



REPUBLIC OF KENYA



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

Odunga (Suing as the Administratrix of the Estate of the Late Joshua Othieno alias Josiah Odunga Omondi) v Barasa & 9 others (Environment and Land Appeal E001 of 2021) [2025] KEELC 355 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEELC 355 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E001 OF 2021
BN OLAO, J
FEBRUARY 3, 2025

BETWEEN

PENINA ODUNGA APPELLANT
SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE JOSHUA
OTHIENO ALIAS JOSIAH ODUNGA OMONDI

AND

ZAKAYO OUMA BARASA 1ST RESPONDENT
JOHN OMURUTU BARASA 2ND RESPONDENT
WILLIAM OPERA WASWA 3RD RESPONDENT
JACOB OUMA BARASA 4TH RESPONDENT
DANIEL ODHIAMBO WASWA 5TH RESPONDENT
STEPHEN WAFULA WASWA 6TH RESPONDENT
NIMROD KARAKACHA 7TH RESPONDENT
CHARLES OPERA WASWA 8TH RESPONDENT
CHIEF LAND REGISTRAR 9TH RESPONDENT
WASWA OBERA (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE SAMSON BARASA OBERA ALIAS BARASA
OPERA) 10TH RESPONDENT



RULING

1. Penina Odunga (The Appellant herein and suing as the Administratrix of the Estate of the late Joshua Othieno alias Josiah Odunga Omondi) was the Plaintiff in Busia Chief Magistrate's Elc Case No E001 of 2021 in which she had filed an amended plaint against Zakayo Ouma Barasa, John Omurutu Barasa, William Opera Waswa, Jacob Ouma Waswa, Daniel Odhiambo Waswa, Nimrod Karakacha, Charles Opera Waswa, The Chief Land Registrar and Waswa Obera (the 1st to 10th Respondents respectively). She sought judgment against the Respondents jointly in the following terms:
 - a. An order of permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents either by themselves, their agents, servants or otherwise howsoever from interfering with the Appellant's quiet and peaceful possession and occupation of 6.0 acres portion of the suit property known as Bukhayo/Malanga/541 belonging to the Estate of the late Joshua Othieno alias Josiah Odunga Omondi.
 - b. A permanent injunction against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents prohibiting them whether by themselves, their agents or servants from entering upon, remaining upon, transferring, occupying, leasing, charging, assigning or interfering with the Appellants quiet possession of the suit property known as Bukhayo/Malanga/541 belonging to the Estate of the late Joshua Othieno alias Josiah Odunga Omondi.
 - c. A declaration that the Appellant is entitled to ownership and occupation of the 6.0 acres portion of the suit property known as Bukhayo/Malanga/541 belonging to the Estate of the late Joshua Othieno alias Josiah Omondi to the exclusion of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents herein.
 - d. A declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents have no legal right or recognizable interest over 6.0 acres portion of the property known as Bukhayo/Malanga/514 belonging to the Estate of the late Joshua Othieno alias Josiah Odunga Omondi and that any title document they hold is a nullity, null and void.
 - e. A declaration that the Administrator(s) of the Estate of the late Samson Barasa Obera alias Barasa Opera to transfer the 6.0 acres portion of the property known as Bukhayo/Malanga/541 belonging to the Estate of the late Joshua Othieno alias Josiah Odunga Omondi to the Appellant herein, in default of which the 9th Respondent unconditionally be compelled to effect registration of the 6.0 acres portion of the property known as Bukhayo/Malanga/541 belonging to the Estate of the late Joshua Othieno alias Josiah Odunga Omondi in favour of the Appellant herein within 15 days of issuance of this order.
 - f. Costs of the suit.
2. The Appellant's claim was resisted and in a joint defence by 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th statement of defence, the said Respondents pleaded, inter alia, that the Appellant infact only occupies two acres of the land parcel No Bukhayo/Malanga/541 which is registered in the name of Barasa Opera (deceased) whose Estate is not represented by the Appellant. Further, that there exists Busia Chief Magistrate's Court Succession Cause No 716 of 2018 in which the issue of the true beneficiaries to the Estate of Barasa Opera (deceased) will be addressed and that the land parcel No Bukhayo/Malanga/541 is family land registered in the name of Barasa Opera (deceased) to hold on his own behalf and on



- behalf of his two brothers Waswa Obera and John Amukacha Maringo. They pleaded that the suit is incompetent, bad in law and an abuse of the process of the Court which should be dismissed with costs.
3. The Appellant filed a reply to that defence in which she joined issues with the Respondents and denied the averments that Barasa Opera (deceased) held the title to the land parcel No Bukhayo/Malanga/541 (the suit land) on behalf of his brothers Waswa Obera and John Amukacha Maringo. She added further that her claim had been recognized in the succession cause.
 4. The suit in the subordinate court fell for trial before Hon. P. Y. Kulecho (Senior Resident Magistrate) who, having heard the evidence, dismissed the Appellant’s suit with costs. The Magistrate also set aside a consent order recorded on 22nd January 2021 between the Appellant and the 1st and 2nd Respondents.
 5. Aggrieved by that judgment, the Appellant lodged an appeal to this Court. Incidentally, both the appeal and the suit in the subordinate court bear the same number being NO E001 of 2021. The Appellants urged this Court to allow their appeal, set aside the judgment of the subordinate Court and substitute it with an order allowing the reliefs in the plaint dated 4th January 2021 with costs to the Appellant.
 6. The appeal was canvassed before Omollo J and vide a judgment delivered on 29th June 2022, the Judge allowed the appeal and issued the following orders:
 - i. “The judgement and order of dismissal made by the Senior Resident Magistrate in Busia CMCC ELC Case No. E01 of 2021 is hereby set aside and substituted with an order allowing the reliefs in the plaint dated 4th January 2021.”
 - ii. “The cost of this Appeal and in the case in the court below CMCC Case No. E01 of 2021 is hereby awarded to the Appellant.”
 7. The Appellant has now approached this court vide her Notice of Motion dated 2nd September 2024 and anchored upon the provisions of Article 159(2) (d) of the [Constitution](#), Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and Order 51 of the Civil Procedure Rules. It is also based on the grounds set out therein and supported by the Appellant’s affidavit of even date.
 8. The Appellant seeks the following orders:
 1. An order be and is hereby issued compelling the Busia County Land Registrar and the Busia District County Land Surveyor to excise 6.0 acres out of the 18 acres comprising the parcel of land known as L.R Bukhayo/Malanga/541 and issue a certificate of title in favour of the Appellant as decreed by this court on 29th June 2022.
 2. An order be and is hereby issued directing the Deputy Registrar of the Environment and Land Court to sign the transaction documents including the transfer instrument to facilitate the excision of the 6.0 acres out of the parcel of land known as L.R Bukhayo/Malanga/541 and the registration in favour of the Appellant.
 3. An order be and is hereby issued compelling the Officer Commanding Police Division (OCPD) Nambale and the Officer Commanding Station (OCS) Nambale Police Station to provide security to the Busia County Land Registrar and the Busia District/County Land Surveyor during the survey and excision of the 6.0 acres out of the land known as L.R Bukhayo/Malanga/541.
 4. The Officer Commanding Police Division (OCPD) Nambale and the Officer Commanding Station (OCS) Nambale Police Station do ensure that Zakayo Ouma Barasa, John Omurutu Barasa, William Opera Waswa, Jacob Ouma Barasa, Daniel Odhiambo Waswa, Stephen Wafula



Waswa, Nimrod Karakacha, Charles Opera Waswa and Waswa Odera who are the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents herein respectively do comply with the orders issued by this Court on 29th June 2022 restraining them from interfering with the Appellants peaceful and quiet possession and occupation of the 6.0 acres portion of the suit property known as Bukhayo/Malanga/541 belonging to the Estate of the late Joshua Othieno alias Josiah Odunga Omondi and further restraining them from entering upon, remaining upon, transferring, occupying, leasing, charging, assigning or interfering with the Appellant's quiet possession thereof.

5. Costs of the application be provided for.
9. The basis of the application is that the Appellant is the owner and occupant of a portion of the suit land measuring 6.0 acres as was decreed by this Court vide the Judgment delivered on 29th June 2022. That the Court vide that Judgment also issued an order of permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents from entering or remaining thereon. That Judgment has not been varied, reviewed, set aside or challenged. However, contrary to that Judgment, on 27th August 2024 the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents illegally, unlawfully and violently evicted her from the suit land and are in the process of sub-dividing and transferring it to third parties and this has been caused by the fact that the Land Registrar and County Surveyor Busia have failed to excise and register her portion in her name. Unless this Court intervenes and grants her the orders sought, there is a real danger that she will permanently be deprived of her property in a manner not contemplated in the law and the Judgment will be rendered futile.
10. The following documents are annexed to the Motion:
 1. A copy of the Judgment delivered herein on 29th June 2022.
 2. A copy of the resultant decree/order.
11. The application is opposed and Jacob Ouma Waswa the 4th Respondent and with the authority of the 3rd, 5th, 6th, 7th, 8th and 10th Respondents has filed a replying affidavit dated 17th September 2024 in which he has deponed, inter alia, that the suit land is registered in the name of Samson Barasa Odera alias Samson Barasa Opera alias Barasa Opera and is held by him on behalf of his two brothers namely Waswa Odera and John Amukacha Maringo. That the said Barasa Opera is now deceased and the 1st and 2nd Respondents are his personal representatives while the 7th Respondent is the son to John Amukacha Maringo. That Barasa Opera, Waswa Odera and John Maringo have their portion of the suit land which are clearly demarcated on the ground while the Appellant occupies a portion measuring about 2 acres.
12. That the Appellant filed Busia Chief Magistrate's Court ELC Case No E001 of 2021 seeking the orders set out therein. The 1st, 2nd and 10th Respondents are personal representatives to the Estate of Samson Barasa Odera alias Samson Barasa Opera which comprises the suit land and they were issued with a Grant vide Busia Chief Magistrate's Court Succession Cause No 652 of 2018 as consolidated with NO 716 of 2018. That in the Grant, Josiah Odunga Omondi is named as a beneficiary entitled to a portion out of the suit land. There are also other beneficiaries using the suit land. That when the Appellant filed Busia Chief Magistrate's Court ELC Case No E001 of 2021, her claim was acknowledged by the 1st and 2nd Respondents who were willing to transfer to her a portion measuring 6.0 acres. Therefore, the issue of sharing out the suit land lies squarely in Busia Chief Magistrate's Court Succession Cause No 652 of 2018. It is not true that on 27th August 2024 the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents violently evicted the Appellant as alleged or at all and she is in occupation and use of 2 acres of the suit land. Further, that it is not true that the said Respondents are in the process of alienating or selling the suit land to third parties.



13. The following documents are annexed to the replying affidavit:
1. Copy of Register for the land parcel No Bukhayo/Malanga/541.
 2. Copy of Grant of Letters of Administration issued in Busia Chief Magistrate's Court Succession Cause No 652 of 2018 as consolidated with No 716 of 2018 as issued to 1st, 2nd and 10th Respondents in respect to the Estate of Samson Barasa Obera alias Samson Barasa Opera on 20th December 2021.
 3. Affidavit in support of the Petition for Letters of Administration in Succession Cause No 652 of 2018.
 4. Affidavit in support of the Petition for Letters of Administration filed in Succession Cause No (not legible) of 2012.
 5. Copy of the 1st Respondent's witness statement filed in Busia Chief Magistrate's Court ELC Case No E001 of 2021.
 6. Copy of the 2nd Respondent's witness statement filed in Busia Chief Magistrates Court ELC Case No E001 of 2021.
14. When the application was placed before me on 2nd September 2024, I directed that it be canvassed by way of written submissions. The submissions were subsequently filed both by Mr Odunga instructed by the firm of Rapando and Odunga Advocates for the Appellant and by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents. Ms Mulati counsel for the 1st and 2nd Respondents did not file any response to the application and the 9th Respondent similarly did not participate in the Motion.
15. I have considered the application, the responses by the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents and the submissions filed.
16. It is common ground that vide a judgment delivered by Omollo J on 29th June 2022, very clear and specific orders were issued against the Respondents in favour of the Appellant herein. I have not heard any of the Respondents allege that the Judgment and the subsequent decree and orders are ambiguous. It is also not in dispute that no appeal was filed against that Judgment. What the Appellant basically seeks are orders to give effect to that Judgment.
17. In his submissions, counsel for the Appellant has stated in paragraph 4 that no response was filed in opposition to the application and that the same is not opposed. That is not correct. I have already in the preceding paragraphs of this ruling made reference to the replying affidavit by the 4th Respondent dated 17th September 2024 and filed on behalf of himself and the 3rd, 5th, 6th, 7th, 8th and 10th Respondents. What is important to state at this stage is that in the response, the 4th Respondents is basically revisiting the same issues that ought to have been canvassed during the appeal or the trial in the Chief Magistrate's Court ELC Case No E001 of 2021. For instance, the 4th Respondent has gone to great length to depone on issues which were in the realm of the Court which considered the appeal. These include that the suit land is registered in the name of Samson Barasa Obera alias Samson Barasa Opera alias Barasa Opera (paragraph 5), that there are several Succession Causes where the beneficiaries of the suit land were determined (paragraphs 14, 15 and 16), that the issue of sharing out the suit land lies squarely in Busia Chief Magistrate's Court Succession Cause No 652 of 2018 (paragraph 19) etc.



18. Counsel for the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents has on his part submitted as follows at page 2 of his submissions:

“It is our humble submission that L.R No Bukhayo/Malanga/541 falls under the class of intestacy and the beneficiaries to the Estate of Samson Barasa Opera will have a duty in Court together with the plaintiff herein where the Court will satisfy itself as to shares of all of them and issue a Certificate of Confirmation specifying itself as to shares of all of them and issue a Certificate of Confirmation specifying all the persons and their respective shares as is required under Section 71(2) of the Law of Succession Act.”

Counsel for the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents goes on in the same page to submit that:

“The 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents have demonstrated that although the size of the share belonging to the Plaintiff has been determined to six (6) acres, the same has to come out of the portion belonging to Barasa Opera who actually sold the portion belonging to him to the said Josiah Odunga Omondi.”

By those averments and submissions, the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents are clearly, but erroneously, inviting this Court to re-consider the evidence which was before the Chief Magistrate and in this Court on appeal and thereby arrive at a different opinion. The truth of the matter is that those issues are now spent and this Court is not sitting on appeal or review against the Judgment of Omollo J. The forum best suited to agitate those issues is the Court of Appeal. And since no appeal was filed against that Judgment, the Respondents herein must abide by its terms. I agree with counsel for the Appellant when he makes the following submission at paragraph 18:

- 18: It would indeed appear that the Respondents would want to re-open and re-litigate the issues that have already been settled by this Court vide the Judgment dated 29th June 2022 through a different forum in the hope that the same can be varied. This is an abuse of process intended to deny the Appellant the fruits of the Judgment which she urges the Court to denounce through the grant of the reliefs (sic) sought in the application”.

The bottom line therefore is that the issues which the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents have raised in their responses and submissions ought to have been raised in the appeal in this Court or placed before a Superior Court on appeal against the Judgment delivered on 29th June 2022. It is too late to raise them in this application.

19. Having said so, Omollo J in her Judgment delivered on 29th June 2022 made specific orders while allowing the Appellant’s appeal. From the Appellant’s supporting affidavit, it is clear that she is yet to enjoy the benefits of that Judgment which she now seeks to be perfected. Court Judgments and orders are not supposed to be in vain or hollow. I shall now interrogate the remedies sought vide the Notice of Motion dated 2nd September 2024 vis-à-vis the Judgment delivered on 29th June 2022.
20. In that Judgment, Omollo J granted the Appellant all the remedies sought in her plaint and which the trial Magistrate had denied her. They included an order of permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents from interfering with her possession of a 6.0 acres portion of the suit land or transferring the same, a declaration that the Appellant is entitled to ownership of the said 6.0 acres and the same should be transferred to her since the said Respondents have no legal right or recognizable interest therein. In her supporting affidavit, she has deponed, inter alia, that the Busia County Land Registrar and County Surveyor have failed to excise and register her as the proprietor of



the said 6.0 acres portion out of the suit land and unless that is done, she will be permanently deprived of the same portion. Those were among the remedies sought in the trial court and which this Court on appeal affirmed. It is therefore proper that the Land Registrar and County Surveyor perform what is required of them to perfect this Judgment. It is instructive to note that the Land Registrar sued as the 9th Defendant has not rebutted the Appellant's averments. And from the replying affidavit of the 4th Respondent, it is clear that the 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents are not prepared to execute any documents to facilitate the transfer of the 6.0 acres out of the suit land to the Appellant.

21. Prayers No 1 and 2 are merited. I allow them.
22. With regard to prayer NO 3 and 4 which seek the intervention of the Officer Commanding Police Division (OCPD) Nambale and the Officer Commanding Station (OCS) Nambale Police Station to provide security during the survey exercise. I am aware that in *Kamau Mucuha -V- The Ripples Ltd C.A. Civil Application No 186 of 1992, 1990 – 1994 E.A. 388 [1993 KLR 33, Kwach J A* stated as follows:

“The only valid criticism of the order of the Judge as now, but which does not swing the scale one way or the other in this application is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The Police should never be involved in securing compliance with Court orders as there is specific provision for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure rules”

That may be so. It is however also clear that under Section 24 of the *National Police Service Act*, among the duties of the Police include:

- a. Provision of assistance to the public when in need;
- b. Maintenance of law and order.
- c. Preservation of peace.
- d. Protection of life and property.

Therefore, where there is fear of likelihood of breach of peace in the execution of a civil process, nothing stops this Court from issuing appropriate orders. It must also be noted that under Section 38(a) of the *Civil Procedure Act*, it is provided that:

- 38: Subject to such conditions and limitations as may be prescribed, the Court may, on application of the decree holder, order execution of the decree –
 - a. by delivery of any property specifically decreed;”

The substantive decree in this appeal is that the Appellant is entitled to be registered as the proprietor of 6.0 acres out of the suit land. This court must facilitate the execution of that decree by granting the prayers sought.

23. The up-shot of all the above is that this Court, having considered the notice of Motion dated September 2, 2024, I allow it and make the following orders:
 1. An order is hereby issued compelling the Land Registrar and County Surveyor Busia to forthwith excise 6.0 acres out of the land parcel Bukhayo/Malanga/541 and register the same in favour of the Appellant.



2. An order is hereby issued directing the Deputy Registrar of this Court to forthwith sign all the relevant documents to facilitate the excision of the 6.0 acres out of the land parcel No Bukhayo/Malanga/541 and its transfer in the name of the Appellant.
3. In the event that any of the Respondents or those acting under them become violent, the Officer Commanding Police Division (OCPD) Nambale and the Officer Commanding Station (OCS) Nambale shall, upon request, provide the necessary security to the Land Registrar and Surveyor Busia and all those working under them during the exercise of excision of the 6.0 acres out of the land parcel No Bukhayo/Malanga/541.
4. The Respondents shall thereafter comply with all the orders restraining them and those claiming under them from interfering in any manner with the 6.0 acres registered in the name of the Appellant.
5. The 3rd, 4th, 5th, 6th, 7th, 8th and 10th Respondents shall meet the Appellant's costs of this application.

BOAZ N. OLAO

JUDGE

3RD FEBRUARY 2025

RULING DATED, SIGNED AND DELIVERED ON THIS 3RD DAY OF FEBRUARY 2025 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

3RD FEBRUARY 2025

