



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**ELC CASE NO. 29 OF 2012.**

**HAMULUTONE MARAKIA WAMBEYE.....PLAINTIFF**

**VERSUS.**

**SAUL MASIKA MAKASI.....1<sup>ST</sup> DEFENDANT**

**ENOCK WANYONYI.....2<sup>ND</sup> DEFENDANT**

**DAVID WALIAULA KIPEI.....3<sup>RD</sup> DEFENDANT**

**ELIAS KOKO.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT.**

[1] The plaintiff is the administrator of the estate of Ainea Wambeye who is the registered owner of Bokoli/Chwele/204. He avers that the defendants jointly and severally without any colour of right, unlawfully entered and trespassed into the said parcel of land and erected structures thereon, cultivated and still cultivate the said Land. The plaintiff avers that the defendants are strangers to him and the estate of the deceased.

[2] The plaintiff claim is therefore for a permanent injunction restraining the defendants, their servants, agents or anyone claiming through them from entering, trespassing into erecting structures or cultivating or in any other manner interfering with the said piece of land.

[3] The defendants except 4<sup>th</sup> defendant filed their defences generally denying the claim and alleged that they purchased the same from sons of the deceased owner.

[4] By a ruling dated 5<sup>th</sup> November, 2013 the defendant were restrained from undertaking new activities/developments on the suit land and carrying out any construction or disposing of the suit land pending the determination of the suit. Status quo was ordered to remain in regard to cultivation. Costs of the application were to abide the outcome of the suit.

[5] PWI Humultone Marakia Wambeye gave evidence and said that he was a farmer in Chwele. That Ainea Wambeye is his father who owned Bokoli/Chwele/204. He produced an official search for the same. He said that he is the administrator of the estate in Bungoma High Court

P & A 168 of 20007. He produced the grant as PExh 2. He said that he had sued the defendants because they are in LR Bokoli/Chwele/204. That the first defendant had built a Kiosk on the land and was utilizing the Land. He produced photos to show the houses and the maize planted. He said that he knew his father did not sell the land to the respondents and that no one gave the respondents the consent to be

on the said land.

He prayed for a permanent injunction and an order for demolition of their structures plus costs of the suit. He said that in the defence there were agreements. He said that his brother Humari had no consent of the family to sell the land. The witness said that he did not participate in the agreements. He said that in the Bungoma High Court P & A 168 of 2007 the 1<sup>st</sup> and 3<sup>rd</sup> defendants filed objections which were dismissed and that the defendants are not beneficiaries of the deceased. He stated that the grant has not been finalized. He confirmed that his brothers will get shares once the grant is confirmed.

[6] In his defence Masika Makasi adopted his statement. He said that he bought the land in 2007 from the son of Ainea Wambeye. He confirmed that he knew that the son was not an administrator of his estate.

[7] Enock Mukhwana Wanyonyi also confirmed that he bought ½ an acre of land from the brother of the plaintiff on 5/12/2003 and another ¼ of an acre on 28/8/2012.

However, on cross examination he confirmed that he bought the same from Leah Chemtai who was not a child of the deceased. He confirmed that his objection filed in the Bungoma High Court Succession Cause P & A 168 OF 2007 was dismissed.

[8] David Waliaula Kipei said that he purchased ½ an acre from Ali Wambeye. He said that he knew the one who sold the land to him had a share in the land he said that Ali Wambeye was the seller but the land belonged to his father. He said that when they bought the land there was no administrator. He admitted that he filed his objection in the Succession Cause but his objection was dismissed by the court.

[9] That being the case for the parties, the issue for determination is whether an order for eviction should be issued against the defendants.

[10] There is no doubt that land Bokoli/Chwele/204 belonged to Ainea Wambeye Wakhabu the father of the applicant. That after he died, the letters of administration of his estate was granted to the applicant plaintiff herein.

There is equally no dispute that the respondents bought their respective claimed portions of the suit land from persons who had no letters of administration to the estate of the deceased. They also bought the alleged portions after the deceaseds death.

[11] A Bungoma High Court Succession Cause P & A 168 of 2007 was filed by the plaintiff. The defendants were aware of the same. They filed their objections, claiming to be included as beneficiaries of the deceaseds Estate. Their applications were dismissed by the Succession Court. The said Cause is pending in Court awaiting distribution to the heirs of the deceased. It is alleged that some of these heirs are the one who sold the pieces of land to the parties herein. Even if they did so, they had no capacity to do so since they did not have the Letters of Administration of the deceased registered owner.

[12] This land is in Chwele. It is an agricultural land and subject to Land Control Boards Consent. There was no evidence in Court to prove that any consent was granted to the alleged sales to the defendants. If there were any sales, they are void for lack of the said consent under the Land Control Act.

[13] The Succession Cause regarding the suit land is on going in the High Court. Those with any claim should await the distribution of the deceaseds Estate in that Cause and bring any claim they may have against the beneficiaries.

[14] The plaintiff who has the letters of administration herein is well within his powers to bring a suit for eviction to preserve the estate of the deceased prior to distribution by the Succession Court.

[15] The defendants claim having been dismissed by the Succession Court, the plaintiff cannot await the final determination of that Cause. They will therefore move and vacate out of the suit land within 60 days. Failing which they will be evicted by the plaintiff with the help of this Courts broker with the help

of the O.C.S. Chwele Police Station. Such eviction shall be at their cost. The Plaintiff shall have the costs of the suit.

It is so ordered.

Dated at Bungoma this **10<sup>th</sup>** day of **January**, 2018.

Judgment read in Open Court.

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Chemutai - Court Assistant

Mr. Tsimonjero for the Plaintiff

Mr. Amani for the Defendant