



Gisesa v National Land Commission & 2 others; County Government of Kisii & 5 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 21327 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND PETITION E001 OF 2023**

**JM KAMAU, J
OCTOBER 31, 2023**

BETWEEN

NYAMBEGA GISESA PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 3RD
RESPONDENT**

AND

COUNTY GOVERNMENT OF KISII INTERESTED PARTY

COUNTY GOVERNMENT OF NYAMIRA INTERESTED PARTY

THE MINISTRY OF LANDS & PHYSICAL PLANNING .. INTERESTED PARTY

CHRISTOPHER BARARE NYANG'AU INTERESTED PARTY

FRANCIS ABURI OYARO INTERESTED PARTY

CHARLES OSORO KIBOI INTERESTED PARTY

RULING

1. On 14th April 2023 the Petitioner herein Nyambega Gisesa, a Member of the County Assembly of Nyamira, filed a Petition to have the boundary between Kisii and Nyamira Counties and particularly at Keroka Town determined.



2. Those named as the Respondents were the National Land Commission and the Honourable Attorney General. He also named the County Governments of Nyamira and Kisii as 1st and 2nd Interested Parties respectively and the Ministry of Lands and Physical Planning as the 3rd Interested Party. He sought the following orders against them: -
- a. A declaration be and is hereby issued that forcing the residents of Keroka town to pay double taxes is a gross violation of the affected traders' property rights under Article 40(3) of the Constitution}}.
 - b. A declaration be and is hereby issued that the double taxation to the residents of Keroka town violates Article 47(1) of the Constitution.
 - c. A declaration be and is hereby issued that the National Land Commission should investigate and erect beacons in Keroka town to as to solve the border dispute between Nyamira and Kisii counties over the town.
 - d. A declaration be and is hereby issued that the Parliament of Kenya should enact enabling legislation to implement Articles 94(3) and 188 of the Constitution.
 - e. A declaration be and is hereby issued that the National Executive of Kenya has failed failing to lessen county boundary disputes by Surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to Articles 129, 130, 131 (1) (b) & (2)(a) & (b), as read together with Article 6(1) and the First Schedule to the Constitution.
 - f. A declaration be and is hereby issued that the National Executive of Kenya should survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to Articles 129, 130, 131 (1) (b) & (2) (a) & (b), as read together with Article 6(1) and the First Schedule to the Constitution.
 - g. A mandatory order compelling the National Land Commission to investigate and erect beacons in the disputed territory in Keroka town, within three months from the date of this Order, so as to resolve the simmering boundary disputes pitting Nyamira and Kisii counties.
 - h. A mandatory order compelling Parliament and the respective county assemblies of Nyamira and Kisii, after the boundary disputes have been resolved, to direct how the County Governments of Nyamira and Kisii will utilize the money held in the joint accounts they opened for revenue collections in Keroka town as ordered by the Court at the beginning of these proceedings.
 - i. A mandatory order compelling the Parliament of Kenya to enact, within six months from the date of this Order, enabling legislation to implement Articles 94(3) and 188 of the Constitution.
 - j. A mandatory order compelling the National Executive to, within twelve months from the date of this Order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the Districts and Provinces Act, 1992, with preference being given to the boundaries between Nyamira and Kisii County.
 - k. A mandatory order compelling the National Land Commission to file in this Honourable Court affidavits demonstrating compliance with the Court Orders at the expiry of the periods within which they have been ordered to act.
 - l. A mandatory order compelling the respondents to pay the petitioner's costs of this Petition.



- m. The Honourable Court be pleased to issue any other or remedy that the Honourable court shall deem fit to grant.
3. Contemporaneously with the Petition, the Petitioner filed an Application under Certificate of Urgency for the following orders: -
 1. That the application be certified as urgent and be heard *ex parte* and service thereof be dispensed with in the first instance.
 2. That pending the inter-parties hearing and determination of the application and/or the petition herein, this Honourable Court be pleased to issue and hereby issues an interim order of *status quo ante*:
 - a. Appointing the County Government of Nyamira to be the sole authority issuing business permits and levying county taxes in Keroka Market just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Kisii County Government.
 - b. Appointing the County Government of Nyamira to be the sole authority issuing land rates in Keroka Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Kisii County Government.
 - c. Appointing the County Government of Nyamira to be the sole authority issuing vehicle and motorcycle stickers in Keroka Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Kisii County Government.
 3. That pending the inter-parties hearing and determination of the application and/or the petition herein, this Honourable Court be pleased to issue and hereby issues an interim order of prohibition:
 - a. Prohibiting the County Government of Kisii and its agents from collecting revenues in any way whatsoever or howsoever in Keroka Town where its predecessor did NOT collect revenues before the establishment of county governments.
 4. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
 5. That costs be in the cause.
 4. When the matter came up in court for the first time on 25th April 2023 I directed the Petitioner to serve the Petition and the Notice of Motion Application dated 6th April 2023 on both Respondents and the 3 Interested Parties. The Court also directed that the matter be mentioned on 11th May 2023 for Directions.
 5. On 11th May 2023 the Court ordered the Secretary (CEO) of the Independent Electoral and Boundaries Commission (IEBC) and the Chairman of the National Land Commission to appear in Court on 25th May 2023 and explain whether the said boundary has ever been determined and the 2 appeared physically on the said date. The Chairman of the National Land Commission personally



while Ms. Carolyn Sabiri Manyange (who is in charge of boundaries at IEBC) appeared on behalf of the CEO. The latter was not available and an apology was tendered to Court on his behalf.

6. On 25th May 2023 Mr. Mbosota for the 2nd Interested Party raised a few preliminary issues on the following:
 1. Jurisdiction of the Court
 2. That the Petition is not pleaded with precision as required of Constitutional Petitions
 3. The same lacks particulars
7. all of which were addressed by the Court and a Ruling delivered on the same date dismissing the said Preliminary Objection. Mr. Mbosota, for the 2nd Interested Party then filed a Notice of Appeal on the said Ruling.
8. On 6th June 2023 the following were admitted as 4th, 5th and 6th Interested Parties respectively following their successful Applications: -
 1. Christopher Barare Nyang'au
 2. Francis Aburi Oyaró
 3. Charles Osano Kiboi
9. On the same day, the Court ordered that there was to be a visit to the *Locus in Quo* on 16th June 2023. The IEBC and experts from Survey of Kenya and Ministry of Roads were to visit the boundary at 9.00 in the morning for the ascertainment of the boundary and the Court would join them later in the afternoon at 2.30pm. Also to be present in the morning were experts from the Ministry of Lands and Physical Planning, Regional Surveyor Nyanza, Land Registrars, Kisii and Nyamira and County Surveyors from both counties. Each party was at liberty to bring their private Surveyors for the exercise. When making this order, the IEBC was admitted in the suit as 3rd Respondent.
10. On 16th June 2023 two Applications under Certificate of Urgency were brought before me in Chambers, one for the matter to be referred to arbitration and the other one for my recusal. The same were filed on 15th June 2023. By the time the same were brought before me, all other parties were in Keroka as directed by the Court on 6th June 2023.
11. The Applications were considered and Directions given before the Court joined the other parties at Keroka in the afternoon.
12. At 12.00 noon, Mr. Morara, for the 4th Interested Party, appeared before me in open Court when I was dealing with other matters and prayed that his client's Application under Certificate of Urgency be heard and that there be a stay of the visit to Keroka. By this time, Directions had already been given on his client's Application.
13. On 3rd July 2023 when the Application for recusal by the 4th Interested Party came to Court for hearing, the Court directed all the parties to file their responses on my recusal within 7 days and the matter was to be mentioned on 26th July 2023 for Directions. It was ordered by Court that the 1st and 2nd Interested Parties were now to become 5th and 4th Respondents respectively. The matter was adjourned to 19th September 2023 when the 4th Interested Party was ordered to appear in Court physically for cross-examination on his Affidavit sworn on 14/6/2023.
14. On 19th September 2023 Mr. Morara told the Court that his client, the 4th Interested Party who he said has never ever appeared in court ever since the Petition was filed, had been admitted in St. Cathelyne



Ichuni Catholic Hospital and was discharged six days earlier and that on that day he had attended Physiotherapy at Oasis Doctors' Plaza Hospital in Kisii and could therefore not attend Court. He said he got this information from his client's "caretaker". There were no documents to authenticate this. When asked to call the caretaker, Mr. Morara, Advocate said he did not have the Caretaker's telephone number. As to the telephone number of the 4th Interested Party he also said that he had not carried the phone that contains the 4th Interested Party's telephone number. He said that he has five different telephone lines and phones but this day he had carried only two to Court and none of them had the 4th Interested Party's number. The Court was not provided with the Applicant's Telephone Number despite the Legal Notice No. 22 published in Kenya Gazette Supplement No. 11 (Legislative Supplement No. 9)105 on 26th February, 2020 which provides as follows:

In exercise of the powers conferred by section 81(1) of the Civil Procedure Act, the Rules Committee makes the following Rules—

The Civil Procedure (amendment) Rules, 2020

Parties to provide contacts [Order 1, rule 26]

1. A party to a suit shall provide contact details to the Court when filing pleadings including the party's —
 - (a) postal address;
 - (b) telephone number;
 - (c) email address; and
 - (d) physical address.
2. A party shall notify the Court of any changes to the contact details provided under sub rule (1).

15. The Court then ordered that the 4th Interested Party do appear in Court on 20th September 2023 with documents to show that he was indeed in hospital on 19th September 2023.
16. On 20th September 2023 Mr. Morara appeared in Court at 10.30am and said that the 4th Interested Party was outside the Court in an Ambulance since this time he was suffering from Hypertension and could not stand trial. He produced medical documents to prove that on the previous day the 4th Interested Party was in hospital. But the same contradicted the previous day's explanations. The Court noticed that the same had come from a different hospital from the one the Applicant is said to have been on 19th September 2023. Mr. Morara undertook to have the 4th Interested Party in Court for cross examination on his Affidavit. Surprisingly, when the Court retired to write this Ruling the documents produced in Court allegedly showing the Applicant's hospitalization were missing in the Court file.
17. On 24th October 2023, a month later, even by 10.30am neither the 4th Interested Party nor his Advocate had arrived in Court and the Court could not wait for any of them any longer. At 11.00am Mr. Morara, Advocate requested to be admitted to Court online and as soon as the Court admitted him, he immediately logged out without addressing the Court. It happened a second time with the same results. His client never showed up in Court nor was the Court given any explanation as to why he never appeared and this Court has only one option, to rule on the Application.
18. The Application by the 4th Interested Party dated 14th June 2023 is worded as follows: -
 1. That this application be heard urgently on priority basis.



2. That there be stay of all proceedings and the site visit scheduled for 6th June 2023 to the *locus in quo* pending hearing and determination of this application.
 3. That the Honourable Trial Judge in this matter Honourable Justice Mugo Kamau be obligated to disqualify and/or recuse himself from further handling this matter.
 4. That any other order which the Honourable Court may deem fit and just too grant in the circumstances.
 5. That costs of this application be provided for.
19. As his grounds supporting the Application, the Applicant said that
- ... on 6/6/2023, while in open court, the Chairman of the Respondent Mr. Gershon Otachi walked into the Court amidst proceedings that were ongoing before the instant matter, when the Trial Judge ushered him to Chambers for a cup of tea.
- That the Trial Judge did also direct Ms. Caroline Sabiri Manyange, the boundaries (IEBC) to join Chairman of the 1st Respondent Geshon Otachi for a cup of tea.
- That when the court took a break, the Chairman of the 1st Respondent Gershon Otachi and the Trial Judge spent a length of time in Chambers before resuming to open Court where all other parties and their Counsel were waiting.
- That.....the Trial Judge made a confession that the Chairman of the 1st Respondent Gershon Otachi is his good friend, having been a classmate since Campus and that he was an astute academician who the Trial Judge could not compare himself with.....”
20. In his Affidavit sworn on 14th June 2023, the Applicant depones as follows: -
5. That I have been informed by my Advocate on record while advise I verily believe to be true that on 6th June 2023 while in open Court when the Chairman of the 1st Respondent Mr. Gershon Otachi walked into the Court amidst proceedings that were ongoing before the instant matter, when the Court ushered him to Chambers for a cup of tea.
 6. That I have also been informed by my Advocates on record which advise I verily believe to be true that when the court took a break, the Chairman of the 1st Respondent Mr. Gershon Otachi and the court spent a length of time in Chambers before resuming to open court where all other parties and their Counsels were waiting.
 7. That I have further been informed by my Advocates on record which advise I believe to be true that when the court resumed to proceed with the intent matter, the Trial Judge made a confession in court that the Chairman of the 1st Respondent Mr. Gershon Otachi is his good friend having been a classmate since Campus and that he was an astute academician who the Trial Judge could not compare himself with.
21. On his part, Mr. George Morara, an Advocate from the Firm of Maosa & Company Advocates also swore an Affidavit on the same date and echoed the same words as his client, word for word. At paragraph 24 of the said Affidavit, Mr. Morara says he has a constitutional right to raise “ my pertinent complaint over the said matter as a litigant and on behalf of my client”. He further deposes at paragraph 25 that “what is stated herein is true and within my knowledge, save what has been deponed to on information whose sources has been given....”



22. When Mr. Morara appeared in Court on 3rd July 2023, he told the Court that his appearance in this court in respect to this matter for the first time was on 8/6/2023. The matters complained of are said to have taken place on 6/6/2023 which time the Advocates on record for the 4th Interested Party were Bonuke & Company Advocates and Mr. Bonuke did represent the Applicant herein. The records of the Court show that the Court never sat on 8th June 2023. Mr. Morara could therefore not have witnessed the acts constituting his and his client's complaints. The Applicant was also not present in Court on 6th June 2023 and he is clear that he got the information from his "Advocates on record." He does not specify whether it was the Advocates on record as at 6th June 2023 or as from 15th June 2023 when Maosa & Co. Advocates came on record. Secondly, when he says "my Advocates on record" which means a firm of Advocates, he is not specific as to which Advocate in particular. The Court has given him ample time to come and explain his source of information but he has failed to appear in Court. Likewise his Advocate Mr. Morara says that the information he has given to Court "is true and within my knowledge, save what has been deponed to on information whose source has been given....." He has not told the Court the source of this information yet he, in his own words, was not in Court when they are alleged to have happened. He also calls himself a litigant in this matter yet nowhere is he a party in the case. Interestingly, Mr. Bonuke who was on record on 6th June 2023 for the 4th Interested Party has opposed the Application for recusal and on 19th September 2023 while complaining about the Applicant's failure to attend Court, this is what Mr. Bonuke said of the 4th Interested Party: -
23. I associate myself with the sentiments of Mr. Maeche although I also act for Interested Parties. I wish the court proceeds to make its determination on the Application for recusal taking into consideration the conduct of the 4th Interested Party. The interests of an Interested Party are not supreme to those of the main parties....."
24. Mr. Bonuke is on record as having opposed the Application for recusal and therefore he can't have been the one quoted by the Applicant as having advised him on the Application. In the premises, the source of the information on the "teas and the association" between the Trial Judge and the Chairman of the National Land Commission (who is not a party to this Petition) is still obscure.
25. What does the law say on who should swear an Affidavit? Order 19 Rule 3 (1) of the [Civil Procedure Rules](#) provides that: -
- Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
- Provided that in interlocutory proceedings, or by leave of the court, an Affidavit may contain statements of information and belief showing sources and grounds thereof."
- The proviso to Rule 3 (1) above is not applicable to the 4th Interested Party since the source of the information has been given. Secondly, the Affidavit of the Applicant is 100% hearsay and whose disclosed sources also fail the test of admissibility of Evidence.
26. The Applicant has also deponed that he got the information from his Advocate and that he believes the advice he got from his Advocates on record. He has not said which Advocate. No Advocate has owned up that he witnessed the matters complained of. He concluded his depositions by swearing that: -
- ...what is stated herein is true and within my knowledge, save what has been deponed to on information whose source has been given....."
27. Under Order 19 Rule 2 of the [Civil Procedure Rules](#) the Court can order, as it did in this case, the deponent of an Affidavit to appear in Court for cross examination.



28 The Court gave him an opportunity to come and explain the source of his information but he failed to take advantage of the same. Save having said that he was in an ambulance outside the Court, the Court has never seen the Applicant. In the case *Raila Odinga & Others -vrs- William Ruto & Others presidential Election Petition* Nos. E001, E002, E003, E004, E005, E007 & E008 of 2022 (consolidated) at paragraphs 135 to 137 the Supreme Court of Kenya held that: -

The Affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar’s Report confirmed evidence to the contrary. All the Forms 34A attached to those Affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the public portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective Affidavits was not only inadmissible, but was also unacceptable. It has been established that none of the agents on whose behalf the Forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two had gone ahead to depone on matters that were not within their knowledge. It is noting that the two are Advocates of the High Court and are on record as representing the 1st Petitioner in the Petition before us.....This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing, to falsehoods and may also be liable to cross-examination to prove the matters deponed to.....In stating so, we echo the words of Ringera, J in *Kisya Investment Limited & Others Vrs Kenya Finance Corporation Ltd HCCC No. 3504 of 1993 (Unreported)* that “It is not competent for a party’s Advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the Advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an Advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel’s affidavit is defective for the reason that it offends the proviso (to) order XVIII Rule 3 (1) (now order 19 rule 3 of the *Civil Procedure Rules* faileing to disclose who the sources of his information are and the grounds of his belief.”

29. The Court is left with only one conclusion in this Application. Either Christopher Barare Nyang’au does not exist at all or that he does not want to come to Court and would want this case to drag in Court forever. And if he really exists then there could be possibility that there are people who are using his name to drag this case for their own ulterior motives. It is also noteworthy that as soon as the Application for recusal was filed, the same was published in the Media at least to give an impression that the Court will not be fair and is already biased. This must have been meant to scare the Court so that the Petition is not determined.

30. It is quite clear that the intention of whoever brought the Application for recusal was that of ridiculing the Trial Court in the eyes of the other parties before the Court but his intention has been thwarted midstream.

31. I must also point out that a well-choreographed scheme of intimidation and delaying tactic has found its way in our Courts. After I had given Directions on the Application for recusal on 16th June 2023,



Counsel for the 4th Interested Party turned up in Court and threatened the Court with the following words: -

If you do not recuse yourself from this case we shall file a complaint to the Judicial Service Commission...”

32. The Applicant’s Advocate did not have to notify me in court. For this kind of threat that seems to be used when litigants don’t want a matter to proceed, I wish to respond as follows: -

I took the oath of office to impartially do justice without any fear, favour, bias, affection, ill-will, prejudice.....”

33. As for fear, the oath was general. The prescribed oath does not specify where the fear will come from. I therefore refuse to be intimidated and to fall prey of fear of death, fear of parties before me, fear of adverse publicity by the press, intimidation from fictitious litigants and even fear of Judicial Service Commission. Although this does not give anyone a license to misbehave, the Judicial Service Commission is meant to facilitate my judicial duties but not to be invoked in order to intimidate me. As long as I do my work to dispense justice fairly and impartially, my conscious is clean. The work of dispensing justice requires a thick skin. I will not have sleepless nights because someone maliciously says he was told by someone he does not disclose that I took tea with a “litigant” when I was all along in Court or that I allowed a former classmate to appear before me.

34. Accordingly, the 4th Interested Party’s Application dated 14th June 2023 is hereby dismissed. Under Order 19 (3) (2) of the Civil Procedure Rules,

.....the costs of every affidavit which shall unnecessarily set forth matters of hearsayshall (unless the court otherwise directs) be paid by the party filing the same, . ..” ,

35. The costs of the Application to all other parties shall be met by the Applicant if he exists at all. And since the alleged Applicant has shown in no uncertain terms that his intention of applying to be joined in this Suit was to derail the proceedings herein, which are of great public interest, this Court invokes the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and strikes out his name as a party in these proceedings.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31ST DAY OF OCTOBER, 2023

MUGO KAMAU

JUDGE

In the presence of: -

MR. Maeche with Ms. Bundi for the Petitioner

Mr. Karanja for the 1st Repondent

Mr. Wabwire for 2nd Resondenat and 3rd interested party.

Mr. Anyka for the 3rd Respondent.

Ms. Kerubo for the 5th Respondent

Mr. Bonuke for the 5th Respondent and 6th interested party.

