



REPUBLIC OF KENYA



**Munyalo & 6 others v Vonza & 8 others (Environment & Land Case  
11 of 2021) [2022] KEELC 4823 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4823 (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 MUI MI 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/Applicant filed a Notice of Motion Application dated 21<sup>st</sup> April 2020 is brought under Article 45 and 159 of *the Constitution* of Kenya 2010 seeking the following orders:-
  1. Spent.
  2. That this Honourable Court be pleased to offer injunctions at the first instance.
  3. That the Senior Chief of Ikutha Sub-County, Athi Location Mwamba Isyuko Sub location be compelled to produce the Death permit and the Identity Card of Munyalo Vonza to this Honourable Court and the same remain in the custody of Kimanzi Munyalo, the first son to the deceased pending final determination and disposal of the suit.
  4. That if Prayer No. 3 above is offered, the same Senior Chief be also compelled to produce official proof that the deceased was buried in his land and that his death certificate must not be processed neither succession be done pending final determination and disposal of the suit.
  5. That status in form of Title Deeds, Sale Agreements or any other written documents that is specifying status of any or each Land Parcel ever registered to Munyalo Vonza in Kenya, that includes Yatta/Nyanyaa/358, 233,192,153 and parcel of land at Ikutha Sub County, Mwamba Isyuko/Kilawa held by any family members and/or contemnors be surrendered in court and remain in the custody of the court pending final determination.
  6. That there shall be no costs to this application.
2. The Application is based on grounds that the 1<sup>st</sup> Respondent, who is the registered owner of land parcels in question passed away on 5<sup>th</sup> April 2020 while at his 2<sup>nd</sup> family home at Ikutha sub-county and that due to government regulations on travel, burials and gatherings, few of the plaintiffs attended the burial. The first born, Kimanzi Munyalo, the 2<sup>nd</sup> Plaintiff herein, was not given the Burial Permit and the Identity Card of the Deceased neither was he allowed to see them contrary to the tradition that the eldest person/s in the family handles correspondence of the family head upon his passing. The 1<sup>st</sup> Plaintiff/Applicant states that this conduct is fishy and is fearful that these documents will find their way into the hands of the Respondents. He also states that it is not clear that their father was buried in his land since the status of the said land is not disclosed to them. His claim is that the Death Certificate and Succession should not be processed until after the final determination and disposal of this matter to avoid contravention of justice.
3. The Plaintiffs filed written submissions to the application dated April 21, 2020 and state that the Plaintiffs are all children of the 1<sup>st</sup> Defendant/Respondent Munyalo Vonza (Deceased) who passed away and with authority from the others the 1<sup>st</sup> Plaintiff/Applicant has filed this matter seeking to resolve the land dispute of Land Parcels LR. No. Yatta/nyanyaa 153,192, 233 & 358 which is their ancestral family land. The 1<sup>st</sup> Plaintiff/Applicant avers that the 1<sup>st</sup> Respondent died at the 2<sup>nd</sup> Family's home and his body was retrieved on the April 7, 2020 for burial without family negotiations and no post-mortem was conducted to know the cause of death.
4. The Plaintiffs submit that as per Kamba customs, the 2<sup>nd</sup> Plaintiff/Applicant was supposed to be given the 1<sup>st</sup> Respondent's items as the first born son that is the identity card, burial permit and death certificate but this was not the case. It is the Plaintiff's submission that the law allows for application of customary laws as long as the traditions as the traditions are not repugnant to justice and morality.



The 1<sup>st</sup> Plaintiff seeks the discretion of the court to allow them to have the said documents or they be ordered to be in custody of the court pending the final determination of this suit.

### **The Respondent's Case**

5. With regard to the Application dated April 21, 2020, the 6<sup>th</sup> Respondent filed a Replying Affidavit stating that the application is vexatious and a waste of precious judicial time and she is not in possession of any of the title deeds and as such cannot surrender any to the court.
6. She denied being a member of the Applicant's family and stated that she is not privy to where the 1<sup>st</sup> Respondent was buried, has never come into possession of either his national identification card or his burial permit and/or his death certificate. The 6<sup>th</sup> Respondent also denied ever conspiring with anyone to deprive anybody of their parcels of land.

### **Analysis and Determination**

7. Prayers 3 and 4 sought in the application dated 21/4/2021 are that the Burial Permit and the Identity Card of the deceased 1<sup>st</sup> Respondent be produced as well as official proof that the deceased was buried in his land and that succession must not be done pending final determination and disposal of the suit. In my view the above prayers raise issues of jurisdiction and it is thus important to state the jurisdiction of this court at this instance.
8. Article 162(2)(b) of *the Constitution* of Kenya provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— the environment and the use and occupation of, and title to, land.”
9. Section 13(2) of the *Environment and Land Court Act* No.19 of 2011 further elaborates this jurisdiction:

“In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”
10. It is the courts view that these prayers fall outside of the jurisdiction of the Environment and Land Court and as such cannot be granted since they relate to the death, burial and documents related to the 1<sup>st</sup> Respondent and not to environment and the use and occupation of, and title to, land.
11. In the words of the famous case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending



other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. 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 for 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.

13. In the courts view the documents the Plaintiffs seek can only be the subject of the succession cause in the estate of the deceased 1<sup>st</sup> Respondent. Further it is noted that the Senior Chief of Ikutha Sub county, Athi Location, Mwamba Isyuko Location against whom the orders sought are directed is not a party to this suit. It would be unjust to order that he be compelled to produce documents which it has not been shown are in his custody or that he is a custodian of the said documents or whether he has been asked to produce the same and he has failed and/or refused to produce the same.

14. Prayer number 2 seeks that this Honourable Court be pleased to offer injunctions at the first instance. It is noted that the Plaintiff has not given details of the property and against which party an order of injunction is sought. The 1<sup>st</sup> Plaintiff/Applicant has alleged that the 1<sup>st</sup> Respondent (Deceased) was coerced into signing a transfer of property to the 6<sup>th</sup> Respondent. It is also clear that there are cautions registered on some of the Title Deeds claiming beneficiary interest on the part of some of the parties herein and the 1<sup>st</sup> Plaintiff/Applicant claims that the land is ancestral land. The Applicant has not shown who owns the properties against which the court is being asked to issue an injunction. Further, in my view the 1<sup>st</sup> Plaintiff/Applicant has not shown the danger the said parcels of land are in. In my view the interests of parties in properties that are still registered in the name of the 1<sup>st</sup> Respondent who is said to be deceased would be best pursued in a succession cause.

15. Injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules which states:-

“Where in any suit it is proved by affidavit or otherwise—

- A any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction



to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

16. Further, it is a trite law that there are conditions that must be met before an interlocutory injunction can be granted as expounded in *Giella v Cassman Brown Co. Ltd 1973 E.A. 358*.

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

17. In my view the Applicant has not proved any of the requirements for the grant of an order of injunction. I further note that there are orders of injunction that were issued in this case and indeed the application dated January 11, 2021 seeks to punish some of the parties herein for contempt of the said court orders issued on March 2, 2017 and extended on March 23, 2017 and March 28, 2017.

18. With regard to prayer number 4 which seeks that status in form of Title Deeds, Sale Agreements or any other written documents that is specifying status of any or each Land Parcel ever registered to Munyalo Vonza in Kenya, that includes Yatta/Nyanyaa/358, 233,192,153 and parcel of land at Ikutha Sub County, Mwamba Isyuko/Kilawa held by any family members and/or contemnors be surrendered in court and remain in the custody of the court pending final determination.

19. I have considered the documents filed and note that the Plaintiffs’ claim is that some of the parcels of land subject of this suit are in the name of the initial 1<sup>st</sup> Defendant in this suit Munyalo Vonza (deceased). It is also alleged that some of the properties were transferred to some of the parties. In my view the Applicant has not shown that he has made any effort to find out the status of the properties listed in the application or the information on the documents he seeks. He has also not shown what difficulties he has encountered to necessitate the application to court and its intervention. Indeed since the parcels of land are registered properties an official search would give some of the information sought. Further the Plaintiff does not indicate which family member is alleged to hold any of the documents sought. In my view the Applicant is fishing for information and is looking to engage the help of the court to do so.

20. The court is of the view that the Applicant seeks documents like written agreements, title deed that he could use in this case. In my view it is the Applicants duty to use his own efforts to get documents to prove his case. 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.”

21. The final orders of the court are that the application dated April 21, 2021 lacks merit and the same is hereby dismissed with no order as to costs.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 20TH DAY OF SEPTEMBER 2022**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**Ruling read in open court in the presence of-**



**Musyoki: Court Assistant**

**M/S Wambua for the 1st Plaintiff/Applicant**

**Mboloi Advocate for the 5th and 6th Defendant/Respondents**

