



**Wafula v Walela & 28 others; Ruto - President and Chief Commander of All
Armed Forces the Republic of Kenya & 2 others (Subsequent Party) (Environment
& Land Case 106 of 2010) [2024] KEELC 4120 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 106 OF 2010**

EC CHERONO, J

MAY 9, 2024

BETWEEN

BENJAMIN BARASA WAFULA APPLICANT

AND

ALEX MWANGELA WALELA 1ST RESPONDENT

JOSEPH MAKHANA EVAN 2ND RESPONDENT

WYCLIFF WANYONY ELAM 3RD RESPONDENT

JOEL KHAEMBA WATIMBINI 4TH RESPONDENT

DICKSON JUMA WALELA 5TH RESPONDENT

JANE NAFULA WALUBENGO 6TH RESPONDENT

HARRIET NABWILE WAWIRE 7TH RESPONDENT

SAMUEL SIMIYU KHAEMBA 8TH RESPONDENT

BEN BARASA WASWA ALIAS BEN SIKOLIA NASWA 9TH RESPONDENT

**VICTOR WANYONYI MURUTU ALIAS WALIOLI ELAM
MURUTU 10TH RESPONDENT**

MOSESS CHETAMBE SIKANGA 11TH RESPONDENT

**ATTORNEY GENERAL FOR HON.MUNYEKENYE SPM WEBUYE LAW
COURTS 12TH RESPONDENT**

MR. WASILWA OF BS ADVOCATES 13TH RESPONDENT

MR. KUNDU OF M/S SITUMA & CO ADVOCATES 14TH RESPONDENT



DANIELI MAELO - INCHARGE REGISTRY SPM COURT AT
 WEBUYE 15TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS FOR OFFICER COMMANDING
 POLICE DIVISION AT WEBUYE 16TH RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 17TH RESPONDENT

ATTORNEY GENERAL FOR THE ASSISTANT CHIEF KHALUMULI SUB-
 LOCATION 18TH RESPONDENT

ATTORNEY GENERAL FOR THE JUDICIARY VIRTUAL LINK INCHARGE
 AT BUNGOMA 19TH RESPONDENT

ATTORNEY GENERAL FOR THE JUDICIARY SERVICE COMMISSION OF
 KENYA 20TH RESPONDENT

ATTORNEY FOR THE CHIEF WEBUYE LOCATION 21ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION FOR HON. DAN WANYAMA
 SITATI MP WEBUYE WEST 22ND RESPONDENT

PARLIAMENTARY SERVICE COMMISSION FOR HON MOSES M
 WETANGULA SPEAKER NATIONAL ASSEMBLY 23RD RESPONDENT

GOVERNOR - BUNGOMA COUNTY 24TH RESPONDENT

CHAIRMAN LAW SOCIETY OF KENYA 25TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS FOR OCPD WEBUYE WEST SUB-
 COUNTY 26TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS FOR OCPD NAIROBI
 CENTRAL 27TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS FOR THE PUBLIC HEALTH
 OFFICER (MR. AMIR) 28TH RESPONDENT

EIGHT PUBLIC HEALTH VIGILANT VISITOR 29TH RESPONDENT

AND

WILLIAM SAMOEI RUTO - PRESIDENT AND CHIEF COMMANDER OF ALL
 ARMED FORCES THE REPUBLIC OF KENYA SUBSEQUENT PARTY

RIGATHI GACHAGUA ALIAS RIGGY G - DEPUTY PRESIDENT OF THE
 REPUBLIC OF KENYA SUBSEQUENT PARTY

CABINET SECRETARY FOR THE MINISTRY OF LANDS SETTLEMENT AND
 URBAN DEVELOPMENT SUBSEQUENT PARTY

RULING

1. What is before me for determination is the application filed dated 29th December, 2023 in which the applicant prays for the following orders;



- a. That it pleases this honourable court to issue declaration orders, declaring the ruling delivered on 19th December, 2023 is null and void because the applicant herein couldn't amend the non-existing plaint of ELCC No. 106 of 2010 by cancelling and underlining in red ink.
- b. That, it pleases this court to dismiss the Application dated 26th May, 2023 because the same was dismissed on 1st September, 2023 by the Senior Principal Magistrate court at Webuye for want of prosecution and never appealed against.
- c. That since the 13th and 19th Respondents have compromised then refused to register Civil Case no. 106 of 2010 to a new Environment and Land Court case number since 2012; it pleases this honourable court to allow the change of the suit track to the Constitutional Petition, so that all court users through Civil Case no. 106 of 2010 can read from the same scripts of a valid Environmental and Land case petition.
- d. That, it pleases this Honourable Court to declare the validity of the changed case track to a constitutional petition instead of civil case no. 106 of 2010 so that the 1st to the 29th respondents herein do not compromise the 19th respondent to mislead the trial judge by misusing the dignity of the innocent 1st to 3rd subsequent parties herein through a non-valid ELCC Case no 106 of 2010.
- e. That, it pleases this honourable court to issue orders under Order 18 Rule 11 of the *Civil Procedure Act*, cap 21 directing the 1st to the 3rd subsequent parties appear on site of the disputed Muchi Registration Diagrams/ Sheets 1,2,3,4,5 and Mihuu Registration/Diagrams/Sheets No. 8,12,13,17 for understanding how the 1st to the 29th respondents herein have misused the President's office to grab, steal and sell ancestral, private, community and government land within Webuye town.
- f. That, it pleases this Honourable Court to issue orders under Order 18, Rule 11 of the *Civil Procedure Act*, Cap 21 directing the 1st to the 3rd subsequent parties appear on site of the disputed Muchi Registration Diagram/Sheet 1 for witnessing how the 1st to the 29th respondents herein have misused the presidents office to grab, steal and sell ancestral, private, community and government land from the applicants unregistered grave land LR No.Ndivisi/Muchi 1234 and LR No.Ndivisi/Muchi 1372 through LR No. Ndivisi/Muchi 2570,2571, 1235 and 2075.
- g. That, it pleases this honourable court to issue orders under Order 18 Rule 11 of the *Civil Procedure Act* Cap 21 directing the 1st to the 3rd subsequent parties appear on site of on site of the disputed Muchi Registration Diagram/Sheet 1 for witnessing how the 1st to the 29th respondents herein have misused the president's office to grab, steal and sell the now deceased Alfayo Wakhalikha Namisiko's Ancestral Private LR No. Ndivisi/Muchi 1237.
- h. That, it pleases this honourable court to issue orders staying the entire response herein, their agents, workers, families and relatives from selling, alienating, transferring and intermeddling with the late Musa Barasa Chen'goli's LR No. Ndivisi/Muchi pending determination of this petition.
- i. That, it pleases this honourable court to issue directions for hearing and determination of this petition by way of viva-voce evidence within 150 days which could stop the 13th and 19th respondents herein from misleading the trial judge through non-existing ELCC No. 106 of 2010.



- j. That, it pleases this honourable court to issue orders for transferring the Webuye Senior Principal ELC Case no. 33 of 2018 back to this court and be consolidated with this petition due to matters filed between same parties, about the same subject matter and same cause of action because the 8th, 12th, 14th and 15th respondents herein have failed to notify all parties to the case since 2018.
- k. That, it pleases this honourable court to issue orders reverting the costs issued on 2nd March, 2022, 26th October, 3rd May 2023 and 19th December, 2023 and pay the same to the petitioner herein within 14 days of the ruling hereof due to the 1st, 4th, 6th, 7th, 13th and 19th respondents compromising to non-existing ELCC 106 OF 2010 then fixed hearing dates ex-parte and filed submissions without serving upon all parties to the case, contrary to practicing directions of 26th October, 2023.
- l. That, it pleases this honourable court to issue orders for costs of this application to the applicant herein.
2. The application is founded on the grounds on its face enumerated from a-s and the supporting affidavit sworn by the applicant-Benjamin Barasa Wafula sworn on 29th December 2023.
3. By way of background, this is a matter which begun by way of plaint dated 26th October, 2010 and registered as High Court of Kenya at Bungoma ELC Suit No.106 of 2010. The applicant herein who was the plaintiff had sued the 1st to 7th respondents as defendants. Upon service of Summons and the plaint, the 1st, 2nd, 3rd and 5th Defendants/Respondents filed a joint statement of defence. The Plaintiff/Applicant herein later sought to amend the plaint and consolidate with CMELC Case No. 285 of 2013. On 27th January, 2020 the trial Judge recused himself from handling this matter and the same was transferred to Kakamega for hearing and determinations where it was registered and given a fresh case number as Kakamega ELC Case No. 40 of 2020.
4. The plaintiff's case was subsequently dismissed for want of prosecution on 2nd March, 2022 but was reinstated on 26th September, 2022. The file was later transferred back to Bungoma after the trial judge was transferred to Busia ELC Court and a hearing date set. When this matter came up for hearing on 3rd May, 2023, the applicant was absent and this case was dismissed for non-attendance and want of prosecution and thereafter the defendants' counter claim set down for hearing. When the matter was called out later in the morning, the plaintiff who was now present complained that he was served with a hearing notice for Bungoma ELC Case No. 106 of 2010 yet the matter was commenced in 2012 after the establishment of the ELC Court. He also argued that he was unable to access the Court's e-filing platform since he had been mapped out in the system at the registry after the e-filing system was lounged by the Judiciary. Upon considering the arguments and submissions by the parties and the issues raised, the court was satisfied with the plaintiff's explanation and set aside the orders dismissing the suit and proceedings at thrown away costs assessed at Kshs.10,000/=
5. On the 23rd May, 2023, the applicant purported to amend his plaint prompting the 1st, 4th, 6th and 7th Respondents to file an application dated 26th May, 2023 in which they sought to have the said amended plaint struck out which after the hearing was allowed with costs in a ruling delivered on 19th December,2023. Thereafter, the applicant filed the current application.
6. The said application has been described as a notice of motion under petition brought under Order 1 Rule 1, Rule 10 (1), (2) and Order 2 Rules (4) (5) of the *Civil Procedure Act*. Upon looking at the provisions under which the said application has been brought and the grounds on the body of the application, I fail to see the nexus. This Honourable Court however is mindful of the provisions of



Sections 1A, 1B, 3A of the Civil Procedure Act Cap 21 as well as Article 159 of the Constitution of Kenya, 2010 on judicial authority given to the courts to do justice without undue regard to procedural technicalities.

7. In the interest of justice and expeditious determination of this suit, this Court will nevertheless consider this application with a caution to the applicant who is fond of filing pleadings unsupported under the law and in a manner that is vexatious and tantamount to an abuse of the court process. In the present application, I note that the grounds on the face of the application have not been spelt out clearly. The court is therefore unable to identify the grounds as framed. The paragraphs which purport to constitute grounds in support of the application are framed so poorly such that they occasion the court a lot of strain and agony in discerning what they intent to bring out in terms of information in support of the application. It takes a lot of judicial time in trying to discern what the applicant really wants.
8. Further, it is unclear how the 8th to the 29th respondents who include H.E Hon. William Samoei Ruto, the president of the Republic of Kenya and H.E Hon. Gigathi Gachagua the Deputy President of the Republic of Kenya came on board and their relation to this case. The cause of action against them is also unclear and the court is further at a loss who and what 'subsequent parties' are since the law does not recognize such. The fact that the applicant sought for orders against the said 'subsequent parties' agonizes the court even more.
9. Nevertheless, I proceed to consider the prayers sought for its worth. In prayer 1 and 2, the applicant is seeking to have the ruling delivered on 19th December, 2023 declared null and void. This ruling was made by this Honourable Court in relation to an application by the 1st, 4th, 6th and 7th Respondents dated 26th May, 2023. According to the applicant, the said application was dismissed by the Senior Principal Magistrate's Court in Webuye. It is trite law that having determined fully what was before it for consideration in that application, this court became *functus officio* regarding the issues raised therein. The Black's Law Dictionary, Tenth Edition defines the term "*functus officio*"

"as having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."
10. In Mombasa Bricks & Tiles Ltd & 5 Others v. Arvind Shah & 7 Others [2018] eKLR, the court discussed the doctrine of *functus officio* and held :-

"I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in Telkom Kenya Ltd v John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file."
11. Therefore, if the applicant was dissatisfied with this Honourable court's ruling issued on 19th December, 2023, the law provides avenues through which an aggrieved party can ventilate his/her right(s) which certainly do not align with the unorthodox technique adopted by the applicant.



12. As for prayer 3, 5,6 and 7, I have mentioned elsewhere in this ruling that it is unclear how the 8th to the 29th respondents and the so called ‘subsequent parties’ were brought on board in this matter. The applicant introduced the 8th to 29th respondents and what he refers to as subsequent parties to the suit without seeking leave of the court to join them as parties to the suit which is un-procedural. Order 1 rule 10(4) of the *Civil Procedure Rules* provide for the manner of joinder of persons to a suit. The actions of the applicant amounted to ushering of parties into a suit through the backdoor. They were improperly joined as parties to this suit and orders against them is untenable. It is not even clear whether they are aware of this case against them.
13. I have in another ruling in this matter cautioned the applicant against adding and joining judicial officers or other officers from the National and County Government without any averment of matters connecting them to any wrong doing in a suit is tantamount to embarrass and bring into disrepute the offices and dignity of those officers and the entire administration of justice which this Honourable Court will not countenance.
14. On prayer 4 and 11, the applicant alleges that the issue of the case track number ELC Case NO. 106 is non-existent. By way of background, this suit was commenced as Bungoma High Court Civil Case No. 106 of 2010 which case number was maintained by the Environment and land registry after the Court was established under the 2010 *Constitution*. When Justice B. Olao recused himself from handling this matter and transferred the same to Kakamega Environment and Land Court for hearing and determination, the same was issued with the case number Kakamega ELC Case no. 14 of 2020. When Hon. Justice B.Olao transferred from Bungoma to ELC Court Busia, the file was re-transferred back to ELC Court Bungoma and it retained its original case number i.e. Bungoma ELC Case No. 106 of 2010. It is therefore unorthodox for the applicant to demand mid-way that the matter be registered as a petition which is a completely different track of pleadings.
15. With regards to prayer 8, the applicant sought for an injunctive order restraining the Respondents from alienating Land parcel No. Ndivisi/Muchi/2366. As can be noted, this court has found elsewhere in this Ruling that the 8th-29th Respondents were improperly joined and therefore the prayer sought against the Respondents, some of who have not been properly joined cannot lie and must therefore fail. The applicant in his prayer which for the purposes of this ruling I shall reproduce verbatim writes;

“That, it pleases this honourable court to issue orders staying the entire response herein, their agents, workers, families and relatives from selling, alienating, transferring and intermeddling with the late Musa Barasa Chen’goli’s LR No. Ndivisi/Muchi pending determination of this petition.”
16. Looking at the prayer as framed, the applicant is seeking for what he refers to as ‘stay’. In simple terms and in my understanding, stay is the act of stopping or arresting or suspending a judicial proceeding, by an order of a court. With reference to the applicant’s prayer, it is unclear what judicial proceedings the applicant wants arrested. I will refer to my earlier comments on poor drafting which cannot be saved by the provisions of Article 159(2)(d) of the *Constitution of Kenya* and the oxygen principles as set out in the *Civil Procedure Act*. The court cannot reconstruct pleadings on behalf of a party and orders cannot issue in vain.
17. The applicant also prays for an order directing that this matter be heard by way of viva voce evidence and the same be done within 150 days. However, no justification has been given for the order sought. Directions on how a matter ought to proceed are taken at the pre-trial stage as governed by Order 11 of the *Civil Procedure Rules*. A perusal of the court record reveals that this is a matter that has gone through pre-trial directions and the matter fixed for hearing on various dates. As a matter of fact, this



case has not proceeded as a result of the parties filing various applications and more so, the applicant who sought to amend his pleadings. This being an adversarial system, the plaintiff in this case has the responsibility of taking such steps to prosecute his own case.

18. The applicant further sought to have ELC Case no. 33 of 2018 filed in the Senior Principal Magistrates Court at Webuye transferred to this court and consolidated with this matter. However, no justification for the said prayer has been laid down. The pleadings in that case have not been attached to this application to allow this Honourable Court consider the same in determining the prayer sought. As earlier mentioned, this court cannot issue an unsubstantiated order since the law does not operate in a vacuum.
19. On the issue of costs, Section 27 of the [Civil Procedure Act](#) grants the Court discretion to either award or not to award costs of a suit. Ordinarily, costs do follow the event and is normally awarded to the successful litigant.
20. The entirety of my analysis is that the application dated 29th December, 2023 is not only fundamentally flawed but also lacks viability, rendering it untenable. Consequently, it is dismissed with costs to the respondents.
21. It is so ordered

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 09TH DAY OF MAY, 2024.

HON.E.C CHERONO

JUDGE

In the presence of:

1. Plaintiff/applicant-present
2. Mr. Sabwami H/B Wasilwa for the 1st, 2nd, 3rd, 4th, 5th & 6th defendants
3. Bett C/A

