



Case Number:	Civil Case 21 of 2008
Date Delivered:	09 Mar 2016
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	Samwel Ndungu Mukunya
Citation:	Fred Wafula Wanyama v Henry Kiyingu Endesha & another [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	Suit dismissed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**ENVIRONMENT AND LAND COURT**

**CIVIL CASE NO.21 OF 2008**

**FRED WAFULA WANYAMA.....PLAINTIFF**

**VERSUS**

**HENRY KIYINGU ENDESHA**

**ALBERT WANYONYI.....DEFENDANTS**

**J U D G M E N T**

[1] The plaintiff in this case filed in the High Court Bungoma probate and administration cause no.150 of 2007. In that cause he sought a limited grant of letters of administration ad litem of the estate of Jackson Wanyama Masiteni who died domiciled in Kenya on 16<sup>th</sup> February 2007. The grant was limited for the purpose only for filing suit and until further representation were granted by the court. The limited grant was given on 16<sup>th</sup> October 2007. On 12<sup>th</sup> March 2008 the plaintiff filed this suit as a legal representative of the estate of the deceased Jackson Wanyama Masiteni.

[2] In the plaint, he stated that the defendants had purchased  $\frac{1}{2}$  an acre and  $\frac{3}{4}$  of an acre from land parcel Bungoma/Tongaren/463. Further that without colour of right he unlawfully destroyed temporal boundary erected in parcel of land known as No.Bungoma/Tongaren/463 aforesaid which was registered in the plaintiff father's name. He averred that the defendants encroached on an area of  $3\frac{1}{2}$  acres of the said land with the sole intention of dispossessing the plaintiff and his siblings and other purchasers of land therein. The plaintiff therefore prays for an order to restrain the defendants jointly and severally and/or through their servants and agents from further interfering with Bungoma/Tongaren/463 until full succession and distribution of the estate of the deceased Jackson Wanyama Masiteni is done.

[3] The defendants who filed a joint defence on 22<sup>nd</sup> April 2008 denied that they have unlawfully destroyed the boundary erected in land parcel Bungoma/Tongaren/463. They stated that they both bought portions of land in Bungoma/Tongaren/463 from the plaintiff's father and that they are recognized as purchasers though title deeds have not been issued. The defendants counterclaimed for portions  $\frac{1}{2}$  and  $\frac{3}{4}$  for the first and second plaintiff respectively and also demanded for a sub division and transfer of their portions from Bungoma/Tongaren/463. They asked for the plaintiff's suit to be dismissed with costs to them. During the cause of the hearing PW1 Fred Wafula said that before his father died, he took the defendants to the Land Control Board. That a consent was given. That a surveyor was brought to the land but the defendants did not agree with the boundaries put by the surveyor and that they destroyed the sisal boundaries. Later the court made an order that the District Surveyor and the Land Registrar to visit the ground to confirm the sizes of  $\frac{1}{2}$  an acre and  $\frac{3}{4}$  of an acre and confirm if they conform to the actual size used by the defendants on the ground. The surveyors went to the site on the ground and found all the other parties except the plaintiff and then filed their report. The district surveyor – Bungoma E.B Nasongo, stated that after verifying all the existing boundaries and the people in possession that

there was no land remaining for plaintiff. That most occupants have developed their parts. The wife of the deceased Susan Nanjala Wanyama said that she does not know the defendants. That she knew some people live on the land. She said she does not know who sold the land to the defendants. The first defendant Kiyingu Endesha explained how he purchased the land from Paul Kutose who bought it from Paul Onyango who had bought it from Jackson Masiteni – deceased. That he had lived there since 2007. The second defendant Albert Wanyonyi said he bought the land in 1994 and he gave the history of his purchase and occupation.

[4] Having perused the claim of the plaintiff and the response from the defendant there is no doubt that the parties agree that the 1<sup>st</sup> defendant and the second defendant purchased  $\frac{1}{2}$  and acre and  $\frac{3}{4}$  respectively. The issue is the size the defendants occupy on the ground. The plaintiff was given a limited grant to file this suit. He was supposed to file a succession suit contemporaneously, so that the letters of administration of the estate of his father one Jackson Masiteni are issued. He does not seem to have done that. It is only in the succession cause that the administrators of the estate of the deceased Jackson Masiteni can be identified. Letters of administration should be issued and distribution of the estate done to the beneficiaries and proven purchasers of his land Bungoma/Tongaren/463. The defendants herein and all other purchasers in the said land may want to join in, in the succession cause to protect their interests.

For the plaintiff herein to fully be able to become a legal representative of the deceased he must have the grant of letters of administration granted to him, and have the said land distributed after the grant is confirmed by the court.

[5] For those reasons, the prayers in the plaint herein cannot be granted. Equally, it would be premature to allow the counterclaim. The parties herein must endeavour to file the application for grant of letters of administration for the estate of Jackson Wanyama Masiteni.

The suit is dismissed with no orders as to costs.

Dated at Bungoma this 9<sup>th</sup> March 2016.

**S.MUKUNYA**

**JUDGE**



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