



REPUBLIC OF KENYA



**Kilui & 8 others v Wafula & another (Environment & Land Case  
113 of 2002) [2022] KEELC 2837 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2837 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 113 OF 2002**

**BN OLAO, J  
JUNE 30, 2022**

**BETWEEN**

**JAPHETHER WAMALWA KILUI ..... 1<sup>ST</sup> PLAINTIFF  
JOHN SIEBELA MUSEE ..... 2<sup>ND</sup> PLAINTIFF  
JOHNSON WANJALA MAFUTA ..... 3<sup>RD</sup> PLAINTIFF  
TIMOTHY MASINDE SINDANI ..... 4<sup>TH</sup> PLAINTIFF  
MARY WASIKE ..... 5<sup>TH</sup> PLAINTIFF  
FRAGNEL WAWIRE MIRIMO ..... 6<sup>TH</sup> PLAINTIFF  
HENRY MASIBO ..... 7<sup>TH</sup> PLAINTIFF  
NICOLAS MASIKA MAIKUMA ..... 8<sup>TH</sup> PLAINTIFF  
TITUS MUSUYA SAKWA ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**MATHEW MUNYOLE WAFULA ..... 1<sup>ST</sup> DEFENDANT  
BEN MACHABE WAFULA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a ruling delivered on October 28, 2021, this Court reinstated the titles to land parcels No Kimilili/ kimilili/2438, 2435, 2432, 2436, 2431, 2433, 2434, 2395 and 2323 into the names of the plaintiffs. That was following the plaintiffs' Notice of Motion dated 6<sup>th</sup> May 2021. In addition to that order, I issued a warrant of arrest against the 2<sup>nd</sup> defendant Ben Machabe Wafula (now deceased) after both he and his brother the 1<sup>st</sup> defendant Mathew Munyole Wafula had been cited and found to be in contempt of the consent orders issued by this Court on March 8, 2011 and which Mukunya J, vide a



ruling delivered on March 28, 2018, found both defendants to have disobeyed. The 1<sup>st</sup> defendant was subsequently fined Kshs. 50,000/= by Ombwayo J on March 15, 2022 at the Kisumu ELC.

2. It would appear that notwithstanding that consent order and my ruling delivered on October 28, 2021, the 1<sup>st</sup> defendant has continued to forcefully occupy the land parcels No Kimilili/kimilili/2323 and 2435.
3. I now have before me for my determination the plaintiffs' Notice of Motion dated December 8, 2021 seeking the following orders: -
  - a. That the 1st defendant do voluntarily vacate the land parcels No Kimilili/kimilili/2323 and 2435 within 15 days of this application upon him.
  - b. That in default of voluntary vacation per prayer (a), the 1st defendant be forcefully evicted from the said land parcels No Kimilili/kimilili /2323 and 2435.
  - c. That the OCS Kimilili Police Station do provide security for the eviction per paragraph (b) hereof.
  - d. That the costs of this application be provided for.
4. The application is premised on the grounds set out therein and is also supported by the 8<sup>th</sup> plaintiff's (John Wanjala Mafuta's) affidavit of even date.
5. The gist of the application is that following orders of this Court, the plaintiffs are the proprietors of the land parcels No Kimilili/kimilili/2438, 2435, 2432, 2436, 2431, 2433, 2434, 2395 and 2323. However, the 1<sup>st</sup> defendant has forcefully settled on the land parcels NO Kimilili/kimilili/2323 and 2435.
6. The application is opposed and by his replying affidavit dated February 28, 2022, Mathew Munyole Wafula the 1<sup>st</sup> defendant has deponed, inter alia, that he has lodged an appeal No E231 of 2021 against this Court's ruling delivered on October 28, 2021. He adds therefore that this application be stayed pending the hearing and determination of the Court Of Appeal Civil Appeal No E23 of 2021 Lodged At The Eldoret Registry. Annexed to that replying affidavit is the memorandum and a document headed "Record of Appeal" which in fact is not a record of appeal.
7. The application has been canvassed by way of written submissions. These have been filed both by MR J. S. Khakula instructed by the firm of J. S. Khakula & Company Advocates for the plaintiffs and by Mathew Munyole Wafula the 1<sup>st</sup> defendant acting in person.
8. I have considered the application, the rival affidavits and the submissions by Mr Khakula and the 1<sup>st</sup> defendant.
9. It is common knowledge that by a consent order issued on March 8, 2011, the land parcels No Kimilili/kimilili/2438, 2435, 2432, 2436, 2431, 2433, 2434, 2395 and 2323 were vested in the plaintiffs. This followed the plaintiffs' plaint filed herein on August 27, 2002 in which they had pleaded, inter alia, that although they were in possession of the land parcels No Kimilili/ Kimilili/ 2438, 2435, 2432, 2436, 2431, 2433, 2434, 2395 and 2323 having purchased them following a sub – division of the land parcel No Kimilili/kimilili/108, the defendants had fraudulently cancelled those titles. Their titles have however now been reverted in their names. The 1<sup>st</sup> defendant has been cited for contempt for disobeying orders of this Court and has even been fined Kshs. 50,000/=. He has however refused to voluntarily vacate the land parcels No Kimilili/kimilili/ 2323 and 2435.



10. The 1<sup>st</sup> defendant's response to that application is that he has filed in the Court of Appeal (Eldoret Registry) Civil Appeal No E231 of 2021. That this application should therefore be stayed pending the hearing of that appeal. He has however not filed any formal application in that respect.
11. Even assuming that such application was before me, it would have to meet the threshold of Order 42 Rule 6 of the Civil Procedure Rules which is to demonstrate that he will suffer substantial loss, move the Court without unreasonable delay, offer security and show sufficient cause. It is common ground that the consent order dated March 8, 2011 was never appealed. The ownership of the land parcels No Kimilili/kimilili/2323 and 2435 from which the 1<sup>st</sup> defendant has refused to vacate is therefore no longer an issue. Having chosen not to appeal that consent Judgment, the 1<sup>st</sup> defendant cannot possibly lodge any competent appeal against the ruling dated October 28, 2022 when in his own earlier replying affidavit dated August 23, 2021, he said called upon: -

“..... the plaintiffs who are alive and representatives of the deceased. Plaintiffs avail themselves so that this Court's Judgment is executed by implementing this Court's orders of April 5, 2011.”

It is also the law under Order 42 Rule 6(1) of the Civil Procedure Rules that: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order .....”  
Emphasis mine.

Therefore, the mere fact that the 1<sup>st</sup> defendant has filed an appeal against this Court's ruling delivered on October 28, 2021 does not, as a matter of course, entitle him to a stay of execution of that ruling pending appeal.

12. An order of stay of execution is a discretionary remedy. It is not lost to this Court that the 1<sup>st</sup> defendant has already been fined Kshs. 50,000/= for disobeying orders of this Court. Given that fact, he cannot be deserving of the exercise of the discretionary powers of this Court in his favour. I have no doubt in my mind that he is abusing the process of the Court by employing the judicial process to the irritation and annoyance of his opponent and the effective administration of justice.– Muchanga Investments Ltd. v. Safaris Unlimited (Africa) Ltd & others C.A Civil Appeal No 25 of 2002 [2009 KLR 229]. Having consented to the orders which vested the land parcels No Kimilili/kimilili/2323 and 2435 to the plaintiffs, the 1<sup>st</sup> defendant is clearly abusing the process of this Court by forcefully occupying the said parcels of land, an averment which he has not even rebutted. The plaintiffs have asked this Court to order the 1<sup>st</sup> defendant to “voluntarily vacate the land parcels No Kimilili/ Kimilili/2323 and 2435 within 15 days of service of this application upon him.” I did not hear the 1<sup>st</sup> defendant say that it would be impracticable for him to do so within that period or that he will be rendered destitute if he voluntarily vacates or is evicted therefrom. Therefore, his continued unlawful occupation of the land parcels No Kimilili/kimilili/2323 and 2435 can only be construed as being deliberately aimed at being oppressive of the plaintiffs as well as defiant and disrespectful of the Court and its processes. That is conduct for which, unfortunately, the 1<sup>st</sup> defendant has now acquired a notorious reputation. He ought to have voluntarily vacated the said parcels of land as far back as 2011 when he conceded that they belong to the plaintiffs. Given the 1<sup>st</sup> defendant's antecedents in this matter, I am not persuaded to give him the luxury of voluntarily vacating the suit land. His hands are irredeemably soiled and equity will not allow this Court to bend backwards any further.
13. Ultimately therefore and having considered all the issues herein, I make the following orders: -



1. Mathew Munyole Wafulabe evicted from the land parcels NoKimilili/kimilili/2323 and 2435 forthwith in compliance with Section 152 G of the *Land Act*.
2. The Officer Commanding Kimilili Police Station(OCS) to provide security to the Court Bailiff during the exercise should there be any resistance.
3. The 1<sup>st</sup> defendant shall meet the costs of this application.

**BOAZ N. OLAO.**

**J U D G E**

**30TH JUNE 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 30<sup>TH</sup> DAY OF JUNE 2022 BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO.**

**J U D G E**

**30TH JUNE 2022.**

