



Wekesa v Keya & 6 others; Wafula & 2 others (Respondent) (All Substituted as Legal Representatives of the Estate of Situndo Otsieno) (Environment & Land Case 59 of 2015) [2025] KEELC 352 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEELC 352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 59 OF 2015
BN OLAO, J
FEBRUARY 4, 2025**

BETWEEN

FLORENCE AUMA WEKESA PLAINTIFF

AND

PATRICK OMONDI KEYA 1ST DEFENDANT

JOSEPH MUYA KEYA 2ND DEFENDANT

PACRAS MUGA 3RD DEFENDANT

PATRICK RAPENDA 4TH DEFENDANT

FRANCIS ODUOR 5TH DEFENDANT

KIZITO NDAKALA 6TH DEFENDANT

THE COUNTY GOVERNMENT OF BUSIA 7TH DEFENDANT

AND

SAMUEL WAFULA RESPONDENT

MARY ATIENO RESPONDENT

WILFRIDA OTIENO NGESA ALIAS ODA SITUNDO OTIENO . RESPONDENT

**ALL SUBSTITUTED AS LEGAL REPRESENTATIVES OF THE ESTATE OF
SITUNDO OTSIENO**

RULING

1. The dispute between Florence Auma Wekesa (the Plaintiff) and Patrick Omondi Keya, Joseph Onyango Keya, Pancras Ouma, Patrick Rapanda, Francis Oduori, Kizito Ndalaku and The County



Government of Busia (the 1st to 7th Defendants respectively) over the land parcel No Marachi/Elukongo/1293 (the suit land) was determined vide a judgment delivered on 28th September 2022 by Omollo J. Among the remedies issued against the Defendants was that the 1st and 2nd Defendants were directed to vacate the suit land within 120 days of service of the Decree against them and in default, they were to be evicted therefrom.

2. The 1st Defendant has now approached this Court vide his Notice of Motion dated 13th September 2024 and premised under the provisions of Order 12 Rule 7 and Order 24 Rule 3 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and Article 159 (2) (b) of *the Constitution*. It is anchored on the grounds set out therein and is supported by the 1st Defendant's affidavit of even date.

3. The following orders are sought vide the Motion:

1. The suit or any matter that has abated as against the deceased Plaintiff Florence Auma Wekesa be revived and the time for substitution extended.
2. Samuel Onyango Situndo, Mary Wekeksa and Wilfrida Othieno Ngesa alias Oda Situndo Otieno be joined as Respondents in this case and substituted as Plaintiffs and as Defendants in the counter claim in place of Florence Auma Wekesa now deceased.
3. The judgment made herein on 28th September 2022 against the Defendant/Applicant herein be set aside and the matter reinstated for the hearing of the case and counter-claim only as between the Applicants and the Respondent.
4. The Applicants be allowed to amend their counter-claim to include the names of the Respondent herein as parties in place of the deceased Plaintiff; or alternatively.
5. The Applicants be allowed to bring fresh suit against the Respondents herein.
6. Any order be made as this Honourable Court deem just and expedient.

7. Costs of this application be provided for.

The application is premised on the grounds set out therein and is supported by the 1st Defendant's affidavit dated 13th September 2024.

4. The 1st Defendant is a pro se litigant and therefore his pleadings are not easy to comprehend. I have always held the view that there is a good case for such litigants in land disputes to be entitled to pro bono services in law bearing in mind the very sensitive nature of such disputes. I will nonetheless do the best I can notwithstanding the prolixity of this application.

5. The 1st Defendants case is that he was not notified of the hearing of this case yet the suit land was ancestral land originally registered in the name of Situndo Otsieno alias Philip Situndo Otsieno who passed away on 22nd April 1970 some three (3) years after the Land Registration process. The suit land was among other parcels of land owned by one Muya Othieno who was the grandfather to the parties herein and who had two wives namely Elizabeth and Salume. That Elizabeth's sons were –

1. Oduori Otsieno
2. Sabastian Ndakala
3. Keya Otsieno alias Jemis Keya Otsieno and;
4. Situndo Otsieno alias Philip Situndo Otsieno

That Salume had two sons namely:



1. Benedict Rapenda Otsieno and

2. Sylvester Muya

That the Defendants are all the children of the late Keya Othieno the brother to Situndo Otsieno while the Plaintiffs are the children of Situndo Otsieno and they all live on the suit land. That the ancestral land was distributed as follows:

1. Oduori Otsieno and Sabastian Ndakala were given land parcel No Marachi/Elukongo/1292 measuring 25.5 acres.

2. Keya Otsieno and Situndo Otsieno were given land parcel No Marachi/Elukongo/1293 measuring 20.0 acres

3. Benedict Otsieno and Sylvester Muya were given land parcel Marachi/Elukongo/1294 measuring 24.0 acres.

At the time of the registration of the above parcels of land, the 1st Defendant's father Keya Otsieno alias Jemis Otsieno was working in Uganda and so the land parcel No Marachi/Elukongo/1293 and which is the suit land was registered in the name of Situndo Otsieno alias Philip Situndo Otsieno, his brother to hold in trust for himself and for Keya Otsieno alias Jemis Otsieno.

6. When Situndo Otsieno alias Philip Situndo Otieno died in 1970, the 1st Defendant's father came back from Uganda for the burial and since then, he has remained on the suit land until 1992 when he died and was buried thereon. That he and his brother the 2nd Defendant were born on the suit land where they have lived and have no other land. When their uncle Situndo Otsieno died, his daughter who is the Plaintiff took out Letters of Administration to his Estate but did not recognize the Defendants as persons who had an interest in the suit land. The Defendants filed a defence and counter-claim to the Plaintiff's suit but they were not notified about the hearing date of the suit.

7. Following the demise of the Plaintiff, the Respondents were jointly issued with the Grant of Letters of administration in respect to the Estate and can therefore now prosecute this suit. That the Defendants have an interest in the suit land where they were born and this application should be allowed as it has been brought in good faith.

8. In response to the Motion, Wilfrida Atieno Ngesa alias Oda Situndo Otieno who is listed herein as the 3rd Respondent swore a replying affidavit dated 27th September 2024 in which she has deposed, inter alia, that she and the 1st and 2nd Respondents are children of Situndo Otsieno who was the brother of Keya Otsieno the 1st Defendant's father. So the Respondents and the Defendants are cousins. That the original land parcel which gave rise to the suit land belonged to their grandfather. It was then sub-divided into three (3) portions being Marachi/Elukongo/1292, 1293 and 1294 as agreed among the family. The land parcel No Marachi/Elukongo/1293 which is the suit land was given to Situndo Otsieno and Keya Otsieno but since the latter was in Uganda at that time, the said land was registered in the name of Situndo Otsieno to hold in trust for himself and his brother in equal shares. That when Situndo Otieno died in 1969, his brother Keya Otsieno travelled from Uganda to bury him and never returned to Uganda. And when he died in 1992, he was buried on the suit land. That the Defendants were born on the suit land where they still live and have nowhere else to go. She therefore prays that this application be allowed so that the Defendants can be given an opportunity to be heard on merit.

9. The parties are acting in person and so the application was canvassed orally on 8th October 2024.

10. I have considered the application and the oral submissions by the 1st Defendant and the 3rd Respondent.



11. What is clear to me is that although the 3rd Respondent filed a replying affidavit to the Motion, she actually supports the order sought therein. I am particularly alive to the averments in paragraphs 8 and 9 of the replying affidavit by the 3rd Respondents and due to their relevance, I shall cite them in extenso. They read:
 - 8: “That our extended family suggests that if we kick the Applicants out of the suit land, our boundary must be cancelled to find a space for them and an issue of the Applicants being on our land No Marachi/Elukongo/1293 with nowhere to go is a thorn in our flesh.”
 - 9: “That the Applicants strongly complain to our extended family that they were conned by the Plaintiff who never served them with the Notice of the hearing date on which the case was heard. I therefore pray that the Applicants’ application dated 13th September 2024 be allowed and the Applicants given an opportunity to be heard on merit to enable this Hon. Court to resolve the problem at once and for all.” Emphasis mine.
12. I must start by commending Wilfrida Atieno Ngesa alias Oda Situndo Otieno the 3rd Respondent for her honesty. Here is a person who is the Administrator of the Estate of the deceased Plaintiff who was a beneficiary of the Judgment herein in which the salient order was the eviction of the Defendants from the suit land. She confirms that the suit land was registered in the name of her father Situndo Otsieno to hold in trust for himself and for his brother Keya Otsieno the father of the Defendants. She has deposed that the Defendants are entitled to a right to be heard. Her sense of justice is admirable and even as I deliver this ruling, I am seeing white smoke ahead in this dispute between the Respondents, who were granted Letters of Administration on 25th July 2023 in High Court Succession Cause NO 18 of 2016 to represent the deceased Plaintiff and the 1st and 2nd Defendants.
13. The main remedy sought by the 1st and 2nd Defendants is to set aside the Judgment herein. The Court’s discretion to set aside a judgment or order is wide and unfettered. In this case, the Defendants allege that they were not served with hearing notice although there is an affidavit of service dated 3rd February 2021 confirming that they were served on 19th January 2021. Nonetheless, as was held in the case of James Kanyitta Nderitu & Another -v- Marios Philotas Ghikas & Another 2016 eKLR, even in a regular judgment, the Court has unfettered discretion in determining whether or not to set aside the judgment and among the issues to consider is whether there is a defence which raises triable issues and the prejudice if any, to be caused to the other side. In this case, as is now already clear, the Respondents who are the legal representatives of the deceased Plaintiff are not averse to the setting aside of the judgment herein which was delivered on 28th September 2022. Where the beneficiary of a judgment, and who in this case is represented by the Respondents, concedes to the setting aside of the same, this Court should not be seen to stand against such a request.
14. It must also be remembered that under Section 3A of the *Civil Procedure Act*, there is no limit to the inherent powers of this Court which is to do justice to the parties before it. That is the fundamental duty of the Court and includes allowing all the parties to have their cases determined on merits. I notice from the Judgment herein that no mention was made of the Defendants’ counter claim against the Plaintiff. Article 50 (1) of *the Constitution* provides for the right to be heard and this Court must uphold it.
15. I am persuaded in the circumstances that the prayer to set aside the judgment delivered on 28th September 2022 is merited but only as relates to the claim between the Plaintiff as represented by the Respondents and the Defendants. This will enable the Defendants to prosecute their counter-claim on which no orders were made either allowing or dismissing the same.



16. The prayer for the deceased Plaintiff to be substituted by the Respondents is hereby allowed as prayed. The amended defence and counter-claim by the 1st, 2nd and 4th Defendants be filed and served upon the Respondents within 15 days from the date of this ruling after which they will have 15 days from date of service to file and serve their defence to the counter claim.
17. To facilitate this, the suit is revived as between the Defendants and Respondents and either party, if they so wish, is at liberty to file any additional statements or documents within the 15 days. In making the above orders, this Court is guided both by the constitutional provisions and by the decision of Sheridan J in the Ugandan case of Sebei District Administration -v- Gasyali 1968 EA 300 in which he adopted some wise words of Ainley J (as he then was) in the case of Jamnadas -v- Sodha Gordandas Hemra 1952 7 ULR 11 where he said:

“... it should always be remembered that to deny the subject a hearing should be the last resort of a Court.”
18. Guided by all the above, I am persuaded to allow the Notice of Motion dated 13th September 2024. I issue the following disposal orders:
 1. The Judgment and all subsequent orders dated 28th September 2022 is hereby set aside but only in respect to the claim and counter-claim between the Plaintiff and the Defendants.
 2. The suit between the Plaintiff and the Defendants is revived and the deceased Plaintiff is hereby substituted by the Respondents i.e. Samuel Wafula Situndo, Mary Atieno Wekesa And Wilfrida Atieno Ngesa alias Oda Situndo Otieno as the Plaintiffs.
 3. The Defendants shall within 15 days of the delivery of this ruling file and serve their amended defence and counter-claim together with any other additional statements or documents, if they so wish, upon the Respondents as Plaintiffs.
 4. The Respondents, as Plaintiffs will also have 15 days upon service of the amended defence and counter-claim upon them to file and serve their reply and defence to the counter-claim together with any other additional statements or documents.
 5. The Plaintiffs and the 1st and 2nd Defendants shall thereafter appear before the Deputy Registrar on 17th February 2025 for pre-trial and to confirm compliance and take a date for hearing.
 6. As the parties are family, each shall meet their own costs of the Motion.

BOAZ N. OLAO

JUDGE

4TH FEBRUARY 2025

Ruling delivered, dated and signed in Open Court on this 4th day of February 2025.

1st Defendant Present

Other Parties absent

BOAZ N. OLAO

JUDGE

4TH FEBRUARY 2025

