024. And on 6<sup>th</sup> November 2024, both Mr Ipapu counsel for the Plaintiff and Mr Okutta counsel for the 1<sup>st</sup> Defendant agreed that there was no need canvassing the 1<sup>st</sup> Defendant’s Notice of motion dated 14<sup>th</sup> May 2024 since a determination of the Plaintiff’s Notice of Motion dated 6<sup>th</sup> May 2024 will suffice in the circumstances of this case. This ruling is therefore in respect to the Plaintiff’s Notice of Motion dated 6<sup>th</sup> May 2024.



2. The Plaintiff first approached this Court vide her plaint dated 25<sup>th</sup> April 2024 in which she sought against JOseph Amolo Ayienga, The Director Remember Nhu-kenya And The Centre Chairman Remember Nhu-kenya Busia Branch (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively) judgment against them jointly and severally in the following terms with respect to the land parcels NO Bukhayo/Mundika/9904 and 9905 (the suit land):

A: An order cancelling the titles NO Bukhayo/Mundika/9904 and 9905.

B: Upon grant of (a) above, the Land Register be restored to reed title NO Bukhayo/Mundika/672.

C: An eviction order to issue against the Defendants.

D: Costs

E: Any other relief the Honourable Court deems just to grant.

The basis of the Plaintiff's case is that the land parcel NO Bukhayo/Mundika/672 was the property of her late mother Marisiana Nabwire Wabwire (the deceased) who passed away in 1998 and whose Estate she represents. That on or around 2<sup>nd</sup> June 2021, the 1<sup>st</sup> Defendant fraudulently sub-divided the said parcel of land to create the suit land which he registered in his names and thereafter, he transferred the land parcel NO Bukhayo/Mundika/9905 to the 2<sup>nd</sup> Defendant. Particulars of fraud have been pleaded in paragraph 6 of the plaint.

3. The record shows that the Defendants are yet to file their defences.

4. What calls for my determination is the Plaintiff's Notice of Motion dated 6<sup>th</sup> May 2024 grounded under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 6 and 18 of the Civil Procedure Act in which she seeks the following Order:

1. Spent

2. Spent

3. That pending the hearing and final determination of this suit, there be issued an order of permanent injunction (sic) against specifically the 1<sup>st</sup> Defendant restraining him, his agents, servants and/or any other person(s) purporting to act through him from interfering in any manner whatsoever in what is now land parcels NO Bukhayo/Mundika/904 and 9905.

4. That there do issue an order of stay of proceedings in Busia Cmc Elc Case No E087 of 2023 between the 1<sup>st</sup> Defendant versus the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.

5. Costs be provided for.

The application is premised on the grounds set out therein and supported by the Plaintiff's affidavit of even date.

5. The gravamen of the application is that the Plaintiff is the daughter of the deceased who at the time of her demise on 5<sup>th</sup> September 1998 was the registered proprietor of the land parcel NO Bukhayo/Mundika/672. That the deceased's Estate has never been the subject of any probate proceedings and neither had she during her life time, sold and transferred her interest in the said parcel of land. That the 1<sup>st</sup> Defendant has fraudulently transferred the said parcel of land to himself and later sub-divided it to create the suit land after which he transferred the resultant sub-division NO Bukhayo/Mundika/9904 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who have put up a massive storied building thereon. The 1<sup>st</sup> Defendant thereafter coveted the development thereon and filed Busia CMC ELC Case No E087 of 2023 against



the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had carried out developments on the land parcel NO Bukhayo/Mundika/9905 which is not what he had sold to them. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are running a children's home have been injuncted in Busia Cmc Elc Case No E087 of 2023 forcing the children to remain homeless. That the 1<sup>st</sup> Defendant intermeddled with the deceased's Estate as can be seen from the transfer of land forms executed when the deceased had already died. That the Plaintiff is amenable to a negotiated settlement with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for the benefit and interest of the needy children.

6. The following documents are annexed to the Motion:

1. Copy of Grant of Letters of Administration Ad Litem issued to the Plaintiff on 19<sup>th</sup> April 2024 for purposes of filing this suit with respect to the Estate of the deceased.
2. Copy of the Certificate of death for the deceased.
3. Copy of Certificate of Confirmed Grant issued to the deceased in respect to the Estate of one Dismas Wabwire.
4. Photographs of a one storey building.
5. Copy of Transfer of Land Form dated 12<sup>th</sup> August 2021 for the transfer of the land parcel NO Bukhayo/Mundika/9904 by the 1<sup>st</sup> Defendant to Joseph Chege Ngah, Benson Ruor Miano And Doreen Ajiambo Bwire As Trustees For Remember Nhu Kenya.
6. Copy of Letter of Transfer for the land parcel NO Bukhayo/Mundika/9904.
7. Copy Application for Transfer of the land parcel NO Bukhayo/Mundika/9904.
8. Copy of Transfer of Land Form dated 8<sup>th</sup> December 2022 for land parcel NO Bukhayo/Mundika/9905 from the deceased to the 1<sup>st</sup> Defendant.
9. Copy of Letter of Consent dated 1<sup>st</sup> December 2022 for the transfer of the land parcel NO Bukhayo/Mundika/9905 from the deceased to the 1<sup>st</sup> Defendant.
10. Copy of application for consent of the Land Control Board for the transfer of the land parcel NO Bukhayo/Mundika/9905 from the deceased to the 1<sup>st</sup> Defendant.
11. Copy of Mutation Form for the land parcel NO Bukhayo/Mundika/672.
12. Copy of application for consent of the Land Control Board for the partition of the land parcel NO Bukhayo/Mundika/672 into two (2) portions.
13. Copy of letter of consent dated 2<sup>nd</sup> May 2011 for the transfer of the land parcel NO Bukhayo/Mundika/672 to the deceased and Albert Emisiko.

Only the 1<sup>st</sup> Defendant filed a response to the Plaintiff's Notice of Motion dated 6<sup>th</sup> May 2024. That response is in fact the 1<sup>st</sup> Defendant's supporting affidavit to his own Notice of Motion dated 14<sup>th</sup> May 2024. In the said affidavit, the 1<sup>st</sup> Defendant has deposed, inter alia, that he is the registered proprietor of the land parcel NO Bukhayo/Mundika/9905 while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants previously purchased from him the land parcel NO Bukhayo/Mundika/9904. That the Plaintiff is an imposter and a proxy to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are keen to evade the implementation of orders issued in Busia Cmc Elc Case No E087 of 2023 between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That in obtaining the orders issued on 10<sup>th</sup> May 2024, the Plaintiff failed to disclose the existence of the orders issued by the Court and which



have not been set aside, varied or vacated. That the Plaintiff and her cohorts being the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are colluding and using the orders issued on 10<sup>th</sup> May 2024 to invade his land and forcefully evict him which acts are likely to cause chaos on his land. That the Plaintiff also failed to disclose that there was a site visit conducted by the Court and County Surveyor and which resulted in a consent order settling all the claims herein. That the 1<sup>st</sup> Defendant is unable to use his land parcel NO Bukhayo/Mundika/9905 on account of the orders issued on 10<sup>th</sup> May 2024 which orders should be reviewed or varied. That this Court should instead direct that the status quo ante 10<sup>th</sup> May 2024 be conserved since there is a consent order dated 9<sup>th</sup> May 2024 which the Plaintiff wants to evade. That the parties should be compelled to respect the orders issued in Busia Cmc Elc Case No E087 of 2023.

7. Annexed to that affidavit are the following documents:

- 1: Copy of title deed for the land parcel NO Bukhayo/Mundika/9905 issued in the name of the 1<sup>st</sup> Defendant on 3<sup>rd</sup> April 2023.
- 2: Copy of a land sale agreement dated 5<sup>th</sup> August 2021 between the 1<sup>st</sup> Defendant as vendor and the 2<sup>nd</sup> Defendant as purchaser for the land parcel NO Bukhayo/Mundika/9904.
- 3: Copy of order issued on 10<sup>th</sup> August 2023 in Busia Elc Case No 87 of 2023.
- 4: Copy of letter dated 28<sup>th</sup> July 2023 from the Busia Sub-county Children's Officer and addressed to the Manager House Of Joy Girls Rescure Centre Busia.
- 5: Copy of consent order issued on 9<sup>th</sup> May 2024 in Busia Elc Case No E087 of 2023.
- 6: Copy of letter dated 24<sup>th</sup> April 2024 and addressed to the Senior Principal Magistrate's Court Busia By Wycliffe Ouma-okutta Advocate And B. M. Ouma Advocates for the Defendants.

The 1<sup>st</sup> Defendant also filed a supplementary affidavit dated 15<sup>th</sup> May 2024 also in support of his application dated 14<sup>th</sup> May 2023 in which he deposed that there is a consent order dated 9<sup>th</sup> May 2024 showing that the parties are negotiating.

8. This Court directed that the Motion be canvassed by way of written submissions. The same were subsequently filed both by Mr Ipapu instructed by the firm of Ipapu P. Jackah & Company Advocates for the Plaintiff and by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocates for the 1<sup>st</sup> Defendant.
9. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, as already stated above, did not file any response to the application. Indeed the record shows that an appearance was entered for them on 16<sup>th</sup> September 2024 by the firm of Teti & Company Advocates.
10. I have considered the application, the rival affidavits and the submissions by counsel. The Plaintiff seeks two substantive orders, being:
  1. Order of temporary injunction pending trial.
  2. Stay of proceedings in Busia Cmc Elc Case No E087 of 2023.
  3. I shall consider them in that sequence.



## Temporary Injunction

11. The now well-trodden path in applications of this nature is as set out in the case of *Giella -v- Cassman Brown & Company Ltd* 1973 E.A 358 where it was held that a party seeking such an order must establish the following

- 1: Show a prima facie case with a probability of success.
- 2: Demonstrate that unless the order is granted, he will suffer irreparable loss or injury which would not adequately be compensated by an award of damages.
- 3: If the Court is in doubt, it will determine the application on a balance of convenience.

Further and as was held in the case of *Films Rover International Ltd -v- Cannon Film Sales Ltd* 1963 3 ALL-EIR 772, a Court considering such an application should take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

12. A prima facie case, as was stated in the case of *Mrao -v- First American Bank Of Kenya Ltd & Others* C.a. Civil Appeal No 39 of 2002 [2003 eKLR]:

“... is a case which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Court of Appeal went on to adopt the above definition and added the following in the case of *Nguruman Ltd -v- Jan Bonde Nielsen & Others* C.a. Civil Appeal No. 77 of 2012 [2014 eKLR]:

“We adopt that definition save to add the following by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from that invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as is otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.” Emphasis mine.

Guided by the above, it is clear from the evidence herein that the suit land is a resultant sub-division of the land parcel NO Bukhayo/Mundika/672 which originally belonged to one Dismas Wabwire before being transmitted to the deceased. One Albert Emasiko was recognized as a purchaser of a portion measuring 4 acres. A confirmed Grant was issued to the deceased vide High Court Succession Cause No 39 (not very legible) of 1991 (Nairobi). There is also a copy of the deceased’s death certificate showing that she died on 5<sup>th</sup> September 1998 and that the Plaintiff took out a Limited Grant of Letters of Administration Ad Litem on 19<sup>th</sup> July 2024 in Busia High Court Succession Cause No E044 of 2024 for purposes of



filing this suit. It cannot therefore be correct for counsel for the 1<sup>st</sup> Defendant to submit, as he has done, that the Plaintiff has no locus standi to file this suit or that she has no interest in the suit land or any justiciable right. Far from it. The confirmed Grant issued to her on 27<sup>th</sup> August 1993 discloses a clear interest in the land parcel NO Bukhayo/Mundika/672 which gave rise to the suit land. On the other hand, the 1<sup>st</sup> Defendant's interest in the land parcel NO Bukhayo/Mundika/9905 is unclear other than for the fact that he holds a title thereto issued on 3<sup>rd</sup> April 2023. That title is being challenged for fraud and as is now well known, where the title is in dispute, it is not enough to wave it to the Court – *Munyua Maina -v- Hiram Gathiha Maina* 2013 eKLR. At this point in these proceedings, the duty of the Court is only to confirm if a prima facie case has been established by the Plaintiff. The validity or otherwise of the titles to the suit land will be determined at the trial. On the evidence before me, I am persuaded that the Plaintiff has established a prima facie case.

13. On the issue of irreparable loss which cannot adequately be compensated by an award of damages, there is pictorial evidence that a storey building has already been constructed on part of the suit land. If the prayer for injunction is declined, much more may be done on the suit land including disposal of the same putting it beyond the Plaintiff's reach perhaps even necessitating other suits. That loss will be irreparable. The Plaintiff has satisfied the second limb set out in the case of *Giella -v- Cassman Brown & Company Ltd* (supra).
14. Finally, if I was in any doubt, and which I am not, the balance of convenience tilts in favour of granting the order of temporary injunction sought. In view of the history as to how the suit land was created, the course which appears to me to carry the lower risk of injustice dictates that I grant the orders sought.
15. The up-shot of all the above is that the prayer for temporary injunction pending trial is well merited.
16. I must of course point out that in the Motion, counsel inadvertently sought an order of "permanent injunction". That was in error and I must remind counsel and parties about proof reading their pleadings.

### **Order Of Stay Of Proceedings In Busia Cmc Elc Case No E087 Of 2023**

17. It has been obvious in the course of this ruling that the Defendants are also litigating over the same subject matter in Busia Elc Case No. E087 of 2023 where the 1<sup>st</sup> Defendant is the Plaintiff while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the Defendants. It is not clear at what stage the proceedings in the case have reached. However, the parties therein recorded a consent dated 9<sup>th</sup> May 2024 allowing the children to access premises on the suit land as the parties negotiate. The Plaintiff in this case is not a party in Busia Elc Case No E087 of 2023 yet any consent or judgment therein will have a profound bearing on the ownership of the suit land. That is not a healthy state of affairs but the same has just been brought to the attention of this Court in this application. Section 6 of the [Civil Procedure Act](#) addresses such situations. It reads:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

This Court has not had the benefit of perusing the pleadings in Busia Cmc Elc Case No E087 of 2023 but what is not in doubt is that the Plaintiff is not a party in that case which however involves the same land subject of this case. And although the Plaintiff is not a party in that case, there is a suggestion by



counsel for the 1<sup>st</sup> Defendant in this case that the Plaintiff is simply a proxy of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Indeed in his submissions at paragraph *para\_10 10*, counsel for the 1<sup>st</sup> Defendant has described the Plaintiff as “a mercenary at work”. If that is a correct assessment of the Plaintiff, the truth will be made known during the trial.

18. What is clear to me at this stage, however, is that the parties in this case and in Busia Cmc Elc Case No E087 of 2023 are litigating over the same subject matter. This is what Section 6 of the Civil Procedure Rules and which I have already cited above addresses through the principle of sub-judice whose salutary purpose is to prevent two Courts from entertaining and adjudicating upon two parallel litigations in respect of the same subject matter. In the circumstances of this case, the prayer for stay of proceedings in Busia Cmc Elc Case No E087 of 2023 is well merited. I allow it but will soon be making other orders with regard to Busia Cmc Elc Case No E087 of 2023.
19. Having considered all the above, I make the following orders with regard to the Plaintiff’s Notice of Motion dated 6<sup>th</sup> May 2024:
  1. An order of temporary injunction is hereby issued restraining the 1<sup>st</sup> Defendant, his agents, servants or any other persons acting through him from in any manner dealing with the land parcels NO Bukhayo/Mundika/9904 and 9905 pending the hearing and determination of this suit.
  2. An order staying the proceedings in Busia Cmc Elc Case No E087 of 2023 until the hearing and determination of this case or until any other further orders.
  3. I further direct that this matter be mentioned on 6<sup>th</sup> February 2025 together with Busia Elc Cmc Case No E087 of 2023 for further orders.
  4. The parties are directed that pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules, this suit must be determined within 12 months from the date of this ruling otherwise the order of injunction shall lapse unless otherwise extended by this Court.
  5. Costs shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**BOAZ N. OLAO**

**JUDGE**

**23<sup>RD</sup> JANUARY 2025**

