



**Wekesa v Wekesa & another (Environment and Land Appeal  
E001 of 2022) [2024] KEELC 1368 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1368 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

**EC CHERONO, J  
MARCH 11, 2024**

**BETWEEN**

**DANIEL NYONGESA WEKESA ..... APPELLANT**

**AND**

**DOROTHY SYLVIA WEKESA ..... 1<sup>ST</sup> RESPONDENT**

**GEOFFERRY WEKESA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the Judgment of Hon.C.A.S MUTAI (SPM)  
delivered on 10<sup>TH</sup> December, 2021 in Bungoma CM ELC Case no. E067 of 2021)*

**JUDGMENT**

1. This appeal arises from the ruling of the Principal Magistrate Hon. Hon. C.A.S Mutai delivered on 10<sup>th</sup> December 2021 in Bungoma Chief Magistrate Court ELC Case No. E067 OF 2021 for the application dated 13<sup>TH</sup> October, 2021.
2. The brief background of this case is that vide a plaint dated 14<sup>th</sup> October 2021 the respondents prayed for judgment against the appellant for;
  - a. The Honourable Court to be pleased to issue an injunction permanently restraining the defendant herein and/or his licensees, servants, agents and/or employees from further vandalizing, destroying, demolishing and interfering in any manner whatsoever with the house, building and/or structure on property known as W. Bukusu/S. Mateka Bungoma County L.R. No. 5406(‘the suit land’) the ancestral home of the plaintiffs.
  - b. The Honourable Court to be pleased to issue permanent order against the defendant to allow the 1<sup>st</sup> Plaintiff to remove, destroy and alienate the structures on the property known as W. Bukusu/S. Mateka Bungoma County L.R. No. 5406 and which particularly sits on the portion where the late Joyce Aluoch Wekesa instructed the defendant to construct his house.



- c. The Honourable Court to be pleased to issue permanent order against the defendant compelling him to remove and/or destroy any barrier and/or structure erected on W. Bukusu/S. Mateka Bungoma County L.R. No. 5406 for purposes of denying the beneficiaries from accessing the homestead.
  - d. The Honourable Court to be pleased to issue an order barring the defendants from hiring any security guard and further permanently barring any such guards from further conducting any illegal activities under the instructions of the defendant and or stepping, accessing or carrying out any activities within the homestead, premises or farm as situated in W. Bukusu/S. Mateka Bungoma County L.R. No. 5406 without consulting other beneficiaries.
  - e. This court be pleased to issue an order directing the defendant to remove all his valuables, his possession and household goods as they are in the 1<sup>st</sup> Applicants house within 24 hours after the determination of this suit failure to which the respondent should be evicted forcefully.
  - f. This honorable court be pleased issue an order allowing the 1<sup>st</sup> applicant to remove all materials used to construct her house as situated on a portion allocated to the defendant and demolish her house in toto on property known W. BUKUSU/S. Mateka Bungoma County L.R. No. 5406.
  - g. The officer commanding Kabula Police Station do assist the court in making the above orders effective.
  - h. Interest on (j) and (k) above from time of filing suit till payment in full.
3. It was the respondent's case that they are siblings, beneficiaries and holders of letters of administration ad litem of the estate of the late Joyce Aluoch Wekesa who died on the February, 2020. It is averred that prior to the death of Joyce Aluoch Wekesa-dcd, the 1<sup>st</sup> respondent had constructed a house with the consent of the deceased on a portion which later became her inheritance. The appellant promised the 1<sup>st</sup> respondent quite possession of the portion she was occupying but to her dismay the appellant took possession of the house and moved in his 2<sup>nd</sup> wife denying the 1<sup>st</sup> respondent access to the house and homestead at large rendering her homeless.
  4. It was averred the appellant rendered other beneficiaries of the estate homeless by displacing and/or barring them from accessing their ancestral home and their rights under the will of the deceased. The appellant is said to have erected a barrier and posted a security guard on the main gate denying the other beneficiaries' peaceful enjoyment of the homestead. It was averred that the appellant had been charged for malicious damage to property regarding his abovementioned actions.
  5. Upon being served with Summons and the plaint, the appellant filed a statement of defence dated 24<sup>th</sup> January, 2022 denying the respondents claim as per their plaint. It was his case that the portion the 1<sup>st</sup> respondent occupied prior to the death of Joyce Aluoch Wekesa-dcd later on became his inheritance and that he was therefore entitled to the dwelling houses therein. It was his claim that the 1<sup>st</sup> respondent being a married woman had her home at her husband's house. He stated that there was no will as alleged. Further he stated that the 2<sup>nd</sup> respondent was allocated his share of the portion of land where he stays with his family while the 1<sup>st</sup> respondent and her sisters were allocated their share here they share. He proceeded to seek to have the respondents case dismissed with costs.
  6. Before the main suit could be heard, the respondents herein who were the plaintiff/applicants filed an application dated 13<sup>th</sup> October, 2021 seeking for orders; -



- a. This honourable court be pleased to issue an order of injunction restraining the respondent herein and/or his licensees, servants, agents and/or employees from vandalizing, destroying, demolishing and interfering in any manner whatsoever with the house building and/or structure or property on W. Bukusu/S. Mateka Bungoma County L.R. No. 5406 which is the ancestral home of the applicants.
  - b. This honourable court be pleased to issue an order barring the hired security guard Erick Walukwe from further conducting illegal activities under the instructions of the respondent and/or stepping or accessing or carrying out any activities within the homestead premises or farm situated on W. Bukusu/S. Mateka Bungoma County L.R. No. 5406 herein being declared a persona non grata.
  - c. This honourable court be pleased to issue an order directing the respondents to remove all his valuables, his possessions and household goods as they are in the 1<sup>st</sup> applicants house within 24hours after the determination of this suit failure to which the respondent should be evicted forcefully.
  - d. The honourable court be pleased to issue an order allowing the 1<sup>st</sup> applicant to remove all materials used to construct her house as situated on portion allocated to the respondent and demolish that house in toto on property known as W. Bukusu/S. Mateka Bungoma County L.R. No. 5406.
  - e. The Officer Commanding Kabula Police Station do assist the court in making the above orders effective.
  - f. The respondent do pay the costs of this application.
7. The appellant filed his replying affidavit dated 26<sup>th</sup> October, 2021 where he averred that he is the lastborn of Joyce Aluoch Wekesa -deceased and brother to the respondents herein. It was his statement that the suit land is registered in the name of the deceased who prior to her death had allocated portion to each of her children. He averred that the respondents herein have been trying to displace him out of his portion. He denied the allegation that the respondents herein were the legal representatives of the estate of the deceased and averred that he had an equal share to them and that the issues raised herein can only be canvassed in a succession court. He stated that the respondents herein have reported him to the police where he was charged for malicious damage to property. He contended that the will was a forgery since the same has not been executed and that wrangles on division of the suit land have persisted since 2016.
  8. The trial court -upon determination of the application delivered its ruling dated 10<sup>th</sup> December, 2021 where it granted orders as sought in prayer 2,3,4,5 and 7.
  9. Being aggrieved by the court's judgment, the Appellants herein preferred an appeal vide a memorandum of appeal dated 3<sup>rd</sup> January, 2022 on the following grounds;
    - a. That the learned trial magistrate erred in law and in facts when he proceeded and allowed the application dated 13<sup>th</sup> October 20221 in its entirety thus allowing main suit which has similar prayers like those sought for in the said application thus denying the appellant a right to a fair hearing.
    - b. That the trial learned magistrate erred in law and fact when he allowed the eviction of the appellant at the application stage from a house whose ownership is not known or determined which ownership was only to be ascertained at the hearing of the main suit.



- c. That the learned trial magistrate erred in law and fact when he allowed the application dated 13<sup>th</sup> October 2021 in total disregard of the appellants submissions thus arriving at a wrong conclusion.
10. The appellant sought to have the appeal allowed, the ruling of the trial court set aside and for the court to reevaluate the evidence and reach its own conclusion.
11. Directions were taken to canvass the appeal by filing of submission. However, neither of the party filed submissions on the appeal.
12. I have read the Memorandum of Appeal, the Record of Appeal and the court record generally and the single issue for determination is whether the trial Magistrate erred in allowing the respondents application and who will bear the costs of the appeal.
13. From the foregoing exposure of the pleadings and the application whose ruling is impugned, it is clear that the parties herein are engaged in a scuffle over the sharing of the suit land. From a perusal of the issues raised in the application more so the orders sought, I agree with the appellant that they are similar to those prayed in the plaint.
14. Having said that, determination of the issues raised in this application and the orders sought are substantive and could only be granted after hearing the main suit on merit. I note that the trial court in page 64 line 10 page 64 had issued an order that status quo be maintained but went on and granted orders allowing various final prayers in the application.
15. It is my view that status quo ought to be maintained pending hearing and determination of the main suit where the rights and interests of each party shall be heard and determined on merit.
16. In the final analysis, this appeal is allowed in the following terms;
- i. The ruling of the trial court delivered on 10<sup>th</sup> December, 2021 be and is hereby set aside.
  - ii. The costs of this appeal and the the impugned application before the trial court dated 14<sup>th</sup> October, 2021 shall be borne by the respondents.
  - iii. The original court file Bungoma CM-ELC No.E067 to be remitted back to the Chief Magistrate for hearing and determination before another Magistrate other than C.A.S Mutai.
  - iv. Mention for directions before the CM-Bungoma on 3/4/2024.
  - v. It is so ordered.

**DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 11TH DAY OF MARCH, 2024.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Kinyua H/B M/S Kuria for Respondent
2. Mr. Anwar H/B for Wamalwa S. for appellant
3. Bett C/A

