



REPUBLIC OF KENYA



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**Njurukani & 2 others v Barasa (Civil Appeal 2 of 2021)  
[2023] KEHC 3660 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3660 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 2 OF 2021  
JRA WANANDA, J  
APRIL 28, 2023**

**BETWEEN**

**JOSEPH NDAFU NJURUKANI ..... 1<sup>ST</sup> APPELLANT**

**SOSPETER JUMA NDAFU ..... 2<sup>ND</sup> APPELLANT**

**TOBIA WANGILA NDAFU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**EMILY NALIAKA BARASA ..... RESPONDENT**

**JUDGMENT**

1. This Appeal is against the Ruling of the trial Court dismissing an Objection that sought the revocation of a Grant of Letters of Administration issued to the Respondent. The Grant relates to the Estate of one Jonathan Barasa Mbotiki who died in the year 1993 and who is alleged to have been the husband of the Respondent.
2. The genesis of the matter is that on 18/02/2016, in Bungoma Chief Magistrate's Court Succession Cause No. 46 of 2016, the Respondent petitioned the trial Court to issue to her a Grant of Letters of Administration as aforesaid. On 30/06/2016 the Grant was duly issued in favour of the Respondent. The only property cited in the Estate was West Bukusu/West Siboti/607 stated to measure 8.4 acres and to be worth Kshs 10,000,000/-.
3. The Petition was supported by the letter dated 17/02/2016 from the local Chief who stated that the deceased was the owner of the said piece of land, that the deceased was married to the Respondent, that they were not blessed with any children and that the Respondent was the sole beneficiary of the estate.
4. However, on 6/10/2016 the Appellants filed an Objection challenging the Grant. The Objectors (present Appellants) are the sons of a brother of the deceased, thus sons of the Respondent's brother-in-law.



5. The grounds alleged in the Application were that the said land parcel West Bukusu/West Siboti/607 was registered in the name of one Barasa Waswa and not the said Jonathan Barasa Mbotiki, that the Respondent failed to disclose to the Court that the parcel of land was occupied by the Appellants and that the Appellants only discovered that the Respondent had obtained the Grant when the Respondent threatened to evict them therefrom.
6. The Respondent opposed the Objection and stated that the deceased Jonathan Barasa Mbotiki whom she alleged was also known as Barasa Waswa was her husband, they got married in the year 1977, dowry was paid in the year 1980, she was willing to avail witnesses from the village where they stay to confirm the marriage, her husband was the sole registered owner of the piece of land and she was the only person surviving the deceased and the only one entitled to the estate.
7. The parties filed various Affidavits, Witness Statements and bundles of documents. The matter then proceeded for viva voce evidence wherein the witnesses adopted the Statements and Affidavits and basically reiterated the matters set out above.

### **Appellants' case before the trial Court**

8. PW1, Joseph Ndafu Barasa (the 1<sup>st</sup> Appellant herein) testified that they (his family) owned plot number 524 and 607 W. Bukusu W. Siboti, the deceased Jonathan Baraza Mbotiki was his paternal uncle, the deceased did not have another name, it is not true that the deceased was also known as Barasa Waswa, in the year 2007 there was a land tribunal case involving plot number 524, Bukusu/W/Siboti, plot 607 was registered in the name of a strange person described as Baraza Waswa who was not the same as Baraza Waswa Mbotiki, it is not true that PW1 set the Respondent's house ablaze, in the tribunal the Respondent was awarded 14 acres from the plot 524, PW1 has filed a claim for adverse possession and plot number 607 belonged to PW1's father Morris Ndafu.
9. In cross examination, PW1 stated that Jonathan Baraza Mbotiki was his paternal uncle, he used to stay in Kabuchai and came to live with them in the year 1980, while there he married the Respondent Emily Naliaka, Jonathan Baraza Mbotiki was a brother to PW1's father known as Morris Wafula Mbotiki, plot no. 607 was registered in the name of Baraza Waswa, Jonathan Baraza Mbotiki was buried on plot no. 524, he had seen the letter from their local Chief dated 16/2/2016 but the content thereof is not entirely correct.
10. PW2, Sospeter Juma Ndafu (the 2<sup>nd</sup> Appellant) testified that the deceased Jonathan Baraza Mbotiki was a brother to his father and was the husband to the Respondent. He stated that he agreed with the evidence of PW1.

### **Respondent's case before the trial Court**

11. The Respondent then testified as DW1. She stated that the deceased Jonathan Baraza Mbotiki was her husband, he used to be known as Baraza Waswa Mbotiki and referred to a letter from the Chief in support thereof. In cross-examination, she stated that they got married in the year 1977, the land parcel W Bukusu/W Siboti/607 belonged to her father-in-law (father to the deceased) but the father-in-law had registered it in the name of the deceased, when she got married in the year 1977 the father-in-law had already died, he was buried at Kimaeti, the title for the land was issued in the year 1972.
12. She stated further that she lived with the deceased for 16 years before he died, she had sued one Morris at the Tribunal and she was awarded 14 acres out of plot No. 524, her house was set ablaze, she had never been married before she met the deceased, her husband (the deceased) was baptised as "Jonathan"



when he was about to die, she did not have any children and there was another case in the High Court over parcel number 524.

13. In Re-examination, she stated that the father to the Appellants was one Morris Ndafu, the Green Cards show the name of Baraza Waswa Mbotiki who is her husband, Morris Ndafu gave her his piece of land but her house there was set ablaze, this was in the year 2008, the Appellants were not staying on the land, they were not born on that land, they have their own pieces of land and they started using the piece of land in the year 2008 and that Baraza Waswa Botik also uses names alias Baraza Waswa Mbotiki.
14. DW2 was one Hassan Juma Khisa who in his Statement described himself as a brother of the deceased. In cross-examination, he testified that he sold Maurice Ndafu a piece of land, he never had a dispute with him over the land, Jonathan Baraza Mbotiki was staying on the land in 1962, he got to know Jonathan Baraza Botik in the year 1950, he was baptised as Jonathan in the year 1979, Jonathan was staying with the Respondent, the Respondent had sued Maurice Ndafu at the land tribunal in the year 2007, Jonathan was born on that piece of land, DW2 knew him in the year 1950 and he was then known as Baraza Waswa, Maurice Ndafu was also a brother to DW2, DW2's other names are Juma Abeti. In Re-examination, he stated that the Respondent was never given any piece of land by Maurice.
15. DW3 was one Francis Baraza Silisili who described himself as a brother to the Respondent's father. In cross-examination he testified that he knew the deceased Jonathan Baraza in the year 1977, Jonathan Baraza was staying with the Respondent, the Respondent got married to the deceased in the year 1977, DW3 attended the tribunal sittings, the Respondent wanted title document from Maurice, the land in dispute was West Bukusu West Siboti 524 and the tribunal gave the Respondent 14 acres from that piece.
16. In re-examination, he stated that he received the Respondent's dowry, the tribunal decided on land West Bukusu/West Siboti 524, there are boundary features between West Bukusu No. 524 and 607 and that the Respondent's house was burnt.
17. DW4 was one Esau Mukhwana Fwamba who in his Statement described himself as the clan Chairman of Abatuwika Bakitang'a Nambuchi branch. In cross-examination, he testified that he knew Baraza Waswa who was also known as Baraza Jonathan Botiki, dowry was paid for the Respondent in the year 1980, he knew Morris Ndafu who was a brother to Jonathan Mbotiki, there was a land dispute between the Appellant and Morris Ndafu, the dispute ended at the Lands Disputes Tribunal, DW4 was the chair of the Abatuwika clan, Maurice Ndafu died in the year 2016, the 3 Appellants live on piece of land 524 and that the Respondent was chased from the land. In Re-examination, he stated that the piece of land 607 belongs to Jonathan Baraza Botiki husband to the Respondent and that the Respondent was ejected from the land.

### **Trial Court's Ruling**

18. Upon considering the testimonies of the witnesses and the evidence tendered, the trial Court delivered its Ruling on 23/07/2021 whereof it found that the Appellants lacked the locus standi to object to the Grant. Accordingly, the Objection was dismissed.

### **Appeal**

19. Being dissatisfied with the Ruling, the Appellants instituted this Appeal vide the Memorandum of Appeal filed on 26/07/2021. 5 Grounds of Appeal were cited as follows:
  - i. That the learned trial magistrate erred in law and in fact by stating that Jonathan Barasa Mbotiki was the same as Barasa Waswa.



- ii. That the learned trial magistrate erred in law and in fact by stating that the deceased left behind a parcel of land known as W. BUKUSU/W. SIBOTI 602.
- iii. That the learned trial magistrate erred in law and in fact when he failed to consider the submissions and testimonies of the objectors and the objectors' documents thus arriving at a wrong conclusion.
- iv. That the learned trial magistrate erred in law and in fact when he held that the objectors do not have any right to object in this procedure thus arriving at wrong conclusion.
- v. That the learned trial magistrate erred in law and in fact when he dismissed the objectors' application with costs against the strength of the evidence on record thus arriving at a wrong conclusion.

### **Hearing of the Appeal**

20. It was then directed that this appeal be canvassed by way of written submissions. The Appellants, through Wamalwa Simiyu & Co. Advocates, filed their submissions on 10/01/2023 and the Respondent, through Paul Juma & Co. Advocates, filed hers on 20/01/2023.

### **Appellant's submissions**

21. Counsel for the Appellant submitted that the name of the deceased upon whom the Succession was being carried out was Jonathan Barasa Mbotiki who died at Khasoso and not Barasa Waswa, that by the trial magistrate beginning his Judgement by referring to the deceased as "Jonathan Barasa Mbotiki aka Barasa Waswa", it is an indication that the magistrate had already made up his mind before analysing the whole suit to refer to the deceased as Barasa Waswa and that in the entire Ruling the trial magistrate never delved into the issue of whether the deceased was also known as Barasa Waswa. He submitted that the deceased Jonathan Barasa Mbotiki was not the same person as Barasa Waswa.
22. Counsel submitted that the Respondent had sued one Maurice Ndafu Mbotiki claiming a share in land parcel W. Bukusu/W. Siboti/524 where she was awarded 14 acres, the said Maurice Ndafu Mbotiki was categorical that Jonathan Barasa Mbotiki came with no land having sold his share at Kabuchai, the Respondent admitted that it is the said Maurice Ndafu Mbotiki who called the deceased from scheme and showed him where to build and as such Maurice Ndafu Mbotiki should give them land, Jonathan Barasa Mbotiki did not leave behind any land to be inherited, DW1 testified that the suit land was ancestral land which had been allocated to Barasa Waswa, the trial Court should have found that it did not have jurisdiction as a Succession Court to determine who the proper owner of the suit land could have been and that the proper proprietor of the estate became an issue which then is in purview of the Environment & Lands Court.
23. He submitted further that the estate having been mentioned as an ancestral land it meant that a constructive trust was being sought and what the trial magistrate could have done at this particular time was to revoke the grant and allow the Appellants seek a proper forum to ventilate their claim which fact is fortified by the proceedings at land tribunal.
24. Counsel added that the Grant was made by concealment from the Court of something material, the non-disclosure is that the Respondent petitioned for the Grant without informing them yet she knew that the Appellants were in occupation of the land during and after the demise of the Respondent's husband who is the deceased herein, she included land parcel W. Bukusu/W Sibot1/607 while well aware that the same did not belong to the deceased, if she had any claim she should have done so in land



parcel W. Bukusu/W Siboti/524 and that the truth is fortified by the Respondent's admission to have moved to the tribunal where she was awarded 14 acres to be hived off from land parcel W. Bukusu/W Siboti/524.

25. Counsel further submitted that there is nowhere in the Respondent's Affidavit where she mentioned the existence of the Appellants as being in occupation of the estate, all she did was to make the Court believe that she was the only person existing over W.Bukusu/W. Siboti/607 which land was not available for succession, the land was not owned by her deceased husband, had the Court been allowed to have such facts at this particular stage it would have directed otherwise,
26. He added that it is evident that in order to conceal the truth from the Court the Respondent altered the parcel number from land parcel W. Bukusu/W Siboti/524 to land parcel W. Bukusu/W Siboti/607, this fact was admitted by the Respondent and also by a witness Hassan Juma Khisa during their cross-examination, had the Court been put in the picture of this facts most probably it would have insisted on the presence of the Petitioners and directed them to seek redress in the proper court, the Petitioners would have sought audience before the Environment & Lands Court for redress and the Petitioners would have filed a case thereof and moved this Court to stand over the matter generally. In support of his arguments, Counsel cited the case of *In the Estate of Stone Kakhuli Muinde (Deceased)* [2016] eKLR and urged this Court to allow the appeal.

### **Respondent's Submissions**

27. Counsel for the Respondent urged that the trial Court did not err as it was dealing with a simple matter of administration of the estate of the deceased, the trial Magistrate issued the grant to the Respondent as the widow of the deceased and confirmed it according to the law of succession, from the Appellant's evidence it was not disputed that the Respondent was the only surviving beneficiary to the deceased and it was not in dispute that the Appellants' father was allocated land parcel number W. Bukusu/W. Siboti/524 and the deceased W.Bukusu /W. Siboti/607.
28. Regarding whether the Appellants proved their claim as beneficiaries of the estate, Counsel submitted that the answer is in the negative as the deceased was survived by the Respondent as his only wife, under the provisions of Section 66 of the *Law of Succession Act*, the Respondent had the priority to be issued with the Letters of Administration, the Appellants were not able to prove beneficial interest of the suit land since the deceased was not supporting the appellants and they were also unable to prove that the deceased left a will bequeathing upon them a share of the property.
29. On whether the deceased was also known as Barasa Waswa, Counsel submitted that the Respondent produced the Chief's letter dated 23/6/2016 which confirmed that indeed the late Jonathan Barasa Mbotiki was also known as Barasa Waswa. He urged that the appeal be found unmerited.

### **Analysis & Determination**

30. This being a first appeal, the Court is enjoined to analyse and re-assess the evidence afresh and reach its own conclusion but always bearing in mind that it neither saw or heard the witnesses testify (see *Kiruga vs Kiruga & Another* (1988) KLR 348 and also *Selle vs Associated Motor Boat Co.* (1968) EA 123).

### **Issues for determination**

31. In my view, the issues that arise for determination in this appeal are the following;
  - i. Whether the trial court erred in finding that the deceased Jonathan Baraza Mbotiki was also known as or was the same person as Barasa Waswa.



- ii. Whether the trial Court erred in finding that the Appellants had no right to object to the Grant.
32. I now proceed to analyze and answer the said Issues.
- i. Whether the deceased Jonathan Baraza Mbotiki was also known as or was the same person as Barasa Waswa.
33. It is evident that the trial Court did not expressly pronounce itself on this issue and thus Ground 1 of appeal refers to a matter that does not appear in the Judgement. That notwithstanding, I have perused the Record and note that the Respondent produced a letter dated 23/6/2016 from the local Chief confirming that indeed the late Jonathan Barasa Mbotiki, husband to the Respondent, was also known as Barasa Waswa.
34. Further, the Respondent who testified as DW1 stated that the deceased Jonathan Baraza Mbotiki was her husband, he used to be known as Baraza Waswa Mbotiki and referred to the said letter from the Chief. In cross-examination, she stated that the deceased (her husband) was baptised as “Jonathan” when he was about to die.
35. In addition, DW2, one Hassan Juma Khisa who in his Statement described himself as a brother of the deceased also testified that the deceased was baptised as “Jonathan” in the year 1979.
36. DW4, one Esau Mukhwana Fwamba, who in his Statement described himself as the clan Chairman of Abatuwika Bakitang’a Nambuchi branch which he alleged the deceased belonged, also testified that he knew Baraza Waswa who was also known as Baraza Jonathan Botiki.
37. The said letter from the Chief and the evidence of the said witnesses were never controverted by the Appellants. More curious, although the Appellants merely claimed that Jonathan Barasa Mbotiki was a different person from Barasa Waswa, that the Chief was merely assisting the Respondent and that the Respondent’s witnesses were liars, the Appellants did not make any attempt to give their own version of the identity of the alleged real Barasa Waswa or give any information on who he was, whether he was alive or dead, whether he was a relative or any such particulars to persuade the Court make a contrary finding. In short, if as they allege that Jonathan Barasa Mbotiki was a different person from Barasa Waswa, then they never gave any explanation on who Barasa Waswa was.
38. In the absence of any controverting or contradictory evidence from the Appellants, I find that the deceased Jonathan Barasa Mbotiki or Jonathan Baraza Mbotiki was one and the same person as Barasa Waswa or Baraza Waswa Mbotiki and that he was the husband of the Respondent.
39. Since the Search Report and the Green Card produced in evidence indicate that the property W. Bukusu/W. Siboti/607 is registered in the name of Barasa Waswa, I also find that the deceased was the proprietor of the property. The property was therefore properly included in the Succession proceedings as being part of his estate.
- ii. Whether the trial Court erred in finding that the Appellants had no right to object to the Grant
40. The circumstances under which a Grant of representation may be revoked by the Court are provided for under Section 76 of the *Law of Succession Act*, Cap. 160. In *Matheka and Another vs Matheka* [2005] 2 KLR 455, the Court of Appeal set out the following guiding principles.
- “i. A grant may be revoked either by application by an interested party or by the court on its own motion.
- ii. Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

41. On the hand, Section 66 of the *Law of Succession Act* stipulates the order of preference when applying for a Grant of letters of administration in cases where a deceased person has died intestate. It provides as follows:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

42. The Appellant’s Counsel has submitted that by failing to disclose to the Court that the Appellants were in occupation of the land W. Bukusu/W. Siboti/607, the Respondent concealed material evidence and thus the Grant should have been revoked on that ground. I wholly agree that a material fact such as the one stated should always be disclosed to the Court to enable the Court make an informed decision while handling a distribution of estate matter. Suppression of such facts should in appropriate case indeed lead to revocation or annulment of Grants. Accordingly, I have to castigate the Respondent and her legal team for concealing the fact of occupation by the Appellants.

43. However, in this case it has not been seriously disputed that the Respondent was the wife of the deceased, it is also not disputed that the deceased was survived by the Respondent as his only wife and that they had no children from their union. Further, it is not disputed that the Appellants are not from the immediate or nuclear family of the deceased and neither do they fall within any of the categories recognized in sub-clauses (a), (b), (c) or (d) of Section 66 above.

44. From the foregoing, I am in agreement with the finding of the trial Court that the Appellants did not have the locus standi to object to the Grant in the Succession proceedings as they do not fall within the categories of preference to be given in administering the estate of the deceased.

45. I am therefore persuaded by the submissions by the Counsel for the Respondent that the trial Court did not err as it was dealing with a straight forward matter of administration of an estate, that the trial Magistrate issued the Grant to the Respondent as the widow of the deceased and that he confirmed it according to the law of succession.

46. Counsel for the Appellants has submitted that the trial Court should have stood over the matter generally or stayed it and directed the parties to seek redress in the proper court, namely, the



Environment & Lands & Court. In support of this argument, he cited the decision of Musyoka J in the case of *In the matter of the Estate of Stone Kakhuli Muinde (Deceased)* [2016] eKLR.

47. The above submission in itself confirms that all along the Appellants were aware that the issues that they had introduced were matters that ought to have been raised at the Environment & Lands Court. Despite faulting the trial Court for failing to stay the matter, a perusal of the Application reveals that no prayer of that nature was made in the Appellant's Application dated 6/10/2016. Not even in the course of the hearing or in the Submissions was such prayer made. The issue was therefore never canvassed. All that was sought was that the Grant be revoked or annulled.
48. I also note that the case of *In the matter of the Estate of Stone Kakhuli Muinde (supra)* relied on by the Appellant's Counsel, involved an Application by third parties for joinder into a Succession Cause and in which the Application was dismissed. To give the decision its proper context, Counsel ought to have also cited the following further paragraphs from the same decision:

“24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.

25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.

26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.

27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court,



or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.

29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place. (emphasis mine)
49. From a reading of the entire quotation above, it is clear that what Musyoka J meant is that parties who claim ownership of a property and allege that such property has been wrongly included as part of the estate of a third party in a Succession Cause ought to move to the Environment & Lands Court or the ordinary civil Courts for determination of such ownership. Upon obtaining a decree in their favour from those Courts, they can then move to the Succession Court where the estate is being handled and plead their case accordingly.
50. In the instant case, the Appellants were therefore unprocedurally asking the trial Court to determine ownership of the property W. Bukusu/W. Siboti/607 when such determination is not the province of the Succession Court but of the Environment & Lands Court.
51. In the premises, I find that the trial Court did not err in dismissing the objection.
52. However, it is on record that indeed the Appellants had filed a case, namely, Bungoma ELC Case No. 23 of 2016 (OS) against the Respondent at the Land & Environment Court seeking a declaration of adverse possession over the same property West Bukusu/West Siboti/607. What the Appellants did not do in the intervening period was to apply for stay of the Succession proceedings pending resolution of the Environment & Lands Court case. It is therefore unfair for the Appellants to turn around and fault the trial Court for not suo motu staying the Succession proceedings when no such Application had been made before the Court.
53. Further, it is curious that the Appellants cause of action in the Environment & Lands Court case is that they acquired the property by adverse possession and not that they are entitled to it because it belonged to their father which is what their claim herein entails.
54. Regarding the fate or progress of the Environment & Lands Court case, none of the parties addressed this Court on such progress. However, having gone through the lower Court file before me, I note that the Appellants had filed an Application for Stay pending Appeal against the Judgment of the trial Court and in the Respondent's Further Replying Affidavit, she deponed that the said Bungoma ELC Case No. 23 of 2016 (OS) had since been dismissed on 20/9/2021. She also attached a copy of the Judgment which indicates that the suit was dismissed by Olao J.
55. In the copy of the Judgment attached, it is indicated that in dismissing the claim for adverse possession, the Court expressly declared that the land parcel West Bukusu/West Siboti/607 is the property of the Respondent, the Appellants were also ordered to vacate the land within a period of 3 months or be evicted therefrom and were also restrained by a permanent injunction from trespassing, ploughing upon or doing any acts which are prejudicial to the Respondent's proprietary interests in the land.
56. The copy attached is however not signed and I may therefore not rely on it without any further confirmation.



57. However, I note that the said averment was never controverted by the Appellants and the genuineness of the copy of the Judgment attached was also never challenged. I also took it upon myself to search the Kenya Law Reports website which is a recognized repository of Kenyan Court decisions. I did not find the said Judgment but instead found a Ruling of the same Olao J delivered subsequently on 6/12/2021 in the same Bungoma ELC Case No. 23 of 2016 (OS) in which he declined to grant an order of stay pending Appeal. In the Ruling, the Judge expressly stated that his Ruling was in relation to the Application that sought to stay his Judgment of 20/09/2021. It is therefore evident that Olao J was referring to the same Judgment referred to by the Respondent.
58. In the circumstances, I am persuaded that indeed by the Judgment delivered on 20/09/2021, Olao J dismissed Bungoma ELC Case No. 23 of 2016 (OS) and subsequently on 6/12/2021 declined to stay the Judgment. Unless therefore an Appeal is successfully filed at the Court of Appeal, the present status is that the Environment & Lands Court has finally and conclusively determined that the Respondent is the rightful owner of the property West Bukusu/West Siboti/607 and that the Appellants have no claims thereon whatsoever.
59. Further, I have also noted from the lower Court file that the Succession trial Court has since confirmed the Grant of Letters of Administration and issued the Certificate of Confirmation on 21/04/2021. The Application seeking revocation is therefore now overtaken by events.
60. In conclusion, I state that while I agree that that this Court has powers to stay a Succession Cause pending determination of a related suit filed at the Environment & Lands Court touching on ownership of land in issue in the Succession Cause, in this instant case exercising such powers will be an effort in futility since, unless a successful Appeal is lodged, the Succession Cause is now overtaken by events.

### **Final Orders**

61. In the premises, the Appeal is found to be devoid of merits and is hereby dismissed with costs to the Respondent. It is so ordered.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF APRIL 2023

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**JOHN R. ANURO WANANDA**

**JUDGE**

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