



**Wafula v Nasambu & another (Environment & Land Case
107 of 2012) [2023] KEELC 18696 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 107 OF 2012**

EC CHERONO, J

JULY 6, 2023

BETWEEN

CLEOPHAS WAFULA PLAINTIFF

AND

ASMIN NASAMBU 1ST DEFENDANT

DISTRICT LAND REGISTRAR BUNGOMA 2ND DEFENDANT

RULING

- 1 The plaintiff/applicant moved this Honourable Court vide a Notice of Motion application under certificate of Urgency dated 20th April 2023 seeking the following orders;
 1. (Spent).
 2. That the 1st Defendant/respondent herein be summoned to Court to show cause why they should not be committed to civil jail for blatantly failing to comply with the judgment in Civill suit Number 1109 of 1993 where he was allocated land parcel No. E.bukusu/w.sangalo/891 while the plaintiff/applicant was to remain all land known as E.bukusu/w.sangalo/890
 3. That the 1st defendant/respondent be compelled to surrender the excess 2 acres he is in forceful occupation that forms part of E.bukusu/w.sangalo/890 and the resultant subdivisions from the title which include E.bukusu/w.sangalo/2606
 4. The Costs of this application be borne by the 1st and 2nd defendants/respondents
- 3 The application is premised on the supporting affidavit and a further affidavit of the Applicant sworn on 20/04/2023 and 28/05/2023 respectively. The application is also supported by grounds apparent on the face of the said application.



- 4 The 1st respondent filed a Replying affidavit and also a further replying affidavit on 15/05/2023 and 18/05/2023 respectively. When the said application came up for directions on 15/05/2023, the parties agreed to dispose of the same by way of written submissions.
- 5 According to the applicant, the trial court delivered judgment in Bungoma SPMCC No. 1109 of 1998 on 24/04/1998 whereby the 1st respondent was allocated land parcel No. E.bukusu/w.sangalo/891 while he was ordered to remain with land parcel No. E.bukusu/w.sangalo/890. The applicant further deposed that in a Surveyors report dated 8th may 2017, land parcel No. E.bukusu/w.sangalo/891 has an acreage of 1.6Ha while land parcel No. E.bukusu/w.sangalo/890 has an acreage of 2.4Ha.
- 6 The applicant further stated that the 1st respondent has encroached and removed the boundaries forming part of land known as E.bukusu/w.sangalo/890 and interfered with the acreage as indicated in the Surveyor's report mostly affecting land parcel No. E.bukusu/w.sangalo/2606.
- 7 In his further affidavit in support of the said application sworn by one Maurice Wekesa Tunisio and filed on 29/5/2023, the applicant stated that they instructed their advocate on 20/4/2023 to institute contempt proceedings against the 1st defendant/respondent for blatant disregard of the rule of law and using powers to derail the execution process. The applicant further stated that the 1st defendant/respondent is in occupation of both parcels of land being L.R No. E.bukusu/w.sangalo/890 And E.bukusu/w.sangalo/891 despite numerous court decisions touching the parcels. He deposed that the court ordered a survey to be done on the 9th March 2017 to determine the correct acreage and boundaries.
- 8 At paragraph 9 of the said further affidavit, the applicant deposed as follows;
"9. That I am informed by my Advocates that ELC Case 107 of 2012 was termed as 'Resjudicata' by the court and the same was directed to follow the decision made in Civil Suit Number 1109 of 1993."
- 9 The respondent filed a replying affidavit and a further replying affidavit on 15/5/2023 and 9/6/2023 respectively. At paragraph 13 of the said replying affidavit, the respondent deposed as follows;
"13. That the Court did order in ELC NO. 107/2012, that the case was Resjudicata including the order of 9th March, 2017 plus all the Surveyors' efforts and there was no Appeal against the ruling of Boaz N. Olao Judge made on the 27th May 2021."
- 10 In his replying affidavit filed in court on 15/05/2023, the Respondent annexed a copy of a Ruling by Hon. Mr Justice Boaz N. Olao delivered on 27th May 2021 in which this suit was struck out with costs.
- 11 Where a suit is struck out, there is no foundation upon which an application can be founded. A suit that is struck out is as dead as a dodo. The applicant cannot purport to revive this suit which has been struck out by filing the present application. In my view, the present application is defective, a non-starter and an abuse of the court process.
- 12 For all the reasons given hereinabove, I find the Notice of Motion application dated 20/04/2023 lacking merit and the same is hereby dismissed with costs to the Respondent.

READ, SIGNED AND DELIVERED IN THE OPEN COURT AT BUNGOMA THIS 6TH JULY, 2023

HON. E.C. CHERONO

ELC JUDGE

In the presence of;

Mr Oira H/B for Angima



Respondent/Advocate-absent

Lusweti C/A

