



Onani v Muhahala & 2 others; Muhahala (Interested Party) (Environment and Land Case E018 of 2021) [2025] KEELC 5346 (KLR) (15 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE E018 OF 2021**

**BN OLAO, J
JULY 15, 2025**

BETWEEN

GABRIEL OUNDO ONANI PLAINTIFF

AND

ODONGO MUHAHALA 1ST DEFENDANT

OBWAYO ODONGO 2ND DEFENDANT

MICHAEL ODWORI 3RD DEFENDANT

AND

FREDRICK LANDI MUHAHALA INTERESTED PARTY

RULING

1. By a judgment delivered on 23rd March 2023, this Court made the substantive order that GABRIEL OUNDO ONANI (hereinafter the Plaintiff) had acquired the land parcel NO BUNYALA/ BULEMIA/8X7 by way of adverse possession. That substantive order was made only as against MICHAEL ODWORI ODERO (the 3rd Defendant herein) because the ODONGO MUHALALA and OBWAYO ODONGO (the 1st and 2nd Defendants respectively) were not the registered proprietors of the land parcel NO BUNYALA/ BULEMIA/8X7. However, they too were restrained from interfering with the said parcel of land. That judgment was pursuant to an Originating Summons dated 19th October 2021 in which the Plaintiff had in fact sought for orders, inter alia, that he had acquired the land parcel NO BUNYALA/ BULEMIA/8X3 and not BUNYALA/ BULEMIA/8X7.
2. It is clear therefore, that in so far as the judgment dated 23rd March 2023 referred to the land in dispute as BUNYALA BULEMIA/8X7 and not BUNYALA/ BULEMIA/8X3 which is what was pleaded in the Originating Summons herein, that was obviously a clerical error which this Court must move on it's own motion and correct. None of the parties herein appears to have noticed it and so I have not



been addressed on it. I have only noticed the error while considering the Notice of Motion dated 14th January 2025 by FREDRICK LANDI MUHALALA (the Applicant herein) and which is the subject of this ruling. Section 99 of the Civil Procedure Act provides that:

99: “Clerical or arithmetical mistakes in judgments decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

At the end of this judgment, I shall invoke that provision to make the necessary corrections in the judgment delivered herein on 23rd March 2023 and the subsequent decree issued on 16th May 2023. The land in dispute which is BUNYALA/BULEMIA/8X3 is registered in the names of the 1st and 2nd Defendant not the 3rd Defendant.

3. Pursuant to the aforesaid exparte judgment following proceedings in which the Defendants failed to attend nor file any response to the Originating Summons, the Defendants moved to this Court vide their Notice of Motion dated 23rd June 2023 seeking the following orders:

- a. The judgment delivered on 23rd March 2023 and all the consequential orders be set aside.
- b. Stay of execution of the said judgment.
- c. The Defendants be allowed to file their responses to the Originating Summons and the draft Replying affidavit be deemed as duly filed upon payment of the requisite fees.
- d. Costs be provided for.

4. The Motion was opposed but upon considering it, this Court allowed it. The following orders were accordingly issued on 30th July 2024:

1. The exparte judgment delivered on 23rd March and all consequential orders are set aside.
2. The Defendants are granted 15 days from the date of the ruling to file and serve their responses to the Originating Summons plus their documentary evidence.
3. The Defendants will also within 30 days of the ruling pay to the Plaintiff the sum of Kshs.20,000 being thrown away costs.
4. Thereafter, the matter be listed for pre-trial before the Deputy Registrar on 9th September 2024 to confirm compliance and fix a date for hearing.
5. In default of any of the above conditions, the exparte judgment dated 23rd March 2023 shall revert and the Plaintiff shall be at liberty to execute the same.

The record shows that the parties are yet to appear before the Deputy Registrar to confirm compliance or take a hearing date.

5. Meanwhile, by his Notice of Motion dated 14th January 2025, the Applicant citing the provisions of Order 1 Rule 10(2), Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeks the following orders:

1. Spent
2. Spent.
3. That FREDRICK LANDI MUHAHALA the personal representative of the Estate of the 1st Defendant be joined as an interested party in this suit.



4. That this Honourable Court be pleased to find the proceedings, judgment and subsequent orders made in respect of the 1st and 2nd Defendants to be a nullity ab initio.
5. That this Honourable Court be pleased to strike out the names of the 1st and 2nd Defendants from this suit.
6. That costs of this application be provided for.
6. The gravamen of the application is that the Applicant is the Administrator to the Estate of the 1st Defendant who died on 22nd May 2002 while the 2nd Defendant died on 8th November 1999. I may add at this point that although the Applicant made reference to annexed copies of death certificate, none was annexed to his supporting affidavit. All that was annexed was a copy of the Grant of Letters of administration issued to him on 28th October 2024 in respect of the Estate of the 1st Defendant in BUSIA CHIEF MAGISTRATE'S COURT SUCCESSION CAUSE NO 320 of 2024. It is the Applicants case that the 1st and 2nd Defendants are the registered and absolute proprietors of the land parcel NO BUNYALA/BULEMIA/8X3 and this suit was instituted in 2021 long after the 1st and 2nd Defendants were deceased. This case is therefore an abuse of the Court process and the judgment delivered herein is null and void in so far as it affects the 1st and 2nd Defendants.
7. The following documents are annexed to the Motion:
 1. Copy of the Grant of Letters of Administration issued to the Applicant in respect to the Estate of the 1st Defendant.
 2. Copy of the official search in respect to the land parcel NO BUNYALA/BULEMIA/8X3 registered in the names of the 1st and 2nd Defendants.

As I have already stated above, no copies of certificates of death in respect of the 1st and 2nd Defendants were annexed to the Motion notwithstanding the fact that they were referred to in the supporting affidavit. I do not know whether that was a lapse or whether the said certificates of death actually exist.
8. In response to the Motion, the Plaintiff filed a replying affidavit dated 14th February 2025 in which he deposed, inter alia, that the Originating Summons dated 19th October 2021 and filed herein on 28th October 2021 were served on the 3rd Defendant on 6th December 2021 by a process server one STEPHEN OTAGET OFULA. The 3rd Defendant accepted service on behalf of the 1st and 2nd Defendants and the firm of B. M. OUMA & COMPANY ADVOCATES entered appearance for all the Defendants. However, the said firm did not attend Court and judgment was entered against all Defendants. That by an application dated 27th June 2023, the said firm filed an application to set aside that judgment and no mention was made regarding the deaths of the 1st and 2nd Defendants or that the 3rd Defendant disputed having been served with the Court process on behalf of the 1st and 2nd Defendants. Vide a ruling dated 30th July 2024, the Court allowed the Defendants to file their responses to the Originating Summons and set down the case for hearing on conditions which were not met and therefore the judgment delivered on 23rd March 2023 reverted and the Plaintiff was allowed to execute the same. The affidavit in support of this Motion is defective as it flouts the provisions of Section 5 of the Oaths and Statutory Declaration Act since it purports to have been sworn in BUSIA but was commissioned in NAIROBI thus making the Motion liable for striking out. Further, this judgment was entered way back on 23rd March 2023 with the full knowledge of counsel and this application is an abuse of the process of the Court and only meant to halt the execution process.



9. The Court directed that the Motion be canvassed by way of written submissions. However, only MS EROBA counsel for the Interested Party filed her submissions dated 19th February 2025.
10. I have considered the Motion, the rival affidavits and the submissions by MS EROBA counsel for the Interested Party.
11. The first issue which this Court needs to consider is what has been deposed in paragraphs 14 and 15 of the Plaintiff's replying affidavit that the supporting affidavit sworn by the Interested Party is defective as it is said to have been sworn in BUSIA but commissioned in Nairobi. It therefore fails to comply with the provisions of Section 5 of the Oaths and Statutory Declaration Act. There is merit in that averment. I have looked at the said supporting affidavit and indeed it states in the jurat that it was sworn on 14th January 2025 in BUSIA but was commissioned by a Commissioner of Oaths in Nairobi one KENNEDY ECHESA LUBENGU. Section 5 of the Oaths and Statutory Declaration Act provides that:

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat.”

The effect of the above is that the affidavit purportedly sworn by the Applicant herein does not meet the requirements of the law. An oath, as defined in the BLACK'S LAW DICTIONARY 10TH EDITION, is:

“A solemn declaration accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise. The person making the oath implicitly invites punishment if the statement is untrue or the promise is broken. The legal effect of an oath is to subject person to a penalty for perjury if the testimony is false.”

The defect in the Applicant's affidavit goes to the veracity and probative value of the averments therein and cannot support this Motion. It is for striking out and consequently, the Motion remains without support and is for dismissal because the defect is not, in my view, a matter that can be cured by the provisions of Order 19 Rule 7 of the Civil Procedure Rules or even Article 159(2)(d) of the Constitution as it is not simply a technical issue. This is a matter where no oath was taken at all.

12. But that is not all. Even if the supporting affidavit by the Applicant is to remain on record, what is sought is for this Court to find that the proceedings herein and the subsequent judgment delivered on 23rd March 2023 is null and void and the names of the 1st and 2nd Defendants be struck out because by the time this suit was filed on 28th October 2021, the 1st and 2nd Defendants were already deceased. This is how the Applicant has deposed in paragraphs 2, 3, 4 and 5 of the defective supporting affidavit which this Court has already impeached:

1: “That the 1st and 2nd Respondents are the registered absolute proprietors of land parcel NO BUNYALA/BULEMIA/8X3 each with half share.”

2: “That the 1st Respondent died on the 22nd day of May 2002.”

3: “That the 2nd Respondent died on the 8th day of November 1999.”

4: “That this suit was instituted in the year 2021 against persons who were long dead and is therefore untenable and an abuse of Court process.”



5: “That the proceedings taken, judgment entered and orders made affecting the 1st and 2nd Respondents were/are null and void.”

And in furtherance of those averments, counsel for the Applicant has made the following submissions:

“Having provided certificate of death for the 1st and 2nd Respondents, it is not in contention that by the time this suit was being filed in the year 2021, both of them were long dead. This is the very definition of putting something on nothing and expecting it to stay there. The 1st Respondent died on 22.5.2002 whereas the 2nd Respondent died on 8.11.1999 and they are the only registered proprietors of land parcel NO BUNYALA/BULEMIA/8X3 the subject of the Originating Summons filed herein. This Court therefore had no jurisdiction to proceed and hear a suit filed against deceased persons...”

Counsel then goes on to cite the cases of MCFOY -V- UNITED AFRICA COMPANY LTD 1961 ALL E.R 1169 as well as the case of GEETA BHARANT SHAH & OTHERS -V- OMAR SAID MWATAYARI & ANOTHER 2009 eKLR.

13. As already stated earlier in this ruling, no certificate of death in respect of the 1st and 2nd Defendants were availed in this matter. This Court cannot therefore presume, without such certificates, that indeed the 1st and 2nd Defendants were deceased by the time this case was filed against them. Sections 107(1) and 109 of the *Evidence Act* placed the burden of proving the death of the 1st and 2nd Defendants on the Applicant who was alleging that fact. The affidavit of service by the process server STEPHEN OTAGET OFULA dated 3rd March 2022 shows that when he served the Originating Summons upon the 3rd Defendant, they were received by him on behalf of the 1st and 2nd Defendants. And vide another affidavit of service dated 11th May 2022 by the same process server, it is deposed in paragraphs 3, 4 and 5 as follows:

3: “That on 9th May 2022 I proceeded to the MAU MAU area within MAU MAU Township BUNYALA SUB-COUNTY BUSIA COUNTY where the home of the Respondents is situated.”

4: “That upon arrival to the said home, I met the 3rd respondent to whom I introduced myself and explained the purpose of my visit.”

5: “That the 3rd respondent contacted the 1st and 2nd Respondents who instructed him to receive the document on their behalf.”

I have not heard any aspersions cast on the said process server. Indeed, the only reason why this Court, in its ruling delivered on 30th July 2024 set aside the *ex parte* judgment dated 23rd March 2023 was because their counsel MR OUMA had been engaged in another matter in KISUMU COURT. It had nothing to do with the demise of the 1st and 2nd Defendants. And even when the 3rd Defendant filed his Notice of Motion dated 27th June 2023 seeking to set aside the judgment herein, there was no mention that the 1st and 2nd Defendants were deceased. The fact of the matter is that if indeed the 1st and 2nd Defendants were long deceased by the time this suit was being filed in 2021, nothing would have been easier than saying so as far back as 3rd March 2022 when the Originating Summons were served upon the 3rd Defendant who accepted service on their behalf. It is also on record that on 14th November 2022, the firm of B. M. OUMA & COMPANY ADVOCATES entered appearance for the Defendants. It is not clear how counsel could have been entering appearance to defend parties who had died over 20 years ago.



14. What the Applicant seeks is an equitable remedy. A person who comes to equity must come with clean hands but as is now obvious, the Applicant's hands are soiled and all he has done is attempt, without success, to mislead the Court.
15. There is also a delay in filing this application. The judgment sought to be set aside was delivered on 23rd March 2023. This application was filed on 14th January 2025 a delay of almost two (2) years which I find to be inordinate and has not been explained at all.
16. It is also not lost to this Court that by a ruling delivered on 30th July 2024, the judgment herein was set aside on the application by the 3rd Defendant and all the Defendants were granted 15 days to file and serve their responses to the Originating Summons. It is unfortunate that six (6) months later, the Defendants have not filed any response to the Originating Summons. In that ruling, this Court made it clear that in default of any of the conditions set out therein, the judgment would revert and the Plaintiff would be at liberty to execute it. Given the circumstances herein, I am not persuaded that I should again set aside the judgment. Other than the correction of the error herein and which I alluded to earlier in this ruling, I am not inclined to allow this Motion. The same is for dismissal.
17. The up-shot of all the above is that having considered the Notice of Motion dated 14th January 2025, I make the following disposal orders:
 1. The judgment delivered herein on 23rd March 2023 is corrected to read:
 - a. The Plaintiff has acquired by way of adverse possession the land parcel NO BUNYALA/BULEMIA/8X3 by way of adverse possession the 1st and 2nd Defendants' titles therein having been extinguished by the operation of law.
 - b. The 1st and 2nd Defendants shall within 30 days from the date of this ruling surrender for cancellation the title deed to the land parcel NO BUNYALA/BULEMIA/8X3 to the Land Registrar and execute all the necessary documents to facilitate the registration thereof in the names of the Plaintiff.
 - c. In default of (b) above, the Deputy Registrar shall execute all such documents on behalf of the 1st and 2nd Defendants to facilitate that registration.
 - d. Thereafter, the 1st and 2nd Defendants by their agents, servants or any persons acting through them shall be permanently barred from taking and/or using the land parcel NO BUNYALA/BULEMIA/8X3.
 - e. The claim against the 3rd Defendant is dismissed.
 2. No order as to costs.
 3. The Decree issued herein on 16th May 2023 shall be amended accordingly by the Deputy Registrar.

BOAZ N. OLAO

JUDGE

15TH JULY 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 15TH DAY OF JULY 2025 WITH NOTICE TO THE PARTIES.

Right of appeal.



BOAZ N. OLAO

JUDGE

15TH JULY 2025

