



**Nakhulo v Amwayi & another (Environmental and Land Originating Summons
E015 of 2022) [2024] KEELC 6501 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2022
BN OLAO, J
OCTOBER 7, 2024**

BETWEEN

FREDRICK WAMALWA NAKHULO PLAINTIFF

AND

DESTAR NAMUYONGA AMWAYI 1ST DEFENDANT

**EUNICE MUGANDA (SUED AS PERSONAL REP. OF IBRAHIM
OCHIENO) 2ND DEFENDANT**

RULING

1. Fredrick Wamalwa Nakhulo (the Plaintiff herein) approached this Court by way of an Originating Summons dated 27th May 2022. He impleaded Destar Namuyonga Amwayi and Eunice Muganda (the 1st and 2nd Defendants respectively) whom he sued as the personal representatives of the Estate of Ibrahim Ochieno alias Ibrahim Ochieno Khasimba (the deceased) pursuant to a Special Limited Grant of Letters of Administration issued to the Defendants vide Busia Chief Magistrates Court Miscellaneous Succession Cause NO 171 of 2022. The Plaintiff sought the main remedy that he had acquired by way of adverse possession a portion measuring 2.11 hectares out of the land parcel No Bunyala Mudembi/1738 (the suit land) then registered in the name of the deceased.
2. The defendants did not enter appearance nor file any response to the Originating Summons. The suit therefore came up for hearing ex-parte on 13th March 2023. Vide a judgment delivered on 20th April 2023, this court found in favour of the Plaintiff and issued various orders to facilitate the registration of the 2.11 hectares of the suit land in the name of the plaintiff while the remainder of 1.9 hectares was to be registered in the name of the defendants. No appeal has been filed against the Judgment.
3. Edwin Ojiambo Ochieno (the Applicant) has now moved to this court vide his Notice of Motion dated 29th November 2023 and premised under the provisions of Sections 1A, 3A and 80 of the Civil Procedure Act and Orders 22, 45 and 51 of the Civil Procedure Rules. He seeks the following orders:



- a. Spent
 - b. The Applicant herein be enjoined to this suit as an Interested Party.
 - c. Spent.
 - d. That the Judgement of this Court delivered on 20th April 2023 be and is hereby reviewed and set aside.
 - e. That the Interested party be and is hereby granted leave to file and serve a replying affidavit, witness statement and list of documents within 14 days from the date of grant of leave
 - f. That costs of this application be provided for.
4. The application is premised on the grounds set out therein and supported by the Interested Party's affidavit also dated 27th September, 29th November 2023.
 5. The gist of the application is that the suit land is the property of the deceased whose personal representative is the Applicant. That the defendants have no interest in the suit land nor do they have any capacity to be sued or to sue on behalf of the deceased's Estate. The Applicant obtained a Grant of Letters of Administration as personal representative of the deceased's Estate vide Busia Chief Magistrate's Court Succession Cause NO E534 of 2021 which was confirmed on 30th November 2022. That when the Applicant presented the said Grant for registration to enable him share out the suit land in terms of the Confirmed Grant, it transpired that the Defendants had already been registered as the Administrators to the said Estate and the Plaintiff had sued them to obtain the suit land by way of adverse possession yet they are strangers to that Estate.
 6. Upon investigations, the Applicant discovered that the plaintiff had filed Busia Chief Magistrate's Court Misc. Application NO 171 of 2022 seeking a special limited Grant to issue to the defendants alleging that the deceased had died without a widow, parent, brother, sister or child which averment was false. It was also alleged in that application that the deceased had died on 11th September 2016 which was not true as the deceased had died on 2nd December 2012. The case therefore proceeded without the participation of the defendants who are not known to the family of the deceased and have absolutely no interest in the suit land. Judgment was delivered in favour of the plaintiff awarding him a portion of the suit land measuring 2.11 hectares after the deceased's title was declared to have been extinguished by operation of the law.
 7. The Applicant was not involved in the suit and has been condemned unheard yet he is the personal representative of the deceased. The Applicant adds further that he is aware that the plaintiff had dealings with one Ochola Onani Olwali the registered proprietor of the land parcel No Bunyala/Mudembi/1821 which is adjacent to the suit land. When the said Ochola Onani Olwali passed on, the plaintiff was listed as a beneficiary to his Estate in Busia High Court Succession Cause NO 146 of 2016. Therefore, the plaintiff only had a claim over the land parcel NO Bunyala/Mudembi/1821 and not the suit land. The suit land is owned by the following:
 - a. Edwin Ojiambo Ochieno - 2.1 Hectares.
 - b. Marisela Sikuku Lubworio - 0.1 Hectare.
 - c. Consolata Achieng' Ochieng' - 0.1 Hectare.
 - d. Bonfas Wandera Ochieno - 0.4 Hectare.
 - e. Benson Bwire - 0.4 Hectare.



f. Josephat Onyango Ochieno - 0.4 Hectare.

g. Elvis Juma Ochieno - 0.4 Hectare.

Unless this application is granted, the family of the deceased will be disinherited.

8. The following documents have been annexed to the supporting affidavit.

1. Copy of the Grant of Letters of Administration issued to the Applicant in respect to the Estate of the deceased on 26th November 2021 in Busia Chief Magistrate's Court Succession Cause NO E534 of 2021.
2. Copy of the Certificate of Search issued on 25th September 2021 in respect to the land parcel NO Bunyala/Mudembi/1738.
3. Copy of the confirmed Grant issued to the Applicant on 30th November 2022 in respect to the Estate of the deceased in Busia Chief Magistrate's Court Succession Cause NO E534 of 2021.
4. Copy of the Certificate of Official Search issued on 11th January 2023 in respect to the land parcel NO Bunyala/Mudembi/1738.
5. Copy of a letter dated 13th October 2021 from the Chief Bunyala Location and addressed to the Deputy Registrar Busia High Court identifying the family of the deceased.
6. Petition for Limited Grant issued to the defendants in Busia Chief Magistrate's Court Succession Cause NO 171 of 2022.
7. Copy of Certificate of death showing that the deceased died on 2nd December 2012.
8. Copy of Limited Grant of Letters of Administration Ad Litem issued to the Defendants on 19th May 2022 in respect to the Estate of the deceased in Busia Chief Magistrate's Court Succession Cause NO 171 of 2022.
9. Copy of this court's judgment delivered on 20th April 2023.

9. In opposing the application, the plaintiff filed a replying affidavit and grounds of opposition both dated 17th January 2024.

10. In his grounds of opposition, the plaintiff states that there is no error, mistake or discovery of new evidence or any just reasonable excuse to demonstrate the need for review or setting aside of the proceedings or decree herein. That there is no evidence to show that during his life time, the deceased even dislodged the plaintiff from the portion of the suit land measuring 2.11 Hectares or thereabout. That the Interested Party and the Senior Chief Olanji Mudonga fraudulently misrepresented to the subordinate Court Busia in Chief Magistrate's Court Succession Cause NO E534 of 2021 that the suit land was free property of the deceased yet the same was encumbered by the plaintiff's adverse possession. That the subordinate court's orders were made in excess of jurisdiction as it had no powers to distribute property whose value exceeded Kshs.40 million. That the Interested Party's application is mischievous and should be dismissed with costs.

11. In his replying affidavit, the plaintiff has deposed, inter alia, that his claim and which he placed before the court for its determination was solely whether there was evidence that he had been possession of any part of the suit land to the exclusion of the deceased for a period of more than 12 years. That claim was not controverted and from the Certificate of Official Search to the suit land, the Applicant could as far back as 11th January 2023 known that the plaintiff had registered an interest on the said land. Further, that the defendants herein had been lawfully issued with a Limited Grant of Letters of



Administration to defend the plaintiff's suit and the delivery of this judgment on 20th April 2023 was followed by an entry on the register on 6th June 2023 after this court found as a fact that the plaintiff had proved his case in adverse possession. That on 15th January 2024, the Applicant arbitrarily removed from the register to the suit land a restriction that had been placed on the suit land by the plaintiff yet he knew that the plaintiff was in exclusive possession of part of the said land.

12. The plaintiff depones further that the Applicant and the Senior Chief were aware that the plaintiff had assumed possession of the suit land yet they conspired to defraud the plaintiff of the same. That part of the fraud included writing a letter dated 13th October 2021 addressed to the Deputy Registrar and that the value of the suit land including the developments on the portion thereof in possession of the plaintiff far exceeded the sum of Kshs.50,000,000 and so the Magistrate had no jurisdiction to hear and determine Busia Chief Magistrate's Court Succession Cause NO E534 of 2021. The orders issued by the Magistrate on 30th April 2022 confirming the said Grant were in excess of jurisdiction and therefore are null and void. That since 2nd October 1985, the plaintiff has continuously, openly and as of right possessed and developed the portion of the suit land a fact well known to the Applicant and therefore as at the time of the demise of the deceased in 2015, he was holding the title to the suit land in trust for the plaintiff.

13. Annexed to the replying affidavit are the following documents:

1. Certificate of Official Search for the land parcel NO Bunyala/Mudembi/1738.
2. Affidavit of service of the judgment upon the defendants by way of WhatsApp.
3. Photographic images of the suit land.
4. Drawings by land surveyor delineating boundaries of the portion occupied by the plaintiff.

When the application was placed before me for directions, I directed that it be canvassed by way of written submissions.

14. Those submissions were subsequently filed by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the Applicant and by the plaintiff who is an Advocate of this Court and acting in person.

15. I have considered the application, the rival affidavits and annexures thereto, the grounds of opposition and the submissions.

16. When the application was placed before Cheron J at Bungoma ELC on 11th December 2023, the judge did not certify it as urgent nor grant any ex parte orders. Some of the prayers sought have now already been overtaken by events. I consider the following to be the prayers to be determined in this ruling, namely;

1. Whether the Applicant should be enjoined in these proceedings as an Interested Party.
2. Whether the judgment delivered on 20th April 2023 should be reviewed or set aside.
3. Whether the Applicant once enjoined as an Interested Party, should be granted leave to file and serve his replying affidavit to the Originating Summons together with witnesses statements and documents.
4. Who should bear the costs.

I shall consider those issues in that sequence.



1. Whether the Applicant Should be Enjoined as an Interested Party:

17. An Interested Party is defined in Black's Law Dictionary 10th Edition as:

“A party who has a recognizable stake (and therefore standing) in a matter.”

The same Dictionary also defines an indispensable party as:

“A party who, having interests that would inevitably be affected by a court's judgment, must be included in the case.”

The Applicant has of course approached this court seeking to be enjoined as an Interested Party but not as an indispensable party. But as is clear from the above definitions the common denominator is the interest or stake of the party in the subject matter of the litigation in which such party seeks to be enjoined.

18. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:

“The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit be added.”
Emphasis mine.

In the case of *Trusted Society Of Human Rights Alliance -v- Mumo Matemu & Others Supreme Court Petition No 12 of 2013*, the supreme court described as Interested Party in the following terms:

“Consequently, an Interested Party is one who has a stake in the proceedings, though he or she was not a party to the Cause ab initio. He or she is one who will be effected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”

Guided by the above, the Applicant's interest in the suit land which is the subject of these proceedings is that whereas the plaintiff obtained a judgment against the defendants who were sued allegedly as the legal representatives of the Estate of the deceased, it is the Applicant who was infact the legal representative of that Estate having obtained a Grant of Letters of Administration in respect to that Estate in Busia Chief Magistrate's Court Succession Cause NO E534 of 2021. That infact the Limited Grant Ad Litem issued to the defendants in Busia Chief Magistrates Court Succession Cause NO 171 of 2022 on 19th May 2022 was wrongly issued since the defendants are not known to the family of the deceased and therefore have no interest in the suit land. The true beneficiaries of the Estate of the deceased which comprises the suit land have been condemned un-heard while the defendants who were sued as the legal representatives of that Estate did not attend the trial.



19. In his submissions, the plaintiff has gone to great lengths to demonstrate that he is truly entitled to a portion of the suit land by way of adverse possession. In paragraph 21 of his affidavit opposing this application, he has deposed thus:

" 21: That I have thus continuously since the 2nd October 1985 when the late Ibrahim Ochieno was registered as the proprietor of the said property continuously openly as of right and exclusively possessed, developed, used and quietly enjoyed and exercised all rights and privileges of an owner of the large part of the said property title number Bunyala/Mudembi/1738 facts that have not been contested by the Interested Party by any probable proof."

However, the Applicant who seeks to be enjoined in these proceedings as an Interested Party was not sued ab initio. He could therefore not have been in any position to contest the Applicant's claim to the suit land. That claim was directed against the defendants who only had a Limited Grant Ad Litem issued to them on 19th May 2022 "limited to the purposes of filing prosecuting and defending suit in respect of land parcel number Bunyala/Mudembi/1738". The Applicant had, on the other hand, obtained Grant of Letters of Administration with respect to the Estate of the deceased on 26th November 2021 and which was subsequently confirmed on 30th November 2022 and the suit land was distributed to the beneficiaries to the Estate which include the Applicant. The Applicant's share of the suit land, incidentally, is 2.1 Hectares while in the judgment sought to be set aside and reviewed, the plaintiff was adjudged to be entitled to a portion of the suit land measuring 2.11 Hectares. Once of the issues which will no doubt come up for consideration by the trial court should this judgment be set aside, will obviously be which of the two Grants will carry the day. This court does not wish to preempt that discussion and will leave it at that.

20. What is clear from all the above is that the Applicant has, in my view, demonstrated that he has an interest in the suit land and, therefore, a state in these proceedings. The prayer to enjoin him as an Interest Party is well merited. I allow it.

2. Whether the Judgment Should be Reviewed/set Aside

21. The power to review a judgment or order is set out in Section 80 of the [Civil Procedure Act](#). The procedure is provided for in Order 45 Rule 1 of the Civil Procedure Rules which reads:

"Any person considering himself aggrieved –

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

It is clear from the above that a party seeking an order of review of a judgment or order must:

1. Show that there has been discovery of new and important matter or evidence.
2. Demonstrate that there is some mistake or error apparent on the face of the record.



3. Show that there is other sufficient reason.
4. Move to the court without unreasonable delay.

The Applicant did not participate in the trial which resulted in the judgment sought to be set aside. He was therefore not available to present before the court any evidence or new and important matter during the trial. He also cannot benefit from the ground of mistake or error apparent on the face of the record because this court only relied on the evidence placed before it.

22. With regard to the ground of any other sufficient reason, I believe this is to be exercised on a case to case basis and is left to the discretion of the court. It need not be analogous to the other grounds otherwise that would restrict the court's discretion *Shanzu Investments Ltd -v- Commissioner For Lands C.a. Civil Appeal No 100 of 1993*. The fact that the Applicant has availed a Confirmed Grant naming him among the beneficiaries to the Estate of the deceased is, prima facie, sufficient reason to warrant a review of the judgment herein by setting it aside so that he and other beneficiaries can be heard by this court before a final decision is made.
23. On the ground of unreasonable delay, the Applicant was not a party to the proceedings and therefore could not have been aware of the judgment when it was delivered. All he was able to discover was that the defendants had applied to be Administrators to the Estate of the deceased by filing Succession Cause NO 171 of 2022 in the Chief Magistrate's Court as averred in paragraph 9 of his supporting affidavit. It is not however shown that he became aware of the delivery of the judgment on the day it was delivered. On the other hand, the plaintiff has averred in paragraph 13 of his grounds of opposition "that on 15th January 2024, the Interested Party procured the arbitrary removal by the Land Registrar from the register of land title number Bunyala/Mudembi/1738 noting the outcome of the said judgment." Without any direct evidence as to when exactly the Applicant became aware of the judgment, this court is un-able to make any finding of unreasonable delay. Any doubt therefore must be resolved in favour of the Applicant bearing in mind the cardinal principle under Article 50 (1) of *the Constitution* which protects the right to be heard. I am satisfied therefore that there is sufficient reason to review the judgment herein by setting it aside and granting the Applicant the opportunity to defend the plaintiff's claim to the suit land by way of adverse possession.

3. Whether the Applicant Should be Granted Leave to File a Replying Affidavit to the Originating Summons:

24. Having enjoined the Applicant herein as an Interested Party, and in view of his averment that it is him, and not the Defendants, who is the legitimate legal representative to the Estate of the deceased, it is obvious that he must be allowed to file a replying affidavit together with supporting documents and statements in response to the Originating Summons. That will enable this court to "effectually and completely to adjudicate upon and settle all questions involved in the suit" as provided under Order 1 Rule 10 (2) of the Civil Procedure Rules cited above.
25. And with regard to costs, I order that they shall be in the Cause.
26. Ultimately therefore and having considered the Notice of Motion dated November 29, 2023, I am persuaded that it is merited. I allow it and make the following orders:
 1. The judgment delivered herein on April 20, 2023 is hereby set aside.
 2. The Applicant is enjoined herein as an Interested Party.



3. The Applicant shall within 14 days of the delivery of this ruling file and serve his reply to the Originating Summons as well as statements of his witnesses and any documents upon the plaintiff and defendants.
4. The Plaintiff and defendants shall within 14 days of service upon them of the Interested Party's reply, witness statements and documents be at liberty to file and serve any supplementary affidavits and other documents which they may wish to file.
5. The matter shall thereafter be listed before the Deputy Registrar for pre-trial on 4th November 2024 who shall then list the suit for hearing after confirming compliance.
6. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 7TH DAY OF OCTOBER 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2024

