



**Wafula (Suing as the Appointed Attorney of Selina Namalwa Masoni) v Makokhwanyoni & another (Environment & Land Case 14B of 2017) [2023] KEELC 22142 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22142 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 14B OF 2017  
EC CHERONO, J  
DECEMBER 11, 2023**

**BETWEEN**

**BENJAMIN BARASA WAFULA (SUING AS THE APPOINTED ATTORNEY OF SELINA NAMALWA MASONI) ..... PLAINTIFF**

**AND**

**LUKA MAKOKHWANYONYI ..... 1<sup>ST</sup> DEFENDANT**

**ASHON SIKOLIA WANYONYI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me for determination is the application filed by the applicant dated 24<sup>th</sup> May, 2023 where the applicant prays for the following orders.
  - a. That pending inter-parte hearing, it pleases this Honourable Court to dispense with this application in the first instance and be certified urgent; then stay Ashoni Sikolia Wanyonyi, his family, relatives, agents' clients or any institution claiming through him from misusing the order dated 5<sup>th</sup> May, 2023 to withdraw the late Ben Masoni Wanyonyi's shop's rent from the Judiciary Account until the Environment and land court determines who is the bonafide owner of Webuye Township Plots 74 & 75.
  - b. That pending determination of these matters, it pleases this Honourable court to issue resistant or obstruction orders, nullifying the order dated 5<sup>th</sup> April, 2023 because land ownership and or intestate estate documents cannot be amended before the Environment and Land Court has determined who the bonafide owner of Webuye Township plots 74 & 75 is between now deceased Reuben Wanyonyi and Ben Masoni Wanyonyi.
  - c. That after granting such orders, it pleases this honourable court to nullify the certificate of lease opened on 15<sup>th</sup> February, 2002 by an existing county counsel of Webuye after Ben



Masoni Wanyonyi's site plan was approved on 24<sup>th</sup> April 1976 and then developed his Webuye Township plots 74 & 75 fully.

- d. That it pleases this honorable court to issue ex-parte orders directing the High Court Civil Registry to avail Succession Cause no. 51 of 2005 for consolidation with the Environment and Land Case No. 14'B' of 2017 pursuant to the ruling delivered on 25<sup>th</sup> April, 2023 about these same subject matter and same parties.
  - e. That this honourable court be pleased to issue orders declaring that, Webuye Township plots 7996/74 and 7996/75 are no longer intestate Estate subject matter after confirming on 4<sup>th</sup> November, 2010 and shared in the names of the late Ben Masoni Wanyonyi eligible Intestate estate beneficiaries.
  - f. That it pleases this Honourable court to issue orders declaring that Land transfer documents for both now deceased Reuben Wanyonyi Sikolia and Mary Gorreti Munoko are not found in the land registry at Bungoma because the now deceased Reuben Wanyonyi Sikolia never owned L.R. No. Ndivisi/Muchi/1399 which was partitioned and registered as Webuye Township Plots 74 and 75 contrary to the purported registration of 24<sup>th</sup> November, 1999 through a non-existing county council of Webuye.
  - g. That it pleases this honourable court to declare that the National Government acquired L.R. Ndivisi/Muchi 1399 from the now deceased Cheloti Kisaka through Kenya gazette no. 1710 of 12<sup>th</sup> June 1970 for urbanization of Webuye.
  - h. That it pleases this honourable court to issue orders declaring the now deceased Reuben Wanyonyi Sikolia, was leased Webuye Township plots 76,77,78 and 79 by the Town Council of Webuye as a leasee but not a private proprietor.
  - i. That it pleases this honourable court to issue orders declaring Webuye Township plots 74 and 75 being part-portions of L.R No. Ndivisi/Muchi 1399, bought by the government from the now deceased Cheloti Kisaka, through Kenya Gazette no. 1710 of 12<sup>th</sup> June 1970 then leased to now also deceased Ben Masoni Wanyonyi by the town council of Webuye before the year 1976.
  - j. That this Honourable court be pleased to issue orders that M/S J.O. Makali & Co Advocates must have cross-examined the Applicant/Objector herein, for the 1<sup>st</sup> petitioner who is her appointed attorney, pursuant to the powers of attorney registered as No. 674/2017 donated on the 11<sup>th</sup> day of May, 2017.
  - k. That it pleases this honourable court to issue orders compelling the 1<sup>st</sup> petitioner/Respondent and the 1<sup>st</sup> objector/respondent herein to avail original documents- made on 17<sup>th</sup> May 1977, 8<sup>th</sup> December, 1979 between 19<sup>th</sup> July 1996 and 26<sup>th</sup> June 1998, then 24<sup>th</sup> November 1999 for investigation by the national director of criminal investigations documents laboratory.
  - l. That it is in the interest of justice for this honourable court to issue vesting orders directing the National director of criminal investigations to investigate and file documents laboratory reports for verifying the signatures of the late Ben Masoni Wanyonyi's signature signed on 17<sup>th</sup> May, 1977, 8<sup>th</sup> December, 1979 between 19<sup>th</sup> July 1996 and 26<sup>th</sup> June 1998, then 24<sup>th</sup> November 1999.
  - m. Costs of this process.
2. The application is founded on the grounds on its face enumerated from a-y. I note that the annexed supporting affidavit bears totally different case details;



Republic Of Kenya

In The High Court of Kenya At Bungoma

Succession Cause No. 51 of 2005

(in The Matter of The Estate of Ben Masoni Wanyonyi-deceased)

Selina Namalwa Masoni..... 1<sup>St</sup> Petitioner/respondent

Janet Khakasa Wanyonyi.....2<sup>Nd</sup> Petitioner/respondent

Benjamin Barasa Wafula

(objecting As 1<sup>St</sup> Petitioner's Attorney) ..... Applicant /objector

Versus

Scholastica Wakasa Wakasa.....1<sup>St</sup> Objector/respondent

Ashon Sikolia Wanyonyi.....2<sup>Nd</sup> Objector/respondent

Luka Makokha Wanyonyi.....3<sup>Rd</sup> Objector/respondent

and it is therefore unclear whether the same relates to the current application. The same is dated an earlier date i.e 18<sup>th</sup> May, 2023 than the application which is dated 24<sup>th</sup> May,2023 which brings even more confusion.

3. It is the applicant's case as per the grounds that L.R. No. Ndivisi/Muchi 961-1448 was acquired by the government through gazette notice No. 1710 dated 12<sup>th</sup> June,1973 for purposes of urbanizing Webuye and that one Cheloti Kisaka owned L.R. Ndivisi/Muchi 1399 which is now Township plots 7996/91 and 92 developed and housing various businesses and banks. On the other hand, Reuben Wanyonyi Sikolia owned L.R. No. Ndivisi/Muchi 1238 and 1245 with L.R. No. Ndivisi/Muchi 1238. It is averred that there are various cases in various courts including the supreme court with various parties claiming.
4. The applicant stated that he has sued various individuals in the Supreme Court who allegedly have fraudulently assisted individuals known to him to falsify documents and acquire land illegally. It is stated that the respondents herein misled the court that L.R. No. Ndivisi/Muchi 1401 forms part of the estate of Reuben Sikolia Wanyonyi. The applicant averred that the respondent misguided the court to amend the grant issued on 8<sup>th</sup> November,2010 to include Ben Masoni's property.
5. The court is called upon to determine who the owner of Webuye town plots 74 and 75 belong to between Reuben Wanyonyi Sikolia and Ben Masoni Wanyonyi. The applicant sought to have the status quo maintained pending determination of the above question. It is averred that one Mary Goretti Munoko alias Mary Nasimiyu Munoko forged the signature of Ben Masoni Wanyonyi in a sale agreement dated 8<sup>th</sup> December, 1979 and again in court documents in the year 1999 with the help of the courts executive officer and further that the respondents herein also forged the signature of Reuben Wanyonyi Sikolia in a letter to the town clerk over the property.
6. Lastly the applicant averred that Mary Goretti Munoko alias Mary Nasimiyu Munoko knowingly failed to invite Ben Masini Wanyonyi to the Webuye Municipality Planning Committee which was held on 16<sup>th</sup> December,1999 and used the resultant minutes to forge lease documents.
7. The respondents opposed the application by filing grounds of opposition dated 19<sup>th</sup> June,2023 where they stated that the application lacks merit as it purports to vary and or vacate orders issued by other courts. It is further stated that the application is unclear on the issues raised as it refers to decisions and



proceedings which are not before this court and which have not been challenged in their respective files. The respondents further stated that the pleadings had been labeled “amended” yet no leave had been sought for such amendments r changes.

8. The respondents further stated that the issue of plots no. 75 and 74 had been fully heard and determined before the succession court in Cause No.51 of 2005 and the orders sought are therefore not applicable since this court and the succession court have separate mandates. Lastly, it was stated that the current application is ambiguous and superfluous since it is not clear on the reliefs sought.
9. Parties thereafter took directions to canvas the applications by way of written submissions.
10. By way of a brief background, I note that this matter was struck out for being incompetent on 15<sup>th</sup> February,2021. Initially the applicant had been granted leave to seek further advice as to the correct forum to file the suit.
11. I have considered the application in its entirety and the grounds of opposition thereto and the applicants’ submissions and it is my view that the single issue for consideration is whether the applicant is deserving of the orders and declarations sought.
12. This court notes that the application before it for consideration is referred to as an ‘amended Chamber Summons’ it is not clear which chamber summons this application emanates from. As earlier stated this matter had been initially struck out for the reasons that it was not accompanied by any plaint as required under the law. It seems the applicant herein did not appreciate the significance of the court’s order such that instead of correcting the error he resulted to repeating it.
13. Further, the applicant instead of filing a fresh suit seeing that the file had been closed opted to file what is now being referred to as ‘Amended Chamber Summons’ in this very file.
14. Section 19 of the [Civil Procedure Act](#) Cap 21 states that: -

“Every suit shall be instituted in such manner as may be prescribed by Rules.”
15. Likewise Order 3 Rule (i) (ii) of the Civil Procedure Rules 2010 provides that:-

“every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule a suit can only be instituted by way of a Plaint, petition or an Originating summons.”
16. Both section 19 and Order 3 use the word shall. This makes the filing of a plaint a mandatory provision of law. It is not a discretionary directive. Chamber summons are not legally recognized as an originating process. They are ideally brought under a specific rule while seeking for orders within a pending suit.
17. In *Geoffrey Ndungu Theuri v Law Society of Kenya* [1988] eKLR, the Court stated as follows: -

“..... the order specifically refers to a suit which is defined under section 2 of the [Civil Procedure Act](#) in these terms; ‘suit’ means all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 30 of the Civil Procure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the [Civil Procedure Act](#) does not give the court the power to act without jurisdiction.” (Own emphasis)



18. In Photo Energy Limited v Hashi Energy Limited Misc 180 of 2018 the Court stated as follows:-

“Order 3 Rule (i) (ii) of the Civil Procedure Rules provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.” (own emphasis).

19. In this matter, the Applicant did not anchor his chamber summons in a substantive suit. He therefore does not have a competent suit before the court. The application is not anchored in any pleading to give it validity.

20. The applicant cannot therefore seek refuge in the provisions of Article 159 of *the Constitution*, 2010 since the filing of a suit is a mandatory statutory provision which cannot be excused. The failure/omission of the Applicant to file substantive a suit cannot be overlooked as a “mere technicality” and as such, it renders the application fatally defective.

21. Further, even if the court were to overlook procedure and purport to entertain the application; the orders sought seek definitive declarations that determine the rights and obligation of a party to land and in my view cannot be determined in an application such as the one before court especially in the absence of a substantive suit. The issues the court is called upon to determine for the lack of a substantive suit are mounted on a vacuum and cannot stand.

22. In the end, the application is not only fatally defective but a non-starter as it is not anchored on a substantive suit and the same is therefore struck out with costs to the Respondents.

23. Orders accordingly.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF DECEMBER, 2023.**

.....

**HON. E.C CHERONO**

**JUDGE**

**In the presence of;**

**1. M/S Masengeli H/B Sichangi for Defendants/Respondents.**

**2. Benjamin Barasa Wafula holder of a power of Attorney/applicant.**

**3. Okwaro C/A.**

