



**Nawanikhe v Muluta Alias Yohana Wekesa Epopo (Environment & Land Case 16 of 2021) [2022] KEELC 15654 (KLR) (22 March 2022) (Ruling)**

Neutral citation: [2022] KEELC 15654 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 16 OF 2021**

**DO OHUNGO, J**

**MARCH 22, 2022**

**BETWEEN**

**PHILIP MAONGA NAWANIKHE ..... PLAINTIFF**

**AND**

**JOHN MULUTA ALIAS YOHANA WEKESA EPOPO ..... DEFENDANT**

**RULING**

1. Proceedings in this matter were commenced in the High Court as Kakamega HCCC No. 19 of 2008 (OS). The said court heard the suit and rendered judgment on 22<sup>nd</sup> November 2011 as follows:
  - i. That four (4) acres be excised from Land Parcel L. R. Bunyala/Namirama/487, and the same be transferred and registered in the names of the applicant as sole absolute owner.
  - ii. That the Respondent is directed to sign all relevant documents to facilitate the subdivision and transfer of the four (4) acres of Land parcel L. R. Bunyala/Namirama/487 to the Applicant and in default, the Deputy Registrar of this Court is hereby authorized to execute the relevant forms on his behalf.
  - iii. That the Respondent be condemned to pay costs of this Suit.
2. The matter remained in the High Court until 25<sup>th</sup> May 2021 when the said court transferred the matter to this court, on the ground that it lost jurisdiction on 27<sup>th</sup> August 2010 following the promulgation of the Constitution of Kenya 2010. I must however observe that Section 22 of the Sixth Schedule of the Constitution of Kenya 2010 provides:

All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.



3. As at the date of the judgment herein, no directions had been issued as contemplated under the above provisions. It seems to me therefore that the High Court could validly hear and determine the matter, as it did. Pioneer directions under the provision were issued by the Chief Justice on 9<sup>th</sup> February 2012 under the title “Practice Directions on Proceedings Relating to The Environment and The Use and Occupation of, and Title to Land” and published through Gazette Notice No. 1617. By that date, judgment had been delivered herein some two and a half months back.
4. It is important to note also that the latest and prevailing directions on the matter were issued by the Chief Justice on 25<sup>th</sup> July 2014 under the title “Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation of, and Title to Land and Proceedings in Other Courts” and published through Gazette Notice No. 5178. Paragraphs 3 and 4 of the said directions provide as follows:
  3. All pending judgments and rulings relating to the environment and the use and occupation of, and title to land pending before the High court shall be delivered by the same court.
  4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.
5. So, the law remains that the High Court has jurisdiction to hear and determine all part-heard cases relating to the environment and the use and occupation of, and title to land that were pending before it as at 27<sup>th</sup> August 2010.
6. By Notice of Motion dated 25<sup>th</sup> May 2021, Beatrice Repar Reuben, the applicant, seeks the following orders:
  1. That this Honourable Court be pleased to substitute the deceased/respondent John Muluta Alias Yohana Wekesa Epopo By Beatrice Repar Reuben.
  2. That the Judgement delivered herein on 22<sup>nd</sup> November, 2011 and all consequential orders be set aside and the case do proceed to hearing on merit.
  3. That the sub-division of Land Parcel No. Bunyala/sidikho/487 into Land Parcel No. Bunyala/namirama/1688 and Bunyala/namirama/1689 be cancelled and the land do revert to the original Number.
  4. That costs of this Application be provided for.
7. The application is supported by an affidavit sworn by the applicant. She deposed that John Muluta alias Yohana Wekesa Epopo, the defendant, died on 28<sup>th</sup> April 2009 and that she is the legal representative of his estate. That the defendant was not aware of the existence of this suit in his lifetime and that following his demise, no family member was aware of this suit. That when the hearing proceeded on 21<sup>st</sup> March 2011 and when judgement was delivered on 22<sup>nd</sup> November 2011, the defendant “could not be served to attend court ... while resting in his grave among the dead”. She added that learnt of this case when she was barred from registering the Grant and Certificate of Confirmation of a Grant.
8. The plaintiff opposed the application through a replying affidavit in which he deposed that the defendant never entered appearance, never filed defence and never attended court despite being served. That the applicant’s late husband sold to him the suit property and that the applicant works for him on the suit property as a casual who is paid daily. That the present application is filed in bad faith after discovering that he is the registered owner of the portion that he purchased.



9. The application was canvassed through written submissions. The applicant argued that the deceased ought not to be condemned unheard contrary to natural justice.
10. For the plaintiff, it was argued that no reasons have been advanced for the delay of 10 years and that the defendant was duly served. He urged the court to dismiss the application.
11. I have considered the application, the affidavits and the submissions. The applicant has availed evidence that the defendant passed away on 28<sup>th</sup> April 2009 and that she is the legal representative of his estate. The plaintiff has not offered any evidence to counter or disprove what has been availed by the applicant. In the circumstances, substitution is warranted pursuant to Order 24 rule 4 of the *Civil Procedure Rules*.
12. The record herein shows that directions regarding the manner of hearing of the Originating Summons were taken on 22<sup>nd</sup> July 2010 and that hearing proceeded on 21<sup>st</sup> March 2011. On all those occasions, the defendant was long dead and could not therefore be served to attend court. There was simply no service.
13. The law relating to an application for setting aside where there was no service is that such an applicant is entitled to setting aside as of right. See *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR.
14. The applicant has prayed that the sub-division of the suit property be cancelled and the land do revert to the original number. Whereas I see a need to preserve the suit property pending determination of the suit, and I will make orders in that regard, I cannot order cancellation of title through an interlocutory application. The applicant will have to decide how to approach the issue of cancellation of title in the pleadings that she will subsequently file.
15. In view of the foregoing discourse, I find merit in prayers 1 and 2 of the application. I make the following orders:
  - a. The defendant John Muluta alias Yohana Wekesa Epopo is hereby substituted by Beatrice Repar Reuben.
  - b. The Judgement delivered herein on 22<sup>nd</sup> November 2011 and all consequential orders are hereby set aside.
  - c. The plaintiff to file and serve an amended plaint to reflect the substitution within 14 (fourteen) days from the date of delivery of this ruling.
  - d. Beatrice Repar Reuben to file and serve a statement of defence within 14 (fourteen) days of service of the amended plaint or within 30 (thirty) days from the date of delivery of this ruling if no amended plaint will have been served upon her.
  - e. So as to preserve the suit property herein, an inhibition be registered against the parcels of land known as Bunyala/Namirama/487, Bunyala/Namirama/1688 and Bunyala/Namirama/1689 pending hearing and determination of this suit.
  - f. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF MARCH 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:



Mr Okali holding brief for Mr Omukunda for the plaintiff

The applicant present in person

Court Assistant: E. Juma

