



**Ndalila & 2 others v Wambu (Environment and Land Appeal  
13 of 2024) [2024] KEELC 5483 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5483 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 13 OF 2024  
EC CHERONO, J  
JULY 18, 2024**

**BETWEEN**

**SILAS WAFULA NDALILA ..... 1<sup>ST</sup> APPELLANT**

**CHRISTIN MAINA KWEYU ..... 2<sup>ND</sup> APPELLANT**

**ALEX NDALILA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**CRESTERS KULOBA WAMBU ..... RESPONDENT**

**RULING**

1. Vide a Notice of Motion application dated 11<sup>th</sup> April, 2024 brought under Section 1A,1B,3 & 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules*, the applicant prays for the following orders;
  - a. Spent.
  - b. Spent
  - c. Spent
  - d. That this Honourable Court do suspend the injunctive orders issued on 27<sup>th</sup> March 2024 against the Appellants/Applicants herein in Bungoma CM ELC No. E019 of 2024 pending hearing and determination of the appeal.
  - e. That in place of the orders of 27<sup>th</sup> March, 2024, an order do issue maintaining the status obtaining in the land parcel numbers East Bukusu/ West Sang'alo/9304, 9307 and 9308 pending hearing and determination of the appeal, the status being the applicants continue occupying and using the suit land.



- f. That there be stay of proceedings in Bungoma CM ELC No. E019 of 2024 pending hearing and determination of this appeal.
- g. The costs of this application be provided for.
2. The application is premised on the grounds on the face of the application and the supporting affidavit sworn by the 3<sup>rd</sup> Applicant, Alex Ndalila on 12<sup>th</sup> April, 2024.
3. It is the Appellant/Applicants case that the Respondent filed Bungoma CM ELC E019 of 2024 on 16<sup>th</sup> February, 2024 by way of plaint contemporaneously with an application under certificate of urgency of even date where he sought orders for inter alia injunction restraining them from entering/invading and or interfering with land Parcel No. E.Bukusu/W. Sang'alo/9304 & 9307 & 9308 and for eviction orders. It is stated that the said application was heard and a ruling was delivered on 27<sup>th</sup> March, 2024 allowing the same. It is argued that in reaching its decision, the trial court did not consider the replying affidavit filed by the Applicants herein sworn on 8<sup>th</sup> March, 2024 thereby occasioning an injustice.
4. It was deposed that being aggrieved by the said ruling, an appeal was preferred vide the memorandum of appeal dated 5<sup>th</sup> April, 2024. It was averred that Bungoma CM ELC E019 OF 2024 was filed after the Applicants herein had filed Bungoma ELC OS E005 of 2024 which was filed on 12<sup>th</sup> January, 2024 thus Bungoma CM ELC E019 OF 2024 was sub judice and the said suit ought to be struck out. It was stated that the suit parcels of land were purchased by the Applicants' father in 1985 where they all grew up in and have established their respective homes. The Respondent is said to have subdivided Land Parcel No. E.Bukusu/W.Sang'alo/676 to give rise to land Parcels No. E.Bukusu/W.Sang'alo/9304 & 9307 & 9308 on conclusion of the succession cause for the estate of Wambu Wamukota who was the registered owner of the said land. The Applicants urged the court to grant stay of the orders of the trial court and proceedings of that court pending determination of the appeal since the purpose of the appeal will be defeated. It was further argued that the orders issued amount to eviction orders and unless the orders sought are granted, an injustice will be occasioned upon them.
5. The Respondent filed a replying affidavit sworn on 20<sup>th</sup> April, 2024 in which he stated that the application fails to meet the conditions for the grant of stay of execution as set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*. The Respondent argued that he was the one in occupation and use of land Parcel No. E.Bukusu/W.Sang'alo/9304 & 9307 & 9308. It was stated that the Applicants failed to comply with the timelines set by the trial court for filing of pleadings and as such, the Court only considered what had been filed at the time of making its ruling. The Respondent stated that this court cannot suspend, vary/set aside and or discharge the orders issued by the trial magistrate since that was the preserve of the trial court in accordance with Order 40 Rule 7 of the *Civil Procedure Rules* as read together with Section 81 of the *Civil Procedure Act*. The Respondent argued that the current application was a gimmick by the Applicants whom he had cited for contempt of the aforementioned orders. Finally, the respondent argued that by the time he filed Bungoma CM ELC E019 of 2024, he had not been served with summons to enter appearance in Bungoma ELC (OS) E005 of 2024.
6. Parties took directions to canvass the application by way of written submissions. The Applicants filed their submissions dated 6<sup>th</sup> April 2024 where they argued that they have been in occupation of the suit parcels of land since 1985 and in as much as the Respondent was the registered owner, his rights were subject to limitations as per Section 25, 26 and 28 of the *Land Registration Act*, 2012. It was further submitted that Bungoma ELC OS E005 of 2024 was filed earlier than Bungoma CM ELC E019 OF 2024 hence the primary suit herein was sub judice. Lastly, it was argued that the appeal has overwhelming chances of success and that the court should grant the orders sought.



7. The Respondent filed submissions dated 20<sup>th</sup> April, 2024 where he submitted on three issues. On the first and second issues, it was submitted that the conditions for stay of execution and proceedings under Order 42 Rule 6(2) of the Civil Procedure Rules have not been established. Reliance was placed in the of Macharia t/ Macharia & Co Advocates vs. East African Standard (2002) eKLR 2 KLR 63, Kenya Wildlife Service vs. James Mutembei (2019) eKLR. On the third issue, it was submitted that this court cannot suspend, vary/set aside and or discharge the orders issued by the trial magistrate since that was the preserve of the trial court as provided for under Order 40 Rule 7 of the Civil Procedure Rules as read together with Section 81 of the Civil Procedure Act.

### **Legal Analysis And Decision**

8. I have carefully considered the application, the affidavit in support, the Replying affidavit as well as the rival submissions. The singular issue for consideration in this application is whether the Applicant has made a case for the grant of the orders sought and who bears the costs of the application.
9. This court has carefully perused the Notice of Motion and the Applicants supporting affidavit and note that the documents same is not supported by documentary referred in the supporting affidavit and marked 'AN-1 (a) & (b), AN-2, AN-3, AN-4, AN-5, & AN-6 have not been annexed. This being an appellate court, our mandate is to re-evaluate the evidence before the trial court and arrive at my own conclusion. In the absence of the evidence relied by the trial court, it would be difficult to upset the finding by trial court on grounds of mistake or error. It is difficult to understand how the Applicants referred to numerous documents but fail to annex them in the supporting affidavit. Failure to attach the said documents is fatal to this application.
10. It is trite law that an Affidavit and the annexures thereto constitute evidence. Indeed, where a person seeks to proof a fact by way of Affidavit, he is obligated to attach those documents to his Affidavit. It therefore goes without saying that in the absence of the documents referred to in the specific paragraphs of the supporting affidavit remain hollow and unproven. Therefore, this Court cannot base its findings on nothing. However, in my view, that does not make the entire affidavit defective. The Court will rely on the other paragraphs that are not based on documentary evidence.
11. Considering the materials placed before me and the rival submissions, I find that in the absence of the documents referred to as annexures, the current application becomes a lame duck
12. It is my finding the applicants application is not supported by any meaningful evidence hence a candidate for dismissal. This so because the documents which are referred in the supporting affidavit have not been attached as deposed.
13. The upshot of my finding is that the Notice of Motion application dated 12<sup>th</sup> April, 2024 is devoid of merit and the same is hereby dismissed with costs to the Respondent.
14. It is so ordered.

**READ, DATED AND SIGNED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Wanyama H/B for Bwonchiri for Respondent.



2. Mr. Shikhu H/B for Mugisu for Applicant.

3. Bett C/A.

