



**Wafula (Suing as the legal representative of the Estate of -Christine Wafula Wephukhulu) v Wanambisi (Environment & Land Case 98 of 2015) [2024] KEELC 1030 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 98 OF 2015  
EC CHERONO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**CAROLINE WAFULA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF -CHRISTINE WAFULA WEPHUKHULU) ..... PLAINTIFF**

**AND**

**STEPHEN JUMA WANAMBISI ..... DEFENDANT**

**JUDGMENT**

1. By way of a plaint dated 17<sup>th</sup> July 2015, the Plaintiff sought for the following orders against the Defendant;
  - a. That the defendant do stop his activities and leave the plaintiff's land forthwith.
  - b. That the defendant be permanently restrained from trespassing on the plaintiff's land.
  - c. That the defendant be condemned to pay the costs of this suit.
  - d. Any other relief as the court may be pleased to order.
2. The plaintiff contends that she is the widow of one Evanson Wafula Wephukhulu-Deceased who died on 6<sup>th</sup> June, 2014. She avers that they lived with her late Husband on a portion of land measuring 8 acres comprised in land title No. E. Bukusu/n. Sang'alo/1702 (herein referred to as "the suit land") registered in the name of his late father Wephukhulu Wanambisi Maundende.
3. The plaintiff averred that on or about August 2014, the defendant entered into the said 8 acre land, fenced it off and begun construction of permanent structures thereon and ploughing. She further averred that the unlawful actions by the defendant is in of breach of her peaceful enjoyment of the suit land therefore giving rise to this suit.



4. At first, the defendant failed to Enter Appearance or file defence despite being served with summons to enter appearance and the matter proceeded for formal proof with an ex-parte judgment being entered in favour of the plaintiff on 10<sup>th</sup> March, 2017. The defendant vide an application dated 22<sup>nd</sup> March, 2017 sought to set aside the said ex-parte Judgment and for leave to defend the suit. On 11<sup>th</sup> May 2017, the parties recorded a consent compromising the said application.
5. The defendant in his defence dated 22<sup>nd</sup> May, 2017 stated that together with the plaintiff, he purchased from one Evanson Wafula 8 Acres being a portion comprising land parcel no. E. Bukusu/sang'alo/661 and took possession by establishing his homestead thereon. He averred that the said parcel of land No. E. Bukusu/sang'alo/661 was later subdivided and allocated a resultant portion being Land parcel No. E.bukusu/sang'alo/1702. The 1<sup>st</sup> defendant further averred that the said subdivision was later cancelled vide a court order issued in Kakamega HC Succession Cause No. 124 of 1986 wherein the subject asset of the estate is land parcel no. E.bukusu/sang'alo/661.
6. It is the defendants case that there is an appeal in this matter i.e. Court of Appeal at Kisumu Civil Appeal No. 22 of 2014 and that land parcel no. E.bukusu/sang'alo/661 and the subsequent resultant sub-divisions are subject of litigation in various court cases such as Bungoma HCC 66 OF 20016, Bungoma CMCC 193 OF 1988, Kakamega HCCA 133 IF 1989, Bungoma HCC 55 OF 2010 and Bungoma HCEL 68 of 2010. The defendant also avers that the plaintiff lacks capacity to sue in respect of land parcel no. E.bukusu/sang'alo/661 or 1702. It is further averred that the registration of parcel no. E.bukusu/sang'alo/1702 was cancelled to restore plot no.661 thus the subject matter is non-existent.
7. The defendant argued that being the administrator of the estate of her late husband Evanson Wafula (deceased), the plaintiff is duty bound to comply with the terms and conditions of the sale agreement and urged the court to dismiss the plaintiff's claim with costs.
8. After the close of pleadings, parties took directions and agreed to proceed with the hearing by way of viva voce evidence. During the hearing, the plaintiffs called one witness while the defendant called three witnesses.

### **Plaintiffs Case**

9. PWI Caroline Wafula was sworn and referred to her witness statement dated 1<sup>st</sup> September, 2015 which she requested the court to adopt as her evidence- in –chief. She also referred to her list of documents dated 24<sup>th</sup> August, 2015 which she produced as P-Exhibit 1-4. In cross-examination, she confirmed that PExhibit 2 which was a certificate of official search showed the land referenced therein belonged to one Wephukhulu Wanambisi Maudende (deceased). She explained that the proprietor as registered was her grand-father since she was the daughter of Evanson Wafuka. It was her evidence that she was not aware whether letters of administration were taken out for the estate of Wephukhulu Wanambisi Maudende.
10. The witness further testified that before her father died, he had filed a case with regard to Wephukhulu Wanambisi Maudende's land and more so plot no. 1702 which is where her parents reside. The witness was referred to paragraph 2 and 5 of DExhibit no. 2 which is a court order in Kakamega Succession Cause no. 124 of 1986 and she stated that parcel no 661 is the original land while 1702 is a resultant sub-division.
11. It was her further testimony that the current administrators of the estate of her deceased grandfather are namely; Moses Maudende Wephukhulu and David Wafula Wephukulu. She testified that as indicated in D-Exhibit 2, the letters of administration issued on 27<sup>th</sup> August, 1986 were revoked. The witness testified that she was not aware that her parents were involved in Kisumu CoA Case no. 22 of 2014 where her father and the defendant were respondents.



12. PW1 denied knowledge of the sale agreement over the suit land and insisted that the defendant was occupying it illegally. She added that prior to her father's death, there was no dispute over the suit land and that the defendant begun construction works after 2014 contrary to the sale agreement which states that he took possession in 2005.
13. In re-examination, the witness testified that according to the sale agreement shown to her, the purchaser is said to be one Teresa Wali while the defendant herein is a witness to the agreement
14. Christopher Kuloba (PW2) was sworn and referred to his witness statement dated 28<sup>th</sup> July, 2018 which he sought to be adopted as his evidence- in -chief. He was referred to the plaintiff's list of documents which he affirmed as the plaintiff's documentary evidence. In cross-examination, he stated that he has been the chairman of Bakansala Clan for over 10 years and his role is to resolve clan disputes. He stated that he was not aware of the alleged sale of the suit land by Evanson Wafula to the defendant and that he was involved at the stage where the defendant started ploughing the land and constructing structures thereon In re-examination, he stated that the deceased and his family have resided in the land for over 30 years.

### **Defendants Case**

15. Wanambisi Stephen Juma (DW1) The was sworn after which he referred to his witness statement dated 23<sup>rd</sup> May,2017 and sought to adopt as his evidence- in –chief. He also referred to the defendants list of documents dated 23<sup>rd</sup> May, 2017 which he produced as D-Exhibit 1-11. In cross- examination, he stated that he purchased the suit land after conducting due diligence. It was his testimony that a vesting order was issued in SRM CC NO.193 OF 1988 directing for the sub-division of the suit land. He denied knowledge of a consent order setting aside the vesting orders.
16. When referred to D-Exhibit 1a, the witness confirmed that the agreement was between Evanson Wafula and his wife Teresia Wali who was not a party to this suit. As for DExhibit 1b, the witness confirmed that he was the buyer in the agreement where he bought one acre. He stated that his wife had donated the authority to deal with the portion of land he purchased thus his claim. When an issue of discrepancy in the signature of the vendor in both agreements was raised, he insisted that Evanson Wafula was the signatory in both.
17. The witness denied coming into the land after the death of Evanson Wafula and stated that his Wife Christine Wafula was aware of the sale of the suit land. In re-examination, the witness testified that Evanson Wafula held 107 acres but he and his wife bought 8 acres.
18. David Wafua Wepukulu (DW2) requested to be allowed to adopt his witness statement dated 23<sup>rd</sup> May, 2017 as his evidence- in- chief. He also relied on the documentary evidence produced by DW1. He testified that when the defendant purchased the suit land, Evanson Wafula was the registered owner. It was his testimony that the plaintiff only became an administrator of the estate in 2012 after letters of administration issued earlier were revoked and a fresh petition filed. It was his evidence that before then Evanson was the administrator and had the capacity to sale.
19. Thereafter, the defence closed their case and the parties agreed by consent to file their respective submissions

### **c) Submissions By Parties**

20. The plaintiff submitted on five issues in their submissions dated 24<sup>th</sup> October, 2023. On the first issue, it was submitted that the plaintiff resided on the suit land as the widow of Evanson Wafula who inherited



from his father Wphukulu Wanambisi Maundende. On the second issue, the plaintiff submitted that the defendant invaded the property and constructed permanent structures thereon.

21. On the third issue, it was submitted that the sale agreements produced by the defendant were a nullity since the vendor indicated was not the registered proprietor of the land. Further, it was argued that the defendant had no capacity to claim on behalf of his wife in the absence of a power of attorney and that the defendant can only argue his case to the extent of the 1acre he alleges to have bought for Evanson and not the 8 acres claimed by the plaintiff.
22. On the fourth issue, it was submitted that the defendants did not controvert the plaintiff's case and as such, they should be permanently restrained from interfering with the plaintiff's occupation of the suit land. On the fifth issue, the plaintiff argued that she was entitled to general damages occasioned by the defendant's unlawful occupation of the suit land. Lastly, she also sought for costs of the suit.
23. The defendants on their part filed submissions dated 15<sup>th</sup> November, 2023 in which they raised three issues. The first issue is that at the time he and his wife purchased the suit land from Evanson Wafula, he was the registered owner having obtained letters of administration. They argued that Evanson Wafula had been registered as such from 1986 to 2012 when the grant was revoked, a vesting order causing the subdivision of land parcel no. E. Bukusu/sang'alo/661 set aside and a fresh grant issued in the name of Moses Maundende Wephukulu and David Wafula Wephukulu.
24. The defendant also submitted that the plaintiff in this matter claims land parcel no. E.bukusu/sang'alo/1702 which is non-existent since the court cancelled the sub-division and restored the original parcel of land.
25. In his further submissions, the defendant relied on Section 3, 79, 82 of the *Law of Succession Act*. The defendant relied in the case of *Alexander Mutunda Watbome vs. Peter Lavu Tumbo & Another* (2015). In conclusion, the defendant asked that this Honourable court to dismiss the plaintiff's case with costs.

#### **d) Analysis And Determination\_**

26. I have considered the pleadings, documentary evidence adduced, submissions and authorities cited by both parties; the main issue for determination in my view is whether the plaintiff has proved her claim to the required standard and therefore entitled to the orders sought.
27. From the pleadings by both parties and the evidence before court, the following issues are common ground; one, the plaintiff in this suit is suing as a beneficiary of Evanson Wafula Wephukulu-dcd who was a son of the proprietor of the suit land. Two, the suit land forms part of the assets of the estate of Wephukulu Wanambisi Maundende-deceased. Three, the estate of Wephukulu Wanambisi Maundende has not been fully administered. Four, that land title no. E. Bukusu/n. Sang'alo/661 is the main asset for distribution in the estate of Wephukulu Wanambisi Maundende. Five, letters of administration which had initially been issued to Evanson Wafula Wephukulu-dcd were revoked in 2012 and fresh letters issued to Moses Maundende Wephukulu and David Wafula Wephukulu.
28. I should mention that this suit was instituted by one Christine Wafula Wephukulu who passed on in the cause of the suit and was substituted by her daughter Caroline Wafula who contends that she holds the certificate of grant ad-litem for the estate of her deceased mother. The said Christine Wafula Wephukulu held the certificate of letters of administration ad colligenda bona for the estate of Evanson Wafula Wephukulu (her late husband) who was a son, therefore a beneficiary of the late Wephukulu Wanambisi Maundende. The plaintiff claims that Evanson Wafula Wephukulu's interest in the estate of the late Wephukulu Wanambisi Maundende devolved to her hence the standing in the suit.



29. It is argued by the defendant that the plaintiff lacks the capacity to institute this suit while the plaintiff's contention is that the suit property was to be inherited by her deceased husband and his siblings as beneficiaries. It is my view that the Plaintiff has a stake in the suit property where she claims her husband's share as was held in the case of *Law Society of Kenya .Vs. Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000 where the court observed that for a person to have locus standi, they must have a sufficiency of interest in the subject matter. It is my view that the Plaintiffs apparent interest as a widow to a son of the proprietor of the suit property is sufficient interest for her to seek for redress from this court.
30. The defendant on his part contends that he acquired the suit property vide an agreement of sale dated 22<sup>nd</sup> October, 2005 and 3<sup>rd</sup> September, 2006(DExhibit 1a &1b). It is his case that he purchased the suit land from the plaintiff's late husband who at the time was the legal administrator of the estate of the late Wephukulu Wanambisi Maundende and the registered owner of the suit land. It was his argument that at the time he purchased the suit property, the same was registered in the name of Evanson Wafula Wephukulu (deceased). It was his testimony that he did due diligence by conducting a search of the property before purchasing it and that he was therefore a bonafide purchaser. However, he did not produce a certificate of search to prove this contention.
31. Further, the defendant produced DExhibit2 which is an order issued in Kakamega HC SUCC. Case No. 124 Of 1986 which revoked the letters of administration issued on 27<sup>th</sup> August, 1986 and confirmed on 24<sup>th</sup> July 1987 and a fresh grant issued in the joint names of David Wafula Wephukulu and Moses Maundende Wephukulu. From the court's ruling, the grant was revoked on grounds that there was a concealment of material information on the beneficiaries of the estate of the late Wephukulu Wanambisi Maundende.
32. In *Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi* (2015) eKLR (Achode J), the court discussed circumstances under which a grant can be revoked and held;
- “ The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of a first applicant or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”
33. The effect of revocation and annulment of a grant is settled law. The revocation of the grant confirmed in favour of Evanson Wafula Wephukulu rendered all that was done in reliance on the same a nullity since the title held by Evanson Wafula Wanambisi was found to be defective. Following the revocation of the grant issued to Evanson wafula Wanambisi, it is my view that the suit property reverted back to the Estate in question herein.
34. The court is aware that the defendant alleges to have purchased the said property for value. It is my view that after the court revoked the grant issued to Evanson Wafula Wanambisi, regardless of whether the sale and any other transaction on the property became null and void and the property reverted back to the estate of the late Wephukulu Wanambisi Maundende to be administered in accordance with the law. However, Section 93 of the *Law of Succession* specifies circumstances under which a bonafide purchaser can be protected. To acquire such protection, the probate court must hear the matter and where it finds that title was acquired illegally, it can cancel the transfer and have the ownership revert to the rightful owner.



35. This being an Environment and Land court, I cannot go into the merits of the defendants alleged purchase which question can only be addressed by a probate & administration court. It is therefore my view that the defendant's claim can properly be handled by the probate court. I am guided by the decision in *Alexander Mbaka –vs- Royford Muriuki Rauni & 7 Others* [2016] eKLR where the Court held that; -

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

36. I have stated elsewhere in this judgment that the estate of Wephukulu Wanambisi Maundende is pending full administration and the plaintiff who also claims as a beneficiary of the estate of her deceased husband can wait until the succession proceedings are concluded. Again, it is not for this court to make that determination as such a finding can only be determined in the succession proceedings.

37. Accordingly, the plaintiff's case succeeds partially to the extent that the defendant is ordered to stop his activities and leave the suit land forthwith. Costs of the suit shall be borne by the defendant.

38. Orders accordingly.

**DATED SIGNED AND DELIVERD AT BUNGOMA THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;

Wekesa HB for Shikhu for plaintiff

Mr. Nabibia for defendant

Bett C/A.

