



Ochieno (Suing as legal representative to the Estate of Ochieno Aswama Namukobe and on his own behalf) v Waithera & 2 others (Environment & Land Case E026 of 2022) [2024] KEELC 54 (KLR) (22 January 2024) (Ruling)

Neutral citation: [2024] KEELC 54 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E026 OF 2022**

**BN OLAO, J
JANUARY 22, 2024**

BETWEEN

SOLOMON WANDERA OCHIENO (SUING AS LEGAL REPRESENTATIVE TO THE ESTATE OF OCHIENO ASWAMA NAMUKOBE) AND ON HIS OWN BEHALF PLAINTIFF

AND

**ESTHER WAITHERA 1ST RESPONDENT
LAND REGISTRAR, BUSIA COUNTY 2ND RESPONDENT
THE ATTORNEY GENERAL (SUED ON BEHALF OF THE 2ND RESPONDENT) 3RD RESPONDENT**

RULING

1. By a Notice of Motion dated 9th November 2022, Solomon Wandera Ochieng (the Plaintiff’s herein and suing on his own behalf and also as the legal representative of the Estate of Ochieng Aswama Namukobe) sought, inter alia, the main orders:
 - a
 - b
 - c. “That an order of injunction be and is hereby issued restraining the 1st Defendant whether by herself, her agents, relatives, workers and/or servants from evicting, trespassing or doing any activities on LR No Bukhayo/Bugengi/5158 pending the hearing and final determination of the suit.”
2. That application was opposed by Esther Waithera (the 1st Defendant’s herein). However, having heard the application by way of written submissions, this court allowed the application in terms of the above



order vide a ruling delivered on 23rd February 2023. I also directed that the parties ensure that this suit is heard and determined within 12 months from the date of the ruling and also encouraged them to see if they could attempt an out of court settlement.

3. I now have for my determination the 1st defendant's Notice of Motion dated 5th July 2023 in which she seeks the following orders:
 1. Spent
 2. Spent
 3. That this Honourable court be pleased to issue an order of temporary injunction restraining the plaintiff/respondent either by himself, his agents, servants and/or any other person acting under his instructions from burying the remains of his deceased daughter, the late Violet Wandera on the suit parcel herein being LR Bukhayo/Bugengi/5158 pending the hearing and determination of this suit.
 4. That this Honourable Court be pleased to issue an order directing the OCS Busia Police Station to provide security during the execution of the said orders of injunction.
 5. That the costs of this application be borne by the plaintiff/respondent.
 6. Such further and/or other orders be made as the court may deem fit and expedient.
4. The application is premised on the provision of Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* as well as Order 40 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rule*. It is supported by the affidavit of the 1st defendant and based on the grounds set out therein.
5. The crux of the application is that the 1st defendant is the rightful and legal owner of the land parcel No Bukhayo/Bugengi/5158 (the suit land) yet the plaintiff is in the process of burying the remains of his deceased daughter Violet Wandera (the deceased) thereon without the knowledge or consent of the 1st defendant. It is the 1st defendant's case that she purchased the suit land on 19th April 2001 from one Ochieno Awama Namukobe the plaintiff's late father. However, the plaintiff has refused to vacate it and has barred her from utilizing the same. That on 2nd July 2023, she received a phone call from her neighbour that the plaintiff was in the process of secretly burying the deceased's remains on the suit land. That as the registered proprietor of the suit land, such action is a gross violation of her constitutional right to hold and use the same. That by burying the remains of the deceased on the suit land while this case is still pending will occasion the 1st defendant will cause her loss which cannot be compensated by monetary award.
6. Annexed to the application are the following documents:
 1. Copy of the title deed to the land parcel No Bukhayo/Bugengi/5158 issued to the 1st defendant on 19th April 2001.
 2. Copy of the sale agreement dated 19th April 2001 for the suit land parcel No Bukhayo/Bugengi/5158 between the 1st defendant as purchaser and Ochieno Aswama Namukobe as vendor.
7. The application is opposed as the plaintiff has filed a replying affidavit dated 21st July 2023 in which he has deposed, inter alia, that the 1st defendant is not the owner of the suit land as that is a question still pending before this court for determination. That the suit land is ancestral land on which the plaintiff and his generations have been living long before this suit was filed and the 1st defendant cannot purport not to have been aware about the burial of the deceased and other burials thereon and neither has she



demonstrated any irreparable loss which she will suffer if the burial proceeds. That the 1st defendant did not object when members of the plaintiff's family were buried on the suit land and that their dispute started in 2001 long before the death of the Plaintiff's mother and continued in 2002. That in 2003, her daughter Mercy Akinyi died and was also buried on the suit land without any objection from the 1st defendant. Similarly, when his father died in 2005, he too was buried on the suit land next to his wife at a burial site designated for the family members. The plaintiff's brother Peter Odhiambo Ochieno was also buried on the suit land without any objection from the 1st defendant. That it was the wish of the deceased to be buried on the suit land next to her parents' house in line with the customs of the Basichongi clan to which she belonged.

8. When the application was placed before me on 6th July 2023, I granted a temporary injunction in terms of prayer No (2) and directed that the same be canvassed by way of written submissions to be filed on or before 24th July 2023. However, only the 1st defendant filed her submissions through her counsel Mr Odhiambo. Mr. Masiga counsel for the plaintiff opted not to file any submissions and informed the court that he would be relying solely on the plaintiff's replying affidavit.
9. I have considered the application, the rival affidavits and the submissions by MR Odhiambo counsel for the 1st defendant instructed by the firm of Odhiambo B.F.O. & Company.
10. I must start by expressing my displeasure that when I delivered my ruling in this matter on 23rd February 2023 injunctioning the 1st defendant, her agents, relatives, workers or servants from evicting the plaintiff and his family from the suit land pending the hearing and determination of this suit, I also went ahead, in accordance with the provisions of Order 40 Rule 6 of the Civil Procedure Rules, to direct the parties to ensure that this suit is heard and determined within 12 months otherwise the order would lapse unless otherwise extended by this court. That provision reads:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise”.
11. It is therefore unfortunate that just a few weeks shy of the expiration of the 12 months, the parties are still engaging this court in another interlocutory application over the use of the suit land. Parties must not go to sleep once they get interlocutory orders in their favour. Such orders, I must remind the parties herein, are merely provisional and address specific issues. They do not resolve the main dispute nor finally determine the rights of the parties with regard to the subject matter. In view of what has transpired in this matter since this court granted an order of temporary injunction almost one year ago, I intend to make further orders to ensure the expeditious disposal of this suit. And I expect full compliance thereof by all the parties.
12. This court has already injunctioned the 1st defendant from in any way evicting the plaintiff and his family from the suit land. The purpose of an order of temporary injunction is to preserve the suit land pending trial. The 1st defendant now seeks an order to restrain the plaintiff from burying the remains of the deceased on the same land pending the trial of this suit. The plaintiff's rejoinder is that in fact there are other family members already buried on the suit land and the 1st defendant did not object. That may be so. Indeed the 1st defendant did not file any supplementary affidavit to rebut that allegation. However, for purposes of this application, the 1st defendant has sought a specific remedy with regard to the proposed burial of the deceased and this Court did issue an order of temporary injunction pending the hearing of this application inter-parte. That the 1st defendant did not object to the burial of the plaintiff's parents and other family members on the suit land may be an issue for the main trial. She may not have filed any application to restrain the previous burials. Indeed from the plaintiff's own replying



affidavit, the parties appear to have been trying an out of court settlement. But that was before this suit was filed. Following the filing of this suit, the 1st defendant was at liberty to file a similar application of her own. And that is what she has done in an attempt to protect what she believes to be her interest in the suit land.

13. In determining this application, therefore, this court takes into account the following undisputed facts. Firstly, the plaintiff and his family are currently in occupation and possession of the suit land. Secondly, the plaintiff is enjoying an order of temporary injunction pending trial but which is lapsing on 23rd February 2024 unless otherwise extended by this court. Thirdly, the plaintiff did not bother to expedite the hearing of this case notwithstanding my directions to do so. Fourthly, the 1st defendant has an *ex parte* order of temporary injunction issued on 6th July 2023 pending hearing of the application *inter parte*. Finally, the 1st defendant is the registered proprietor of the suit land. Taking all that into account and guided by the principle that an order of temporary injunction is intended to protect the suit land pending trial, I am persuaded to make the following orders:

1. The plaintiff and his family will remain in occupation and possession of the suit land but they will not bury the body of the deceased Violet Wandera on the same pending the hearing and determination of the suit.
2. The 1st defendant or any other persons acting through her shall not evict the plaintiff or any member of his family from the suit land nor trespass thereon pending the hearing and determination of this suit.
3. The parties confirmed before the Deputy Registrar on 16th May 2023 that they had both complied with the provisions of Order 11 of the Civil Procedure Rules.
4. The Originating Summons as amended on 12th May 2023 shall be the plaint while the Replying Affidavit dated 17th January 2023 shall be the defence.
5. The trial shall proceed by way of *viva voce* evidence on 5th February 2024 and both parties must bring all their witnesses to court on that day. The plaintiff must also serve both the 2nd and 3rd defendants as they were not parties to this application.
6. I have taken the liberty to fix a hearing date without consulting the parties in view of the fact that there is an injunction barring the plaintiff from burying the deceased Violet Wandera on the suit land and there is need to expedite the trial.
7. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

22 ND JANUARY 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 22ND DAY OF JANUARY 2024 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

22ND JANUARY 2024

