



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munyalo & 6 others v Vonza & 8 others (Environment & Land Case  
11 of 2021) [2022] KEELC 4834 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4834 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE 11 OF 2021**

**LG KIMANI, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**MWIKYA MUNYALO ..... 1<sup>ST</sup> PLAINTIFF  
KIMANZI MUNYALO ..... 2<sup>ND</sup> PLAINTIFF  
MWENDE MUNYALO ..... 3<sup>RD</sup> PLAINTIFF  
JUSTUS MUATHA MUNYALO ..... 4<sup>TH</sup> PLAINTIFF  
IRENE MULUU MUNYALO ..... 5<sup>TH</sup> PLAINTIFF  
WAYUA MUNYALO ..... 6<sup>TH</sup> PLAINTIFF  
VONZA MUNYALO ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**MUNYALO VONZA ..... 1<sup>ST</sup> DEFENDANT  
THE CHIEF, NYANYAA, YATTA ..... 2<sup>ND</sup> DEFENDANT  
THE LAND REGISTRAR, KITUI COUNTY ..... 3<sup>RD</sup> DEFENDANT  
CHAIRMAN OF AOMBE NZOKA KATEMI ..... 4<sup>TH</sup> DEFENDANT  
THOMAS MUIMI MUTIE ..... 5<sup>TH</sup> DEFENDANT  
MUMBE MUTUNGA ..... 6<sup>TH</sup> DEFENDANT  
JOSHUA MBUNE KILONZO ..... 7<sup>TH</sup> DEFENDANT  
EPHANTUS MBINDYO ..... 8<sup>TH</sup> DEFENDANT  
ARON N. MWIKYA ..... 9<sup>TH</sup> DEFENDANT**



## RULING

1. The 1<sup>st</sup> plaintiff/applicants filed a notice of motion application dated January 15, 2020 brought under Order 40 rule 3 (1) and (3) of the Civil Procedure Rules and section 3A of the Civil Procedure Act and seeking the following orders:-
  1. Spent.
  2. That 6<sup>th</sup> defendant (Mumbe Mutunga) be and is hereby summoned to appear before this court and show cause as why she should not be held in contempt and disobedience of the honorable court's orders granted at the ELC Machakos Misc Suit No 10 of 2017 on March 2, 2017 and extended on March 23, 2017 dated March 28, 2017.
  3. That the chief surveyor of lands in the ministry of lands Kitui be and is hereby ordered to file exact confirmation of boundary marks of sections of boundary shown on the maps hereto attached of land parcels Yatta/Nyanyaa/153 and 192, remove the arch marked (X) and the land registrar, Kitui County be completed to file registration nos of lands registered to the 1<sup>st</sup> respondent (Munyalo Vonza) and status for each land, at Ikutha, Kilawa and Ikutha, Mwamba Isyuko.
  4. That the filed amended plaint be and is hereby withdrawn and replaced to include occurrence of some developments which may include correction or deletion of untrue or misleading information.
  5. That pending hearing determination of the main suit, the plaintiffs(family members of 1<sup>st</sup> defendant), be and are hereby granted stay at their ancestral family land parcel No Yatta/Nyanyaa/192 and be on cause with stay activities therein.
2. The application is based on the grounds that the Land Parcel No Yatta/Nyanyaa/358 is registered in the name of the 1<sup>st</sup> defendant and is family ancestral land where the 6<sup>th</sup> defendant has invaded under circumstances unknown to the Plaintiffs. The plaintiff/applicant states that the 6<sup>th</sup> defendant is in blatant disregard of court order No 3 granted at Machakos ELC Misc Suit No 10 of 2017. Despite having been served with the said orders, she continues excavating, farming, grazing, lodging and trespassing on the said ancestral family land.
3. The applicant contends that the 7<sup>th</sup> and 8<sup>th</sup> defendants, who are members and officials of the Aombe Nzoka Katemi as well as civil servants used their senior positions and adamantly pushed the said boundary marks into the road towards parcel number 192, swallowed pass way bordering 153 and grabbed portions of the two land parcels. He states that it is only the chief surveyor who can provide the exact proof that the boundary has been interfered with for land parcels Yatta/Nyanyaa/153, 192 and 358.
4. Further, the 1<sup>st</sup> plaintiff/applicant states that the arch marked (X) does not provide service to anyone and is a wastage of the 1<sup>st</sup> defendant's parcel of land and its removal does not cause anyone harm.
5. According to the applicant, the information contained in the replying affidavits filed on December 9, 2014 and the other dated March 6, 2017 in Machakos Misc case number 10 of 2017 was not provided by the 1<sup>st</sup> respondent as he has since been incapacitated and not able to give exact knowledge of his properties and dealings in events and that it is blatant that the rest of the respondents simply appended his thumb print on paper without him knowing the information since he is illiterate and not able to



read and understand the language used. He has also stated that paragraph 3 of the replying affidavit in suit No 164 of 2014 claims that land parcel No Yatta/Nyanyaa/191 and 153 belongs to the 1<sup>st</sup> respondent, contrary to official search status for each of the parcels where Moki Mukula and Mumbi Mutunga are the respective registered owners. The 1<sup>st</sup> plaintiff/applicant has contended that since the two affidavits are contradicting each other they were not from the 1<sup>st</sup> defendant and the informer did not know about the properties in question.

6. In reference to article 35(2) of the Constitution, which provides correction or deletion of untrue or misleading information, the plaintiff seeks to withdraw the amended plaint dated November 3, 2017 and filed at Machakos Case No 198 of 2017 to effect correction and deletion of untrue or any misleading information. He also contends that there are other land parcels within Kitui County, Ikutha, Kilawa and Ikutha registered in the name of the 1<sup>st</sup> respondent, of which the Land Registrar, Kitui County should be compelled to file the said registration Numbers and status of the same.
7. The plaintiff filed written submissions, noting that some of the orders sought in that application have been overtaken by time and events. It is the 1<sup>st</sup> plaintiff/applicant's submission that the 6<sup>th</sup> defendant/respondent took advantage of the incapacitation, illiteracy and aging state of the 1<sup>st</sup> defendant/respondent (now deceased) by causing separation between him and his family members and then manipulating him to transfer his parcel of land LR No Yatta/Nyanyaa 153 and fraudulently registered it as her own. They submit that the said parcel of land was transferred illegally and under duress. *Vide* a replying affidavit in Suit No 164 of 2014, the 1<sup>st</sup> defendant confirms his ownership of the parcel of land but changes his mind in another replying affidavit in suit No 10 of 2017, stating that the 6<sup>th</sup> defendant is the owner of the said parcel of land.
8. The 1<sup>st</sup> plaintiff/applicant refers to an order dated March 2, 2017 and extended on March 28, 2017 where the defendants/respondents were restrained from continued excavation, sub-division and selling or transferring of land parcels LR No Yatta/Nyanyaa 153,192, 233 & 358 but the 6<sup>th</sup> defendant/respondent continues to defy the said orders even after being served with the order and the penal notice. They relied on the holding in Katsuri Limited v Kappurchand Depar Shar(2015)eKLR where the court cited the holding in the case of Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & Another(2005)eKLR 828 whereby Ibrahim J stated that the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proven contemnors.
9. The defendants/respondents filed grounds of opposition to the 1<sup>st</sup> plaintiff/applicant's application on grounds:
  - a) That the application herein is incompetent, misconceived, defective and bad in law.
  - b) That the application is also mischievous and made in bad faith.
  - c) The application is improper, frivolous and an abuse of the court process.
  - d) The application is premature, unmeritorious and it ought to be dismissed with costs.
10. The 6<sup>th</sup> respondent also responded to the application dated January 15, 2020 stating that the purported order which she is alleged to have disobeyed has not even been annexed and/or referred to anywhere in the affidavit in support of the application and thus the allegations are without evidence.
11. Further, the 6<sup>th</sup> respondent avers that she was not a party to the said application and as such, the order was not directed to her, neither was she served with the application and/or the order. She adds that she



was not an agent and/or servant of the defendant/respondent at the time and no evidence has been tendered to prove the contrary.

12. That notwithstanding, the 6<sup>th</sup> respondent denies ever excavating, sub-dividing and/or selling any of the land parcels numbers Yatta/Nyanyaa/153,192, 233 and 358 at any point in time and states that no photograph has been produced to show any sub-division and/or no map or sale agreement that has been produced to show that sale or sub-division has been done by her. She urged the court to dismiss the application with costs to her. Counsel for the 6<sup>th</sup> defendant stated that they would rely on her replying affidavits as her submissions.

### **Analysis and Determination**

13. The first prayer is that the 6<sup>th</sup> defendant (Mumbe Mutunga) be and is hereby summoned to appear before this court and show cause as why she should not be held in contempt and disobedience of the honorable court's orders granted at the ELC Machakos Misc Suit No 10 of 2017 on March 2, 2017 and extended on March 23, 2017 dated March 28, 2017.

14. A look at the above application shows that the court order that the 1<sup>st</sup> plaintiff/applicant has stated that the 6<sup>th</sup> respondent has contravened was issued in Machakos ELC 10 of 2017 a suit between Mwikya Muniyalo and the 1<sup>st</sup> defendant/respondent Muniyalo Vonza. The order read as follows:-

“That pending transfer and hearing of Kitui CMCC No 164 of 2014, the respondents, his agents and/or servants be and are hereby restrained from continued excavating, sub-dividing and/or selling of land parcel Nos Yatta/Nyanyaa 153, 192, 233 and 358 and 358 until March 23, 2017”

15. The proceedings of this file show that this suit was initially known as Kitui Chief Magistrate's Court at Kitui Number 164 of 2014. The applicant has not shown that the 6<sup>th</sup> Respondent was served with the said order. In addition to this, the 1<sup>st</sup> plaintiff/applicant has not annexed any evidence of the alleged disobedience of the court order by the 6<sup>th</sup> defendant/respondent.

16. In the case of *James Ndung'u Kero v Chief Land Registrar & 2 others* [2022] eKLR the court observed that:

“The purpose and import of a supporting affidavit are to explain, clarify, expound, illustrate in greater detail the facts relied on in an application. Further, it introduces evidence in support of the depositions in it in form of annexures. The intention and purpose of a supporting affidavit is to bring out a nexus between the prayers and the grounds an application as well as to introduce documentary evidence to prove facts that asserted by the applicant.”

17. On contempt of court, In *Samuel M N Mweru & Others v National Land Commission & 2 others* [2020] eKLR the court held that:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the respondent, (iii). Failure by the respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities.”



18. In my opinion, the 1<sup>st</sup> plaintiff/applicant has failed to prove contempt of court by the 6<sup>th</sup> respondent, by showing i) the terms of the order, (ii) Knowledge of these terms by the 6<sup>th</sup> respondent, (iii). Failure by the respondent to comply with the terms of the order. The said 6<sup>th</sup> respondent has denied being party to the suit and has also denied committing any of the acts listed in the said order. I do find that prayer 1 sought is not supported.
19. The second prayer that the chief surveyor of lands in the ministry of lands Kitui be ordered to file exact confirmation of boundary marks of sections of boundary shown on the maps hereto attached of land parcels Yatta/Nyanyaa/153 and 192, remove the arch marked (X) and the land registrar, Kitui County be completed to file registration numbers of lands registered to the 1<sup>st</sup> respondent (Munyalo Vonza) and status for each land, at Ikutha, Kilawa and Ikutha, Mwamba Isyuko.
20. Section 18 of the *Land Registration Act* No 3 of 2012 provides as follows:
- “(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, (Cap 299).”
21. In the case of *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties)* [2021] eKLR the court held that:
- “Section 18(2) of the *Land Registration Act* provides in mandatory terms that the dispute should be submitted to the Land Registrar. It is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar. This is also the entity which has the requisite expertise to undertake the aforementioned task.”
22. However, in this case it is not clear that the matter in issue is one about boundaries. If there is actually a dispute in the boundaries then the Land Registrar should be the one to come in and establish the boundaries. Regarding the Arch marked (X), the Land Registrar can be called to give his expert evidence and opinion on whether it needs to be removed. In my view this is a prayer that can only be granted after the trial and upon the Plaintiffs establishing that they are entitled to have the curve complained of removed. At the moment the issue cannot be determined at the interlocutory stage.
23. Regarding the prayer that the Land Registrar needs to file registration numbers of lands registered to the 1<sup>st</sup> respondent (Munyalo Vonza) and status for each land, at Ikutha, Kilawa and Ikutha, Mwamba Isyuko, my view is that this prayer is untenable since it is the plaintiffs/applicants who are meant to state their case and dispute including the parcels of land that are in contention and not the Land Registrar. Since this case is the plaintiff's claim, it is not the Land Registrar's job to go on a fishing expedition



for facts and evidence but the plaintiff should state clearly in his pleadings which parcels of land he has a claim on.

24. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.” The plaintiff must at least concisely state what parcels of land he lays claim on.

In *Ndisbu & another v Muriungi* (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR) (21 January 2022 the court had this to state on pleadings:

“Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary. Although a primary, function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.”

25. The other prayer in the application is that the filed amended plaint be withdrawn and replaced to include occurrence of some developments which may include correction or deletion of untrue or misleading information. I am of the opinion that since it is the plaintiff’s own document, he has the right to withdraw it. However it is noted that this prayer may already have been overtaken by events since the Plaintiff filed an amended plaint on March 3, 2022 long after this application was filed. In the case of *Eastern Bakery v Castelino (1958) 1 EA 461* (CAK) where the court held that;

“Generally speaking, this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.

The court further held: -

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs... court will not refuse to allow an amendment simply because it introduces a new case.....”

26. The last prayer is that pending hearing determination of the main suit, the plaintiffs (family members of 1<sup>st</sup> defendant), be and are hereby granted stay at their ancestral family land parcel No Yatta/ Nyanyaa/192 and be on cause with stay activities therein. In my opinion, the Plaintiffs have not proven that they have a right to stay on the said parcels of land yet. This is a prayer that can only be determined after a full trial with the rights of all the parties having been determined and the Plaintiffs are urged to prosecute their case by way of a full trial in order to have their rights fully determined once and for all. As stated above, the burden is on the plaintiff to prove existence of facts under section 107 of the [Evidence Act](#).

27. Further it is noted that the 1<sup>st</sup> respondent is said to have died on April 5, 2020 and yet from the court record no application of his substitution has been made. Under Order 24 rule 4 of the [Civil Procedure Rules](#) the suit against him has abated by operation of the law. The same provides that:-



Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

28. In the end I do find that the application dated January 15, 2021 lacks merit and the same is hereby dismissed with no order as to costs.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2022**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgement read in open court in the presence of-

Musyoki: Court Assistant

M/S Wambua for the 1<sup>st</sup> Plaintiff/Applicant

Mboloi for the 5<sup>th</sup> and 6<sup>th</sup> Defendant/Respondents

