



**Kenya African National Traders & Farmers Union (Suing Through its Office Bearers Kimani Wanyoike - Chairman), Peter Mugeka Maina - Secretary General and Ibrahim Wanene -Treasurer) v Kilonzo & 8 others (Environment & Land Case 18 of 2017) [2023] KEELC 20701 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20701 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 18 OF 2017**

**BM EBOSO, J  
OCTOBER 2, 2023**

**BETWEEN**

**KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION (SUING THROUGH ITS OFFICE BEARERS KIMANI WANYOIKE - CHAIRMAN), PETER MUGEKA MAINA - SECRETARY GENERAL AND IBRAHIM WANENE -TREASURER) ..... PLAINTIFF**

**AND**

**ZEPHANIA KILUNGU KILONZO ..... 1<sup>ST</sup> DEFENDANT  
JOPHICK NJUGUNA KIBUNJA ..... 2<sup>ND</sup> DEFENDANT  
MOSES NGOTHO MWATHA ..... 3<sup>RD</sup> DEFENDANT  
BETH WANGUI KANJA ..... 4<sup>TH</sup> DEFENDANT  
KWANZA GROUP LIMITED ..... 5<sup>TH</sup> DEFENDANT  
JOSEPH MWAURA KANYUGI ..... 6<sup>TH</sup> DEFENDANT  
MICHAEL GICHUHI NGARI ..... 7<sup>TH</sup> DEFENDANT  
BENARD WANJOHI MURIUKI ..... 8<sup>TH</sup> DEFENDANT  
HARMAR VENTURES COMPANY LIMITED ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

1. This suit was initiated on 25/10/2012 through an originating summons dated 25/10/2012. On 5/8/2016 the plaintiff filed an amended originating summons dated 4/8/2016 through which it sought adverse possession orders against the defendants. On 4/10/2023, the plaintiff brought a notice of



motion dated 3/10/2022 seeking orders of revival and substitution against the 1st defendant. The plaintiff contended that the 1st defendant had died on 16/5/2018. When the application came up for hearing, there was no opposition against it. Consequently, the application was allowed. By dint of the revival and substitution order, David Muthama Kilonzo was substituted in place of Zephania Kihingu Kilonzo.

2. Subsequent to that, on or about 19/1/2023, Mr David Muthama Kilonzo brought a notice of motion dated 14/12/2022 seeking an order setting aside the order of revival and substitution. The key ground on which the application is anchored is that the applicant was never served with the application and was therefore not aware that it was coming up for hearing.
3. The plaintiff opposed the application through an affidavit dated 13/2/2023 sworn by Ibrahim Wanene. The replying affidavit addressed various issues but did not address the issue of service of the application dated 3/10/2022 and service of a hearing notice relating to the said application on David Muthama Kilonzo.
4. I have considered the said application. The right to a fair hearing is given sacred importance in Kenya's civil legal system. The right is underpinned by the requirements of Article 50(1) of *the Constitution* which provides as follows:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

5. Our courts have been categorical that where *ex-parte* orders are irregularly procured without service of court process on the opposing party, those orders ought to be set aside. Indeed the Court of Appeal emphasized this principle in *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* (2016) eKLR in the following words:-

“The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

6. In the present application, it does emerge that the plaintiff procured revival and substitution orders against the applicant without service of the application on the applicant. The plaintiff did not disclose to the court that the key respondent in the application had not been served and was therefore not aware of the application and the proceedings of the day.
7. In the circumstances, the orders of revival and substitution are set aside. The notice of motion dated 3/10/2020 will be heard *inter partes* on a date to be set by the court. Mr David Muthama Kilonzo will have the right to respond to the application. Costs of the application dated December 14, 2022 shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF OCTOBER 2023**

**B M EBOSO**

**JUDGE**

In the presence of: -

Ms Chepkurui for the plaintiff

Ms Mwara for the 1st defendant



Ms Gitau for the 2nd defendant

Court Assistant: Osodo/Hinga

