



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mutenyo v Naliaka & 5 others (Environment & Land Case  
36 of 2018) [2022] KEELC 3897 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3897 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 36 OF 2018**

**DO OHUNGO, J**

**JUNE 21, 2022**

**BETWEEN**

**PATRICK MUTENYO WANJALA ..... PLAINTIFF**

**AND**

**FATUMA NALIAKA KUTA ..... 1<sup>ST</sup> DEFENDANT**

**SALIM MUCHELULE OMULANGULA ..... 2<sup>ND</sup> DEFENDANT**

**ASMINI WABWIRE WANYAMA ..... 3<sup>RD</sup> DEFENDANT**

**RAMADHAN JOM KARIO ..... 4<sup>TH</sup> DEFENDANT**

**RAMADHAN MAHDLY WEKHUYI ..... 5<sup>TH</sup> DEFENDANT**

**GODFREY ONGUME CHICHOLA ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on May 14, 2019 in favour of the plaintiff as follows:
  1. That the plaintiff has acquired title to the said parcels of land namely N Wanga/Khalaba/1800, 1801, 1802, 1803, 1804 and 1805 previously comprised in title NO N Wanga/Khalaba/172 measuring in total 5.93 hectares or thereabouts by adverse possession.
  2. That the defendants as administrators of the estate of the late Ilario Wanzala Wanjala alias Wanyama Wanzala or as beneficiaries thereof hold title to the respective parcels of land in trust for the applicant.
  3. That the title of the late Ilario Wanyama Wanzala alias Wanyama Wanjala and that of the respondents herein got extinguished on the expiry of 12 years from the time the plaintiff started occupying and or using the land way back in the 1970s.



4. The defendants are ordered to transfer to the applicant the said land parcel Nos N Wanga/ Khalaha/1800, 1801, 1802, 1803, 1804 and 1805 (previously forming part of LR N Wanga/ khalaba/172) by executing all documents of transfer in respect of the said parcels of land in favour of the plaintiff and in default the Deputy Registrar to do so.
  5. The defendants to bear the costs of this case.
2. The defendants later filed notice of motion dated May 20, 2021, seeking stay of proceedings and execution of the judgment. I dismissed the plea for stay through ruling delivered on November 30, 2021.
  3. The plaintiff later moved the court through notice of motion dated June 16, 2021, which is the subject of this ruling. The following orders are sought in the application:
    1. That this honorable court be pleased to issue an order of eviction against the respondents, their servants, agents, heirs and dependants from Land parcel No Wanga/khalaba/ 1800, 1801, 1802, 1803, 1804 and 1805.
    2. That the officer commanding Harambee Police station be directed to provide security during the execution and ensure compliance of the above orders.
    3. That costs be provided.
  4. The application is supported by an affidavit sworn by the plaintiff. He deposed that he has been issued with titles in respect of land parcel numbers N/Wanga/Khalaba/1800, 1801, 1802, 1803, 1804 and 1805. That when filing this suit, he never sought eviction and that eviction was therefore not granted. That the defendants will not acknowledge his ownership or give him vacant possession unless the orders sought are granted.
  5. The defendants responded to the application through grounds of opposition in which they took the position that the application is res judicata in view of another application dated January 20, 2021 which was heard and determined and that the court is *functus officio*. Further, that the application raises a new cause of action since the prayers sought were not in the pleadings leading to the judgment.
  6. The application was canvassed through written submissions which both sides duly filed. I have carefully considered the application, the grounds of opposition and the respective submissions.
  7. The plaintiff filed this suit claiming to have acquired land parcel numbers N/Wanga/Khalaba/1800, 1801, 1802, 1803, 1804 and 1805 by adverse possession. His claim succeeded as I have rehashed at paragraph 1 of this ruling. He has conceded at paragraph 6 of his supporting affidavit that he never sought eviction and that eviction was thus not granted. That is not surprising since a claim for adverse possession cannot co-exist with a claim for eviction of the registered proprietor. A claimant seeking adverse possession can only succeed by demonstrating uninterrupted possession for a period of 12 years to the exclusion of the registered proprietor. The age of miracles is certainly not over. The plaintiff now claims that the defendants are in possession and that they should be evicted. How and when he lost possession is a matter that is as baffling as it can be.
  8. The parties having had the opportunity to plead their respective claims and the court having heard and determined the case, the substantive dispute between the parties was brought to a conclusion. The court became functus officio in so far as its power to determine the parties' respective claims in the matter goes. The judgment herein is final and conclusive, subject to any right of appeal. The court does not have jurisdiction to revoke or vary its decision, save in cases of applications for setting aside or review. See *Raila Odinga & others v IEBC & others* [2013] eKLR. In the absence of jurisdiction, any



order or step taken by a court is a nullity. See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.

9. The plaintiff's invitation to the court to consider and grant an order of eviction, if allowed, would in essence amount to modifying the decree herein without any jurisdiction. I decline the invitation to embark on such null and void exercise. I agree with the defendants that the plaintiff is attempting to introduce a new cause of action.
10. It is trite that any proceedings filed in a court without jurisdiction are dead on arrival and cannot be remedied. See *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR. Notice of motion dated June 16, 2021 fits, like a glove, in that description. It is beyond resuscitation by any means and I hereby strike it out with costs to the defendants.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF JUNE 2022.**

**DO OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Osango holding brief for Mr Tanui for the plaintiff

No appearance for the defendants

Court assistant: E Juma

