



Munyekenye & another v Apopo & 4 others (Environment & Land Case E006 of 2023) [2023] KEELC 20642 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E006 OF 2023
BN OLAO, J
OCTOBER 11, 2023**

BETWEEN

SCOLASTICA MUNYEKENYE 1ST APPLICANT

PASCHAL APOPO 2ND APPLICANT

AND

CYRINE BENJADID APOPO 1ST RESPONDENT

OCTAVIAN AUSTINE APOPO 2ND RESPONDENT

DEOGRACIOUS APOPO 3RD RESPONDENT

EMMANUEL WANDERA 4TH RESPONDENT

WINFRED AKUMU MUJEMA 5TH RESPONDENT

RULING

1. What calls for my determination is the Notice of Motion dated 27th February 2023 which is premised under the provisions of articles 50(1) and 159(2) of the [Constitution](#), Sections 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#) and Order 42 Rules 5 and 6 of the [Civil Procedure Rules](#).
2. By that application, the Applicants' Scolastica Munyekenye and Paschal Apopo seek the following orders:
 1. Spent
 2. Spent
 3. That pending hearing and determination of this suit, the orders in (2) above be confirmed.



4. That in any event, this Honourable Court be pleased to stay proceedings in Busia CMC ELC Case No E121 of 2022 and the intended visit to curve out a portion of land from LR No Samia/Luchululo-Bukhulungu/150 (now 2411 and 149) scheduled for 2nd March 2023.
5. That this Honourable Court do issue any and all orders it deems fit to grant to safe guard the Applicants' interest.
3. The application is premised on the grounds set out therein and is supported by the affidavit of Paschal Apopo the 2nd Applicant.
4. The crux of the application, as I understand it, is that the Applicants have an interest over a portion of land measuring 7 acres out of the land parcel No Samia/Luchululo-bukhulungu/150 (now 2411 and 149) and have moved this Court by the Originating Summons dated 27th February 2023 seeking the main remedy that they have obtained the said 7 acres by way of adverse possession.
5. Meanwhile, there is pending in the subordinate Court Busia CMC ELC Case No 121 of 2022 involving the same subject matter and parties. An intended visit to the suit land on 2nd March 2023 was stayed by this Court on 1st March 2023.
6. When the application was placed before me on 1st March 2023, I granted prayer No 2 which was a stay of proceedings in Busia CMC ELC Case No 121 of 2022 pending the hearing of the application inter-partes. I also directed that the Respondents be served with the application and submissions within 7 days after which they would have 14 days to respond.
7. The matter was listed for mention on 23rd March 2023 to confirm compliance but on that day, it turned out that the 5th Respondent had not been served. Meanwhile, this Court called for Busia CMC ELC Case No 121 of 2022 which, as at 10th May 2023, was reported missing and could not be traced. It was not until 2nd October 2023 that the file together with Busia CMC Civil Case No 190 of 2016 were traced. Upon perusal of Busia CMC Civil Case No 190 of 2016, it was discovered that the same had in fact been dismissed on 18th May 2021 by Hon. L. Ambasi Chief Magistrate for want of prosecution.
8. The application is opposed and Cyrine Benjadid Apopo the 1st Respondent with the authority of the 2nd to 4th Respondent has filed a replying affidavit dated 16th March 2023. He has deposed therein, *inter alia*, that he and the 2nd to 4th Respondents are the plaintiff in Busia CMC Civil Case No 121 of 2022 in which they seek orders to restrain the Applicants from burying the remains of one Maurice Munyenywe on the land parcel Samia/Luchululo/Bukhulungu/2411 previously 150. That the said Maurice Munyenywe was husband to 1st Applicant and father to the 2nd Applicant. However, the Applicants went ahead and buried the deceased on 1st October 2022 on the land in dispute and so the substantive prayer in that suit has been over-taken by events. When that suit came up for hearing and that prayer having been over-taken by events, the Court ordered, the Land Registrar to visit the suit land and determine whether the deceased was buried on parcel No Samia/Luchululo-Bukhulungu/149 or 2411 so as to give directions on the suit. A report was made by the Land Registrar confirming that the deceased was buried within the Respondents' parcel of land. From the foregoing there is really nothing for this Court to stay.
9. Annexed to the replying affidavit are the following documents:
 1. Certificate of official search in respect to the land parcel No Samia/Luchululo-Bukhulungu/214.
 2. Plaint in Busia CMC ELC Case No 121 of 2022.



3. Letter dated 25th September 2022 addressed to the Senior Resident Magistrate Busia by the District Officer Funyula Division with respect to Eviction order issued for parcel No Samia/Luchululo-Bukhulungu/150.
 4. Proceedings by the Land Registrar Busia Mr Tom M. Chepkwesi held on 17th March 2015 over the boundary dispute involving parcel No Samia/Luchululo-Bukhulungu/150 or 149.
 5. Plaint in Busia CMC Civil Case No 190 of 2016.
 6. Report of the Land Registrar Busia Mr Nicholas A. Obiero dated 1st November 2022 arising from orders issued in Busia CMC Civil Case No 121 of 2022.
 7. Report of the County Surveyor Busia Mr Kennedy Masibo dated 1st November 2022 arising from orders issued in Busia CMC Civil Cases No 121 of 2022.
 8. Replying affidavit by Scholastica Munyenywe filed in Busia CMC Civil Case No 121 of 2022.
10. The application has been canvassed by way of written submissions as directed. These have been filed both by Mr Okutta instructed by the firm of Ouma-Okutta & Associates Advocates for the Applicants and one Mr F. Omondi instructed by the firm of Omondi & Company Advocates for the 1st to 4th Respondents. The 5th Respondent did not participate in these proceedings.
 11. I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.
 12. In Busia CMC ELC Case No 121 of 2022 which has been availed for my perusal and the plaint also annexed to the Respondents replying affidavit, it is clear that the only remedies sought by the Respondents herein and who are the plaintiffs in that suit against the Applicant herein as defendant is set out in paragraph 8(a) to (c) as follows:
 - a. A permanent injunction to restrain the defendants whether by themselves, their agents, workers and / or servants from burying the remain of their relative Maurice Munyenywe (deceased) on LR No Samia/Luchululo-Bukhulungu/2411 and or otherwise interfering with the plaintiffs occupation and use of Samia/Luchululo-Bukhulungu/2411.
 - b. Costs.
 - c. Any other or further relief that this Honourable Court may deem fit and just to grant.

The 1st Respondent has confirmed that the deceased was infact buried on parcel No Samia/Luchululo-Bukhulungu/2411 notwithstanding the fact that a restraining order had been issued in Busia CMC ELC Case No 121 of 2022. There was no supplementary affidavit filed by the Applicants denying that averment. Basically therefrom, prayer No 8(a) of the plaint in Busia CMC ELC Case No 121 of 2022 has been overtaken by events. It is not clear if that plaint has subsequently been amended.
 13. What is clear however is that in Busia CMC ELC Case No 121 of 2022, the Applicants herein and who are defendants in that case together with one Eunice Julient Lavenda Achieno have filed a defence and counter-claim. In their counter claim the Applicants as 1st and 2nd defendants, seek an order inter alia, that the land parcel No Samia/Luchululo-Bukhulungu/2411 is ancestral land which they have acquired by way of a customary trust and therefore the Respondents hold it in trust. That the Respondents' registration as proprietors of the suit land is not absolute but is subject to the Applicant's overriding interest therein.



14. I have looked at the proceedings in Busia CMC ELC Case No 121 of 2022 and particularly the ruling by Hon. P. Olengo delivered on 2nd December 2022. It is confirmed therein that the remains of Maurice Munyenye have indeed been buried on the suit land although an order of temporary injunction has also been issued against the Applicants.
15. In view of the fact that in Busia CMC ELC Case No 121 of 2022 there is a counter-claim by the Applicants herein based on trust and since the Applicants have also moved to this Court by way of adverse possession, and in exercise of the powers set out in Section 18(b) of the Civil Procedure Act, I find it appropriate to have this file and Busia CMC ELC Case No 121 of 2022 consolidated since the parties and subject matter are the same.
16. Ultimately therefore, and having considered the Notice of Motion dated 27th February 2023, I issue the following orders:
 1. Busia ELC Case No 121 of 2022 is hereby transferred to this Court for purposes of consolidation with this suit.
 2. This case and Busia ELC Case No 121 of 2022 be mentioned on 31st October 2023 for further orders as to consolidation.
 3. Costs in the cause.

BOAZ N. OLAO

JUDGE

11TH OCTOBER 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 11TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

11TH OCTOBER 2023

