



**Babu v Onuko & another (Environment and Land Appeal  
E006 of 2022) [2023] KEELC 17423 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17423 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

**JM KAMAU, J**

**MAY 11, 2023**

**BETWEEN**

**WILFRED KEGONYE BABU ..... APPELLANT**

**AND**

**MARY KERUBO ONUKO ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MORARA ONUKO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Order of the Magistrate's  
Court at Keroka by Hon. Collins Ombija – RM dated and delivered  
on the 9th day of June, 2022 in Keroka PMCC Case No. E206 of 2021)*

**JUDGMENT**

1. On December 28, 2021 in the senior principal magistrate's at Keroka civil suit number E206/2021 the Appellant in his capacity as the legal representative of the estate of Babu Siko (deceased) filed suit against the Respondents for a permanent injunction restraining the Respondents from entering and burying the remains of the late Henry Mose Onuko on land parcel No Nyansiongo Settlement Scheme/460 which he claims is registered in the name of his late father who died on January 14, 2012. The Respondents are widow and son of the late Henry Mose Onuko respectively who died on the night of 25<sup>th</sup>/December 26, 2021. Contemporaneously, the Appellant filed a Notice of Motion for an interim injunction to restrain the Respondents from carrying out the burial of their deceased kin on the suit land pending the hearing of the suit. The same was granted ex parte on December 29, 2021 and the inter partes hearing slated for January 4, 2022 by Hon SK Arome – SRM in the following terms: -
  1. That the Application is hereby certified and service be dispensed with in the first instance.
  2. That the Defendant/Respondents are hereby restrained whether acting by themselves through their servants, employees, agents, relatives and/or any other person (s) claiming through them or otherwise from interring and burying the remains of the late Henry Mose Onuko



(Deceased) on the land parcel No Nyansiongo Settlement Scheme/460 pending Hearing of this Application inter parties.

3. That (OCS) Officer in charge of Matutu Police Station and the area Chief (Nyansiongo Location) to ensure enforcement and observance of the orders granted herein.
4. Inter parte Hearing on January 4, 2022.
2. The 1<sup>st</sup> Respondent opposed the Application vide a Replying Affidavit sworn on January 3, 2023 by annexing a copy of a Sale Agreement showing that the suit land had been bought by the late Henry Mose Onuko, her late husband and that although her late son one Tome Mose who died in 1999 was buried on Nyansiongo Settlement Scheme/460, the family had no intention of burying the late Henry Mose Onuko on the suit land.
3. The 2<sup>nd</sup> Respondent also echoed the same depositions in his Replying Affidavit of even date. Both claim that the suit land had been bought by Henry Mose Onuko from the late Babu Siko which land was carved out of Nyansiongo Settlement Scheme/318 registered in the name of the late Babu Siko and that the former took possession and has settled there for a period of over 62 years. After the confirmation of the said orders above, on April 21, 2022, the Respondent herein applied to have the same set aside and reviewed and for the Court to issue an order allowing the interment of the body of the late Henry Mose Onuko on Nyansiongo Settlement Scheme/2755. The grounds supporting the said Application were mainly that the court issued an order against the burial of the late Henry Mose Onuko on parcel number Nyansiongo Settlement Scheme/2755 an Order that had not been prayed for and that land parcel number Nyansiongo Settlement Scheme/2755 which belongs to the late Henry Mose Onuko has never been a subject of litigation in any court, let alone Keroka PMCC Bo E206 of 2021.
4. In opposition to the Application, the Appellant argued that parcel Number Nyansiongo Settlement Scheme/2755 was made an issue by the Defendants and the same canvassed at the Hearing of the Appellant's Application. The Court then rendered what it christened Judgment allowing the Review and varying as well as setting aside the earlier Orders of the court by holding that the Appellant's Application was premised on restraining the Respondents from burying the remains of their Deceased kin on parcel No 460 and not on parcel number 2755.
5. And that a party is bound by his pleadings and this being a burial dispute, the Court will not lose focus. He went on to order that any party that further stops the burial of the Deceased in parcel number Nyansiongo Settlement Scheme/2755 "shall bear the monetary costs forthwith from the date of the Judgment". He also ordered that the OCS Matutu Police Station and the Area Chief (Nyansiongo Location) do ensure enforcement and strict observance of the Orders granted. He also denied the Appellant stay of his orders. It is these orders that the Appellant seeks that they be set aside by this Honourable court on the following Grounds:
  1. That the Learned Magistrate erred in law and misdirected himself fundamentally in reviewing his Ruling when the court had become *functus officio*.
  2. The Learned Trial Magistrate erred in law and in fact and misdirected himself fundamentally in applying the essential ingredients for granting review orders.
  3. The Learned Trial Magistrate erred in making a decision against the weight of material facts placed before him.
  4. The Learned Magistrate erred in law and in fact in making final orders at the interlocutory stage.



5. The Learned Trial magistrate erred in law and in fact by disregarding the decisions of the Superior Courts regarding the root of title No Nyansiongo Settlement Scheme/2755.
  6. The Learned Magistrate erred in law and in fact fundamentally not holding that prima facie the title No Nyansiongo Settlement Scheme/3755 was unlawfully and un procedurally acquired.
6. I asked both sides to file their written submissions which I have duly considered. It is indeed true that the Appellant never mentioned the parcel of land Number Nyansiongo Settlement Scheme 2755 anywhere in his Plaintiff. It is not in the body of the Plaintiff nor in the prayers. But as the matter progressed, this parcel of land was introduced and the Trial Magistrate extended the injunction to the said parcel of land. As a matter of fact, it is the Respondents who first introduced parcel number Nyansiongo Settlement Scheme/2755 in their Replying Affidavits sworn on January 3, 2022 and claimed that they intended to bury the body of Henry Mose Onuko on the said parcel of land and not on Nyansiongo Settlement Scheme/460. They deponed that Nyansiongo Settlement Scheme/2755 is registered in the name of the Deceased. To counter this, the Appellant in a Supplementary Affidavit sworn on January 10, 2022 claimed that Nyansiongo Settlement Scheme/2755 does not exist on the ground and that it forms part of Nyansiongo Settlement Scheme/459 but was acquired unlawfully and unprocedurally. He further says that the same is a subject of a case in the ELC Court. He concluded his further Affidavit by asking the court to determine whether the body of Mose Onuko should be buried on Nyansiongo Settlement Scheme/2755 “as alleged by the Respondents.”
7. After the court gave orders restraining the Respondents from burying the Deceased’s body on Nyansiongo Settlement Scheme/2755 and was consequently moved to set them aside by the Respondents herein by way of Review, the Learned Trial Magistrate went ahead to write a Judgment before hearing the parties and without giving reasons as to why that procedure was adopted. He agreed in his Judgment that the Appellant’s prayers were for restraining the burial of the Deceased’s body on parcel number Nyansiongo Settlement Scheme/460 and not parcel number Nyansiongo Settlement Scheme/2755. He also pointed out clearly that a party is bound by his own pleadings. The Trial Magistrate finally allowed the Application by stating that there has to be a closure to a case. He did set aside his own orders and substituted them with the following orders: -
- “.....The Applicants/Respondents whether acting by themselves, through their servants, employees, agents, relatives, and/or other reason(s) claiming through them or otherwise are hereby allowed to inter and/or bury the remains of the late Henry Mose Onuko (Deceased) on land parcel No. Nyansiongo Settlement Scheme/2755.....
- The issue of fraudulent transfer or sub-division of parcel 459 to create 2755 shall not be entertained by this court for want of jurisdiction of the same was dealt with at a Superior Court, neither do I have jurisdiction to deal with land matters.....
- Either parties that further stops the burial of the Deceased in parcel 2755 shall bear the monetary costs forthwith from this date of this Judgment.
- Each party to bear their own costs. The OCS Matutu Police Station and the are Chief (Nyansiongo Location) to ensure enforcement and strict observance of the orders granted herein above.”
8. And by being moved to set aside an order he had issued, the Honourable Magistrate got an opportunity to write a Judgment. He even made it clear in no uncertain terms that it was the Judgment of the court. Not a single witness was called to either adopt his statement or testify to shed light on the same. I agree with the Appellant that the Trial Magistrate made final orders at the interlocutory stage. For it to do so, the Court must give good reasons to deviate from full Hearing which is the norm.



9. Whereas there are instances where the Court can bring a suit to an end without having viva voce evidence adduced, such as when a suit is struck out for not disclosing a reasonable cause of action or striking out a Defence for not disclosing a Defence under Order 2 Rule 15 of the [Civil Procedure Rules](#) or by way of granting Summary Judgment under Order 36 of the [Civil Procedure Rules](#) or by virtue of other reasons under Orders 10, 12, 13, 17, 24 and 25 of the [Civil Procedure Rules](#), this is not one of such instances. Even on setting aside of his Orders by way of Review under Order 45 of the [Civil Procedure Rules](#), the court did not indicate whether he found sufficient reasons for setting aside his orders. Was there an error apparent on the face of the record or was there any discovery of new and important matter or evidence which after due diligence, was not within the knowledge of the Respondent or could not have been produced at the time when the initial Order was made? If any of the above were the case, the court ought to have said so.
10. Supposing the Court found that there was an error on the face of the record by extending the Order of the Court to parcel number Nyansiongo Settlement Scheme/2755 that needed to be remedied? A court has powers to amend or review its Judgments, Decrees and Orders. And further to Order 45 Rule 1 of the [Civil Procedure Rules](#) the Court has power to review its orders. Under Section 99 of the [Civil Procedure Act](#), clerical or arithmetical mistakes in Judgments, Decrees or orders, or errors arising thereon from accidental slip or omission may be corrected by the Court either on its own motion or on the Application of any of the parties.
11. And under Section 100 of the [Civil Procedure Act](#), the court may at any stage correct any default or error in any proceedings in a suit for purposes of determining the real question or issue raised by or depending on the proceedings. Having found that the Court had made a mistake in including Nyansiongo Settlement Scheme/2755 in its Order of March 23, 2022, contrary to what had been prayed for in the Motion dated December 28, 2021, the furthest it should have gone would have been to amend the offending Order to exclude this parcel of land. But to turn a restraining injunction into a permanent mandatory injunction was quite irregular.
12. Unfortunately, the Court went ahead to deliver Judgment on an Application for Review and did set aside its earlier Orders without any grounds and substituted them with Orders that were directly opposite the earlier Orders. The earlier Orders were to restrain the burial of the late Henry Mose Onuko on Nyansiongo Settlement Scheme/460 which were set aside by “way of Review” under Order 45 and were substituted with orders to have the remains of the late Henry Mose Onuko buried on Nyansiongo Settlement Scheme/2755, in a case where there was no counterclaim and the granting of the Order was quite irregular there being no prayers to that effect in the pleadings. Interestingly, the Motion dated April 20, 2022 culminated in this “Judgment” and the Order.
13. Having said so, I order that the alleged Judgment entered by the Trial Magistrate in Keroka PMCC ELC Case No E206 of 2021 be set aside in its entirety and the Application dated December 28, 2021 be heard afresh before another Magistrate. Costs of this Appeal and of the “Judgment” of the lower Court are awarded to the Appellant.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 11TH DAY OF MAY 2023.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

Court Assistant: Sibota



Appellant: Ms. Nyandoro holding brief for Mr. Gichana

Respondent: N/A

