



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO.19 OF 2018**

**ZEPHANIA INGOSI & 13 OTHERS ..... PLAINTIFF**

**VERSUS**

**SASAKA HENRY MAKOKHA being sued for and on behalf of Estate of**

**ERASMUS SASAKA WACHILONGA ..... DEFENDANT**

**RULING**

Order 51 Rule 13(3) of the Civil Procedure Rules provides as follows in relation to the service of applications:

***“The application shall be served on respondent together with the list of authorities, if any, not less than seven clear days before the date of hearing” Emphasis added***

On 2<sup>nd</sup> May 2018, **ZEPHANIA INGOSI** and thirteen(13) other Applicants filed an originating summons against **SASAKA HENRY MAKOKHA** (the Respondent) citing Section 38 of the Limitation of Actions Act, Section 28(h) of the Land Registration Act and Order 37 Rule 7(1) and (2) of the Civil Procedure Rules seeking the main prayer that they have been in peaceful, open and un-interrupted occupation of a portion of the land parcel NO.BUNGOMA/NAITIRI/153 (the suit land) measuring 13.35 acres for a period in excess of 12 years are therefore entitled to orders that they have acquired the said portion by way of adverse possession.

Simultaneously with that originating summons, the Applicants filed a Notice of Motion dated 30<sup>th</sup> April 2018 seeking the following main prayers

**1. Spent**

**2. That pending the inter-partes hearing of this application, this Honourable Court be pleased to restrain the Respondent and/or any other person(s) acting or claiming under him from evicting the Applicants from or preventing access to their homesteads established upon 13.35 Ha comprised within LR No. BUNGOMA/NAITIRI/153 registered in the name of the deceased.**

**3. That pending the final determination of this application, this Honourable Court be pleased to restrain the Respondent and/or any other person(s) acting or claiming under him from evicting the Applicants from or preventing access to their homesteads established upon 13.35 Ha comprised within L.R. No. BUNGOMA/NAITIRI/153 registered in the name of the deceased.**

**4. That pending the disposal of the main suit, this Honourable Court be pleased to restrain the Respondent and/or any other person(s) acting or claiming under him from evicting the Applicants from or preventing access to their homesteads established upon 13.35Ha comprised within L.R. No. BUNGOMA/NAITIRI/153 registered in the name of the deceased.**

**5. That the Officer commanding Mbakalo Police Station be directed to ensure compliance with any order(s) emanating from the application herein.**

**6. That the costs of this application be provided for.**

The grounds upon which the application was premised are not really necessary for purposes of the application subject of this ruling. Suffice it to state that it is clear that there was a previous suit being BUNGOMA ELC CASE NO.38 OF 2014 involving the same suit land between one **ERASMUS SASAKA WACHILONGA** (now deceased and on behalf of who the Respondent has been sued in this case), as plaintiff and **SIMON WACHILONGA TOILI, MAGGERY K. WACHILONGA, MAGDALINE MBAYISI** and **EVERLYNE NEKESA WACHILONGA** as defendants.

In a judgement delivered by MUKUNYA J on 29<sup>th</sup> November 2016, the defendants were ordered to vacate from the suit land within 90 days failure to which they would be evicted. It is clear therefore that this application dated 2<sup>nd</sup> May 2018 was filed to forestall such eviction.

That application was first placed before KANIARU J on 7<sup>th</sup> May 2018 at the BUSIA ELC who certified it as urgent and directed that it be served for hearing on 22<sup>nd</sup> May 2018 at the BUSIA ELC. On that day Mr. FWAYA ADVOCATE appeared on behalf of the Applicants but there was no appearance by the Respondent. KANIARU J having been satisfied that there was service upon the Respondent proceeded to grant prayers 3,4 and 6.

The Respondent has now filed his own application dated 24<sup>th</sup> May 2018 and which is the subject of this ruling. The said application is premised under Section 3A of the Civil Procedure Act, Orders 40 Rule 7, 51 Rule 1 and 45 Rule 1 of the Civil Procedure Rules and Sections 13 and 19(2) of the Environment and Land Court Act seeking the following prayers:

**1. ) Spent**

**2. )**

**3. That the orders made herein by the Court at BUSIA on 22<sup>nd</sup> May 2018 and all consequential proceedings and orders be and are hereby discharged and/or reviewed and set aside.**

**4. That the application dated 30<sup>th</sup> April 2018 filed by the Claimants/Respondents be heard on merits inter-parte and on priority basis.**

**5. That costs be borne by the Claimants/Respondents.**

The application is based on the grounds set out therein and supported by the affidavit of **SASAKA HENRY MAKOKHA** the Respondent in this main suit and Applicant in this application.

The gravamen of the application is that the Respondent was duly served on Friday 18<sup>th</sup> November 2018 for this application that was coming up on 22<sup>nd</sup> May 2018 contrary to the provisions of Order 51 Rule 13(3) of the Civil Procedure Rules which require that such service be done not less than seven clear days before the date of hearing.

Further, that the application was heard at BUSIA ELC yet the order served upon the Respondent was that it would be heard at BUNGOMA ELC at 9a.m. where the Respondent was and when he arrived at the BUSIA ELC, he found that the application had been heard and yet there was a judge sitting at the BUNGOMA ELC. Finally, that the Applicants were in fact evicted from the suit land on 17<sup>th</sup> April 2018 but returned to the suit land and burnt down the Respondent's house and are therefore in contempt of Court.

The application is opposed and **ZEPHANIA INGOSI** the 1<sup>st</sup> Applicant has filed a replying affidavit in which he was deponed, inter alia, that the Notice of Motion dated 30<sup>th</sup> April 2018 was filed at BUNGOMA ELC but since there was no judge, it was sent to BUSIA ELC and attempts were made to serve the Respondent both on 16<sup>th</sup> May 2018 and 17<sup>th</sup> May 2018 through his advocates who both declined service. It was then that the Respondent was served at the precincts of BUNGOMA COURT and therefore the orders dated 22<sup>nd</sup> May 2018 were obtained procedurally.

When the parties appeared before me on 12<sup>th</sup> June 2018 for hearing of the application, it was agreed by consent that it be determined on the basis of the parties respective affidavits.

I have considered the application and the rival affidavits.

It is clear beyond peradventure that there was non-compliance with the provisions of order 51 Rule 13(3) of the Civil Procedure Rules which require that the Respondent be served with the application **not less than seven clear days** before the date of hearing. The Respondent has deponed, and that has not been rebutted, that he was only served on Friday 18<sup>th</sup> May 2018 for the application which was due for hearing on 22<sup>nd</sup> May 2018. In the circumstances, the Applicants cannot be heard to say, as deponed in paragraph nine (9) of the replying affidavit by **ZEPHANIA INGOSI**, that the order dated 22<sup>nd</sup> May 2018 was "**procedurally obtained**". An order cannot be said to have been "**procedurally obtained**" when there was a violation of clear and mandatory provisions of the Law and especially when, as alleged by the Respondent and not rebutted, that the application served on him indicated that the hearing would be at the BUNGOMA ELC yet the same was heard at the BUSIA ELC.

An order such as the one obtained ex-parte by the Applicants being a discretionary and equitable one demanded utmost good faith on their part which was clearly lacking. Instead, there was a clear attempt on the part of the Applicants to steal a match on the Respondent.

It is further deponed that the Applicants were in fact evicted from the suit land on 17<sup>th</sup> April 2018 and also a suggestion that this suit is in fact res-judicata having been determined previously in BUNGOMA ELC CASE NO.38 OF 2014. Since the Applicant seeks the order that the application dated 30<sup>th</sup> April 2018 be heard on its merits inter-parte on a priority basis, I will not touch on the issues of eviction and res-judicata at this stage.

Suffice it to state that the Notice of Motion dated 24<sup>th</sup> May 2018 is well merited. I allow it and set aside the orders dated 22<sup>nd</sup> May 2018

issued at BUSIA ELC pursuant to the provision of Order 40 Rule 7 of the Civil Procedure Rules which empower this Court to set aside vary or discharge any orders of injunction. I further direct that the application dated 30<sup>th</sup> April 2018 be canvassed inter-parte on 2<sup>nd</sup> July 2018.

The Respondent shall have costs of this application agreed or taxed.

**BOAZ N. OLAO**

**ELC JUDGE**

**21<sup>ST</sup> JUNE 2018**

Ruling dated, delivered and signed in open Court this 21<sup>st</sup> day of June 2018.

Ms. Khayo for Applicant present

Mr. Watanga for Wetsutsa for Respondent present

**BOAZ N. OLAO**

**ELC JUDGE**

**21<sup>ST</sup> JUNE 2018**

**MS. KHAYO:** 2<sup>nd</sup> file is not correct.

**COURT:** Hearing on 3<sup>rd</sup> July 2018. Replying affidavit be put in within three(3) days.

**BOAZ N. OLAO**

**ELC JUDGE**

**21<sup>ST</sup> JUNE 2018**