



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC CASE NO. 59 OF 2018

(FORMERLY BUNGOMA HCC CASE NO. 146 OF 2012)

ASHON SIKOLIA WANYONYI1ST PLAINTIFF

PATRICK KISAKA MUNIAFU 2ND PLAINTIFF

LUKA MAKOKHA WANYONYI.....3RD PLAINTIFF

AND

BENJAMIN BARASA WAFULA1ST INTERESTED PARTY/APPLICANT

ALFRED MANDU TERA.....2ND INTERESTED PARTY/APPLICANT

SHAPHAN MASAYI LUVONGA3RD INTERESTED PARTY/APPLICANT

ROSEMARY KHALAYI MWONGOLO.....4TH INTERESTED PARTY/APPLICANT

JACKSON MAFUNGA WAMUKOTA.....5TH INTERESTED PARTY/APPLICANT

VERSUS

THE NATIONAL CHIEF LAND REGISTRAR1ST DEFENDANT

THE COUNTY LAND REGISTRAR BUNGOMA 2ND DEFENDANT

THE NATIONAL COMMISSIONER OF LANDS.....3RD DEFENDANT

THE PERMANENT SECRETARY, MINISTRY OF LANDS4TH DEFENDANT

THE ATTORNEY GENERAL5TH DEFENDANT

THE SECRETARY WEBUYE SUB-COUNTY6TH DEFENDANT

THE COUNTY GOVERNMENT OF BUNGOMA7TH DEFENDANT

THE KENYA FOREST SERVICES8TH DEFENDANT

JAMES KETOYO AMBALI9TH DEFENDANT

CHRISPUS WAMOYO WAMUKOTA FORMER

MAYOR OF THE MUNICIPAL COUNCIL OF WEBUYE.....10TH DEFENDANT

WASHINGTON S. K. WASHIALA.....	11 TH DEFENDANT
CHARLES AWINO WISWA	12 TH DEFENDANT
PETER OBIERO GAMA	13 TH DEFENDANT
ANTHONY M. MULATI.....	14 TH DEFENDANT
FRANKLIN MATASI.....	15 TH DEFENDANT
ESTHER KANY NGURU.....	16 TH DEFENDANT
SOPHIE CHERONO	17 TH DEFENDANT
JOSEPH NJOROGE MBURU	18 TH DEFENDANT
ROSELINE SOUL OTAMBO	19 TH DEFENDANT
JANE I. NDEDA	20 TH DEFENDANT
PATRICK W. KAMWESSAR THE FORMER ADMINISTRATOR OF THE MUNICIPAL	
COUNCIL OF WEBUYE.....	21 ST DEFENDANT
FRANCIS MITHAMO NJEGA	22 ND DEFENDANT
MARY GACIKU	23 RD DEFENDANT
JOHN KABUE	24 TH DEFENDANT
MARY WANJIRU NGURU	25 TH DEFENDANT
JAFRED MAKHAKHA WAFULA	26 TH DEFENDANT
MARY NAMULISA WATIMA.....	27 TH DEFENDANT
BEATRICE N. MASINDE.....	28 TH DEFENDANT
MOLLY KETOYO	29 TH DEFENDANT
SARAH HUSSEIN	30 TH DEFENDANT
JOSEPH P. WESWA	31 ST DEFENDANT
PETER WEKESA WATIMAH	32 ND DEFENDANT
RICHARD NGONI.....	33 RD DEFENDANT
TIMOTHY NJUGUNA	34 TH DEFENDANT
HANAH NJOKI MWANGI	35 TH DEFENDANT
PETER N. KARANJA	36 TH DEFENDANT
NAFTARY NGARUIYA KIGURU	37 TH DEFENDANT
MOUNT ZION HOUSE OF PRAYER.....	38 TH DEFENDANT

GODFREY BARASA.....	39 TH DEFENDANT
ANTONY N. MULATI	40 TH DEFENDANT
MOSES KISUYA	41 ST DEFENDANT
JOSEPH MAINA NYAGA.....	42 ND DEFENDANT
FRIENDS SUNRISE CHURCH WEBUYE.....	43 RD DEFENDANT
MARY NDUTA KAMAU	44 TH DEFENDANT
TIMOTHY NJUGUNA NGUGI	45 TH DEFENDANT
AINEA WAFULA BARASA	46 TH DEFENDANT
PAUL NTEERE KINOTI.....	47 TH DEFENDANT
DANIEL KIARIE GITHANGA	48 TH DEFENDANT
HILDA N. WAFULA.....	49 TH DEFENDANT
JOSEPH GATHAGU	50 TH DEFENDANT
SOLOMON KHAMALA	51 ST DEFENDANT
JAMES MUTELE.....	52 ND DEFENDANT
SABINA ANYANGO ARARA.....	53 RD DEFENDANT
IBRAHIM MWAURA	54 TH DEFENDANT
WILSON KIMANI KURIA.....	55 TH DEFENDANT
GRACE GEKENIA MWAMBUTE.....	56 TH DEFENDANT
AFRICAN INLAND CHURCH	57 TH DEFENDANT

R U L I N G

1. The application for determination is the amended notice of motion dated 2nd October 2019 brought by the parties calling themselves as Interested Parties (1st – 5th). The orders sought are:

1A. This Honourable Court be pleased and struck out the 1st and 3rd Plaintiffs'/Respondents' Amended Plaintiff filed in Court on 3rd of July, 2019; Application dated 22nd July, 2019 and A Notice of Preliminary Objection/Grounds dated 30th September, 2019; because this Honourable Court has no jurisdiction to hear parties who forged the Consent dated 7th November, 2012 in the names of our deceased fathers, uncles and grandfathers without legal Locus Standi Intestate Estate of the deceased original proprietors.

1B. This Honourable Court be pleased and grant Orders that the Applicant herein has Locus Standi on both Legal and Factual Matters to prosecute this Case under Order 1: Rules 8(1) and 13(1 – 2); Order 8: Rules 1(1) and 3(4); Order 9: Rule 2(a) and Order 22: Rules 84 and 86 of the Civil Procedures Act Cap 21; Article 22: Clauses 1 & 2 (a – c); Article 22: Clauses 1 & 2 (a – c) of the Constitution, while any Court of Law has the jurisdiction to hear any party to the Case under Article 50: Clause 1 of the Constitution.

2A. This Honourable Court be pleased and grant Orders directing the Chief Officer, Agricultural and Irrigation, Bungoma County together with the County Deputy Agriculture Officer of Webuye East Sub-County to assess the malicious properties damages done by the 3rd Plaintiff/Respondent herein, who is the proposed 58th Defendant in the Amended Plaintiff filed on 2nd July, 2019 and the proposed 2nd Plaintiff of the withdrawn Amended Plaintiff filed in Court on 3rd July, 2019; then file their findings in this Case for further actions.

3A. This Honourable Court be pleased and grant Vesting Orders that; the West Kenya Sugar Company is restrained from

making any payment to CONTRACT No. 151031442 of the 3rd Plaintiff/Respondent herein, who is the proposed 58th Defendant in the Amended Plaint filed on 2nd July, 2019 and the proposed 2nd Plaintiff of the Amended Plaint filed in Court on 3rd July, 2019 which was subsequently withdrawn through the Application dated 22nd July, 2019; and then deposit the net pay realized to the Judiciary Account under Order 27: rule 1 of the Civil Procedures Act Cap 21, pending determination of the entire Case.

4A. This Honourable Court be pleased and grant Orders pending the Surveying exercise as promised by the Government on 22nd November, 1973 that; pursuant to Court Orders issued on 30th June, 2014 the Deceased's Intestacy shall continue farming on their Intestate Liabilities as follows:-

- (1) The late Fredrick Kadi Wefwafwa's family on LR. No. Ndivisi/Muchi 1122,
- (2) The late Tela Kisaka's alias Mukholi Kisaka's family on LR. No. Ndivisi/Muchi 1124,
- (3) The late William Mwongolo Tela's family on LR. No. Ndivisi/Muchi 1125,
- (4) The late Thomas Kadi Mabele's family on LR. No. Ndivisi/Muchi 1127,
- (5) The late Ali Loponi Mukweyi's family on LR. No. Ndivisi/Muchi 1135,
- (6) The late Matayo Muniafu Kisaka's family on LR. No. Ndivisi/Muchi 661,
- (7) The late Musa Barasa Cheng'oli's family on LR. No. Ndivisi/Muchi 4205 and 4206.

5. Costs of the application.

2. The application is supported by the grounds listed on the face of it and the amended affidavit of Benjamin Barasa. Mr. Barasa submitted that the suit filed by the 1st – 3rd plaintiffs is defective because it was filed using a consent given by parties who are deceased. He stated that Kati Thomas died in 2009, Tela Kisaka died in 1986, Thomas Mabele died in 1985 and Musa Barasa Chengoli died in 1995. That the Case was thus filed through a bonafide mistake. He also urged the Court to order West Kenya Sugar Ltd to deposit in Court proceeds of cane harvested from the disputed parcels pending determination of the suit.

3. Mr. Sichangi learned Counsel appearing for the Respondents/Plaintiffs opposed the application. He relied on the notice of preliminary objections and grounds dated 3rd September 2019 which pleaded as follows:-

1. *There are other unprosecuted applications pending on the file and subsequent filing of this application is an abuse of the court process.*
2. *The purported advocate for the Plaintiff/Applicant is a quack, masquerader and a busy body without any legal authority to act in a representative capacity.*
3. *The applicants cannot purport to seek orders against other Plaintiffs hence the documents sought to be struck out and the purported Applicants be made Defendants.*
4. *There is a serious prejudice if the current agent is allowed to file documents non-stop.*

4. From the grounds, the first issue raised is whether the 1st applicant has capacity/authority to bring the present application on his own behalf and on behalf of his co-applicants. In answering this objection, the 1st applicant said he had capacity and authority on the basis of the provisions of Order 9 rule 2(a), Order 22 rule 84 & 86 and Order 1 of the Civil Procedure Rules as well as Article 22 of the Constitution.

5. Article 22(2) of the Constitution states that:

“in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of or in the interest of a group or class of persons.”

The 1st applicant has brought the application for his own and on behalf of his co-applicants who are named parties to the suit. The 1st applicant is thus within the law under article 22(2)(b) to file the present application if given authority by his co-applicants.

6. The applicants are seeking to have the amended plaint filed by the 1st and 3rd plaintiffs on 3rd July 2019 struck out because this Court has no jurisdiction to hear parties who forged the consent dated 7th November 2012 in the names of their deceased fathers, grandfathers and uncles. They also want these plaintiffs declared as lacking locus to prosecute the suit.

7. The suit was commenced by the 1st – 3rd plaintiffs now sued as respondents in the current motion vide a plaint dated 7th November 2012. The plaintiffs had pleaded in paragraph 3 of the said plaint that they brought the suit on their behalf and on behalf of the other Seven (7) families that were affected by the acquisition and whom they had their authority to bring the suit. At paragraph 9, it is pleaded that the

plaintiffs owned the following parcels of land before the acquisition;

- (i) 1st and 2nd plaintiff – Ndivisi/Muchi/1245
- (ii) 3rd plaintiff – Ndivisi/Muchi/1238.
- (iii) 4th plaintiff – Ndivisi/Muchi/1127.
- (iv) 5th plaintiff – Ndivisi/Muchi/1125.
- (v) 6th plaintiff – Ndivisi/Muchi/1124.
- (vi) 7th plaintiff – Ndivisi/Muchi/1248.
- (vii) 8th plaintiff – Ndivisi/Muchi/1308.

8. The Impugned Consent is dated 7/11/2012 signed by 10 people. The applicant states that some of the 10 are deceased. The 1st – 3rd signatories are the persons named as 1st to 3rd plaintiffs. The 4th, 6th, 7th and 9th signatories are said to be deceased. The 1st – 3rd plaintiffs did not deny the averment that these parties are dead. Can their suit stand in light of this revelation?

9. In a copy of a green card for plot number Ndivisi/Muchi/1245 annexed to a supporting affidavit filed to the notice of motion application dated 10th February 2014, which shows the first entry made on 2/10/1972 has Reuben Wanyonyi Sikolia as the registered owner. The second entry made on 11/11/1997 indicates the government of Kenya as the owner. The 1st and 2nd plaintiffs' claim is that this was their land acquired without compensation. The two plaintiffs also annexed a copy of Certificate of Confirmation of grant that appointed them as administrators of the estate of Reuben Wanyonyi.

10. Although the Applicants state that the suit was brought by a consent signed by parties of whom are deceased, the 1st and 2nd plaintiffs have a right to claim as the legal representatives of Reuben Wanyonyi thus their suit cannot be defeated. The only issue that would happen as at the determination of the suit is that the claim on behalf of deceased parties would not succeed in the absence of letters of administration. However the claim on behalf of the deceased parties have since been revived by the applicants coming on board on behalf of the respective estates of the deceased. Accordingly the prayer that the 1st & 2nd plaintiffs lack locus standi does not have a basis.

11. The Applicants also asked the Court to make an order for the proceeds of Cane harvested on Contract No. 151031442 to be deposited in court. The applicants did not specify who among them owns the plot where the Cane was harvested. The 3rd plaintiff pleaded in the plaint that he owned parcel No. Ndivisi/Muchi/1238 which ownership are some of the issues for this court's determination. If this Court were to make a finding at this interlocutory stage on whether or not the 3rd plaintiff owns this plot, I would do an injustice to parties by failing to give them opportunity to present their case on merits.

12. The orders sought under paragraph 4A of the application are conclusive in nature. This Court cannot usurp the role of the Succession Court by distributing the deceased estate as the applicants are asking the court to do. Further the question on who is entitled to what portion/parcel can only be determined after the full trial.

13. Lastly; is the question of which amended plaint should remain on record. I have found that the 1st – 3rd plaintiffs are entitled to bring their claim as of right and or as legal representatives. The 1st – 5th applicants were also joined to these proceedings by an order of the Court. Therefore these are the parties to be included as plaintiffs in these proceedings. The further amended plaint filed on 3rd July 2019 have joined the following as 3rd – 5th plaintiffs.

3rd – Eddy Wandela Tela

4th – Kisaka Mwangolo

5th – David Kiberenge

These names were not properly joined as neither leave of the Court or the other parties were sought. This makes the further amended plaint of 3/7/2019 to be in contravention of the Civil Procedure Rules, to the extent that it added/joined parties without leave, I will strike it out.

14. All the plaintiffs are hereby granted additional time of 14 days to file a joint amended plaint. In default, this Court shall go by the amended plaint filed on 25th September 2018 with the only addition being the inclusion of the applicants as plaintiffs to this suit. The application thus succeeds only on this prayer. The second option the applicants have if the parties cannot agree amongst themselves is for them to bring their separate suit.

15. In conclusion, it is my finding that prayer 2A, 3A & 4A are dismissed. Prayer 1A is partially allowed to the extent that the amended plaint filed in court on 3rd July 2019 is struck out. Prayer 1B is granted as prayed. Costs of the application do abide the outcome of the main suit.

Dated, signed and delivered at BUSIA this 5th day of November 2019.

A. OMOLLO

JUDGE