



REPUBLIC OF KENYA



**KENYA LAW**  
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**Boburia v Atandi & 6 others (Environment & Land Case 38 of 2019)  
[2023] KEELC 22391 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22391 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 38 OF 2019**

**M SILA, J**

**DECEMBER 14, 2023**

**BETWEEN**

**ERICK OBAGA BOBURIA ..... PLAINTIFF**

**AND**

**DOMISIANO BOBURIA ATANDI ..... 1<sup>ST</sup> DEFENDANT**

**MICHAEL OMBONGI KWABA ..... 2<sup>ND</sup> DEFENDANT**

**SAMWEL GESORA ATANDI ..... 3<sup>RD</sup> DEFENDANT**

**VINCENT BAGWASI ..... 4<sup>TH</sup> DEFENDANT**

**AENN NYAMBANE NYATWONGI ..... 5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR – KISII COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

(Application to set aside ex parte proceedings; application allowed but subject to payment of throw away costs)

1. The application before me is that dated 18 October 2023 filed by the 2<sup>nd</sup> defendant in this suit. He seeks to set aside the ex parte proceedings of 19 September 2023, when the matter proceeded in his absence, and for the hearing of the case to start de novo.
2. To put matters into context, this suit was commenced through an Originating Summons filed on 20 November 2020. The plaintiff is son of the 1<sup>st</sup> defendant, one Domisiano Borura Atandi. His averred that his grandfather, one Atandi Makori, owned the land parcel Central Kitutu/Mwamosioma/915, and this land was registered in his name at the time of his death in 1994. He complains that without undergoing succession, this land was subdivided and the resultant subdivisions registered in name of



- the 1<sup>st</sup> – 4<sup>th</sup> defendants. In the suit, the plaintiff seeks cancellation of the resultant subdivisions so as to have the land revert back to the land parcel Central Kitutu/Mwamosioma/915.
3. The applicant herein, named as 2<sup>nd</sup> defendant in the suit, filed a reply to the Originating Summons, opposing the case through the law firm of M/s Ochoki & Company Advocates. On 1 November 2022, I directed the case to proceed for hearing on 25 April 2023 and directed counsel for the plaintiff to serve hearing notices upon the defendants. I however did not sit on 25 April 2023 and I caused a notice to be published re-scheduling the hearing dates with this case fixed for hearing on 19 September 2023. On the hearing date, only Mr. Sagwe, learned counsel for the plaintiff was present. There was no appearance on the part of the defendants and the matter proceeded ex parte upon which the plaintiff closed his case. I directed parties to file their final submissions and listed the case for mention on 26 October 2023 but before that date, this application was filed on 18 October 2023. It has been filed by the law firm of M/s Ochwangi & Company Advocates who have taken over the conduct of the matter from M/s Ochoki & Company Advocates for the applicant through a notice of change of advocates filed alongside the application. I have already mentioned that it is an application seeking to set aside the ex parte proceedings and to have the case start afresh. The application is based on the grounds that the applicant's erstwhile counsel was not served for the hearing and that the purported service upon his said counsel is suspect. He states that he has a good case and deserves to be heard. In his supporting affidavit, he avers that he has been unwell for some time and never got any communication from his previous advocates.
  4. On 26 October 2023, I gave counsel for the plaintiff time to reply to the application but nothing was filed. I declined to extend time when the matter came up before me on 14 November 2023. It follows that there is no reply to the application.
  5. I have considered the application. The application is mainly based on the ground that the applicant's erstwhile counsel was not served. As I had earlier mentioned the case was initially fixed for hearing on 25 April 2023, when I did not sit and notice was published that this case would proceed for hearing on 19 September 2023. In addition to the notice, the court process server also served a hearing notice by email to the applicant's erstwhile counsel and filed an affidavit of service to that effect. I am therefore not persuaded by the reasons that counsel for the applicant was not aware of the hearing date. I am however willing to allow the proceedings to be set aside so that the applicant is not shut out from the seat of justice. He will however pay to the plaintiff throw away costs of Kshs. 7,500/= within 30 days of today.
  6. Thus, this application is allowed but subject to payment of throw away costs of Kshs. 7,500/= payable within 30 days of today. If the costs are not paid as directed, the proceedings of 19 September 2023 to stand and the matter will proceed to judgment.
  7. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 14 DAY OF DECEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

