



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**MISCELLANEOUS CIVIL APPL. NO. 68 OF 2002**

JULIUS MORKONG CHEMTAI ..... PLAINTIFF

VERSUS

LEWIS BOIYO.....1ST RESPONDENT  
REUBEN KIBELET..... 2ND RESPONDENT  
SILAS KIBELET ..... 3RD RESPONDENT  
GEOFFREY KIBELET..... 4TH RESPONDENT

**RULING**

1. The Applicant JULIUS MORKONG CHEMTAI has moved the court by a notice of motion dated 13<sup>th</sup> February 2014 and filed in court on the same date seeking the following orders;

i. That the application be certified as urgent for reasons to be recorded at the hearing hereof and the application be heard *ex parte* in the first instance.

ii. That the Respondents by themselves, their workers, servants agents and whomsoever otherwise be restrained from entering into, demarcating, cultivating, planting any crops, leasing or building any structures thereon or from interfering in any other manner with land parcel number ELGON/NAMORIO/208 pending the hearing and determination of this application *inter partes* and pending the hearing and determination of this suit.

iii. That an order be issued directing the District Land Registrar and the District Surveyor Bungoma Mt. Elgon Districts to visit land parcel no. ELGON/NAMORIO/208 and subdivide the same for the Applicant to get his two acres in terms of the decree issued in Kimilili land case no. 9 of 2001.

iv. That costs of this application be in the cause.

2. The motion is premised on the grounds on its face and the affidavit sworn by the Applicant. The Applicant's complaint is that the Respondents have entered his land without any lawful authority and planted eucalyptus trees covering the whole parcel. He also wants title for his two acres curved out of the suit land and given to him.

3. The application is opposed. The Respondents filed a replying affidavit sworn by the Silas Kibelet

Simotwo on his behalf and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>. The replying affidavit raises inter alia in paragraph 7 thereof that this court is functus officio since the judicial review application was dismissed on 17<sup>th</sup> July 2002. Secondly that if the Applicant wishes to execute the decree of the tribunal then he ought to have filed his application in Kimilili Resident Magistrate land case no. 9 of 2001.

4. There are other issues raised in the replying affidavit but which I will not venture into as the two grounds mentioned above (par. 3) will determine this application without going into its merits or otherwise. Mr. Were advocate for the Respondents in his submissions told court that the judicial review application was dismissed on 17<sup>th</sup> July 2002. This fact is not disputed by Mr. Ateya for the Applicant.

5. I have perused the record and confirmed it is true that application brought for judicial review was dismissed on 17<sup>th</sup> July 2002 for non-prosecution by the ex parte applicant. This was a miscellaneous application seeking judicial review orders. The Applicant was an interested party in those proceedings and was therefore aware of the dismissal order. This applicant even proceeded to file his bill which was taxed at Kshs. 40,000/= by consent.

6. It follows therefore that once the application was dismissed, the entire suit was closed and no further proceedings can be undertaken unless and until the orders of dismissal have been set aside. Mr. Ateya submitted that this court has power to effect the rights of the Applicant. I presume this line of submission is in light of prayer no. (iii) of the application. The Applicant still has doors open to use to realize his rights, one of which is to have sought that prayer before the court which adopted the award of the Tribunal. Certainly this court cannot assist the Applicant in the manner that it has come before it. See case law **Misc. app. no. 98 of 2009 R vs. clerk, County Council of Meru [2012] e KLR and section 8 (3) of the Law Reform Act.**

I therefore find the court is functus officio and is unable to hear and determine the present application. The application is hereby ordered struck off. The earlier orders of injunction that were issued on 17<sup>th</sup> February 2014 be and is hereby vacated. The costs of the application awarded to the Respondent.

**Dated, Signed and Delivered** in open court this 22<sup>nd</sup> day of May 2014

**A. OMOLLO**

**JUDGE.**