



REPUBLIC OF KENYA



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**Wekesa (Suing as the legal representative of Wekesa Sinino - Deceased)
& another; Mutoro & another (Interested Parties) (Civil Appeal
145 of 2003) [2025] KEHC 1796 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 145 OF 2003
S MBUNGI, J
FEBRUARY 12, 2025**

IN THE MATTER OF

**BELINDA WALIAMBILA WEKESA (SUING AS THE LEGAL
REPRESENTATIVE OF WEKESA SININO - DECEASED) 1ST APPLICANT**

**THOMAS MUTORO KUSIENYA (SUING AS THE LEGAL
REPRESENTATIVE TO THE ESTATE OF MARIKO KUSIENYA SININI -
DECEASED) 2ND APPLICANT**

AND

MARK MUKHWANA MUTORO INTERESTED PARTY

PHILIP KHISA MUTORO INTERESTED PARTY

RULING

1. The motion dated 11.11.2024 brought under Order 45 of the Civil Procedure Rules 2010 and Section 80 of the *Civil Procedure Act* by the applicant sought the following orders: -
 - i. That this honorable court be pleased to set aside orders issued 18th December, 2023 and any other consequential orders arising therefrom.
 - ii. That the costs of this application be provided for.
2. The application was premised on the grounds on the face of it as follows: -
 - I. There is evidence that is obvious or apparent error/mistake on the record which necessitates this court to set aside the orders issued by Hon. P.J. Otieno, Judge
 - I. That orders issued by the Honorable Judge came after the appeal had been determined by Justice Thurunira Jaden-Judge who made a judgment in favor of the appellant.



- III. That the court at the point of decree became functus officio and the consequent orders arising from the orders issued by Justice P.J. Otieno-Judge on 18th December, 2023 amounts to abuse of the principle of finality.
 - IV. That the respondents together with the interested party therefore had no business reviving the closed file and particularly if they never served any applications or notices on the appellant and especially if this was not an appeal to a superior court.
 - V. That if the orders are allowed to stand, it will amount to abuse of due process of the court, a waste of court's time and judicial resources given this is also a land matter, and it remains a preserve of the Environment of the Land Court.
 - VI. That any orders emanating from this matter, no matter how well reasoned will be a nullity on account of jurisdiction and the principle of finality.
 - VII. It is only in the interest of justice that this application is allowed as prayed.
3. The application was supported by an Affidavit sworn by Belinda Waliambila Wekesa (the applicant) who stated that she was a widow of the late Wekesa Sinino who died while domiciled in Kenya.
 4. She stated that she appealed to this court after being aggrieved by the decision in Lugari Land Dispute Tribunal No 9 of 2000, and succeeded when Justice B. Thurania delivered a Judgment on 18th April 2013 allowing my appeal.
 5. She further stated that the orders issued by Hon. Justice P.J. Otieno did not appreciate the finality of the decree when he made an order re-opening this file after it was closed and further directed the OCS Lugari Police station to offer security to facilitate the partitioning of this land which amounts to this court setting its own precedence and sitting on an appeal for a decision delivered by it when the court was functus officio and the activities were a nullity.
 6. The applicant further stated that the respondent further Appealed to the Court of Appeal at Kisumu in Court of Appeal Civil Appeal No 157 of 2018 and his appeal was dismissed with costs, thus the decree and Judgment of Justice Thurania Jayden still stands.
 7. The applicant stated that she was never served with any documents, and prayed that this court is conferred with inherent powers to set aside the orders of 18.12.2023 and ensure that litigation comes to an end.

Interested Parties' Case.

8. Vide a replying affidavit dated 11.11.2024, the interested parties stated that the application was frivolous, vexatious, an abuse of the court process and has no substance as the threshold for granting the orders has not been satisfied.
9. They stated that the application was an afterthought filed maliciously to deny the defendants their rightful ownership and utilization of their parcel of land as enshrined in *the Constitution* of Kenya and ought to be dismissed since this court cannot reverse orders that have already been spent.
10. The interested parties further stated that this matter has been heard and determined by various Honourable Courts and approximately 16 judges; and all the judgments and rulings were in favor of the respondents and the issues raised by the appellant / applicant have been overtaken by events.



11. They averred that the applicant has refused to peacefully move out of their parcel of land that is duly registered in our names despite other people who had encroached on the parcel of land herein moving out peacefully.
12. They prayed that the application be dismissed.
13. The parties canvassed the application by way of written submissions.

Applicant's Submissions.

14. As to whether the applicant had satisfied the requirements for setting aside orders in accordance to Order 45 of the Civil Procedure Rules, and Section 80 of the Civil Procedure Act, the applicant submitted positively and stated that the applicant, in her supporting affidavit had produced evidence of Judgment entered in her favor hence the orders of 18.12.2023 by Hon. Justice Otieno could not stand as the court had become functus official at the point of decree. She cited the case of Republic vs Attorney General and Another Exparte James Alfred Koroso.
15. Secondly, the applicant submitted that she was entitled to the reliefs of setting aside orders issued on 18.12.2023 since the respondents have not demonstrated any evidence or review, setting aside or varying the orders by Hon. Justice Jayden Thurairarajah on 18.04.2013 and thus the applicant who was the successful party ought to enjoy the fruits of the judgment.
16. The applicant further averred that the attempts by the respondents to circumvent the orders issued earlier were contemptuous since the orders of 18.04.2013 were made in their presence, and led to the misdirected orders issued on 18.12.2023 which go against the principle of finality and that litigation must come to an end. She cited the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2007] eKLR.
17. It was the applicant's submission that as per the Supreme Court's Judgment in Everton Coal Enterprises Limited Karanja & 5 others (Application E026 of 2023) [2023] KESC 98 (KLR), a person cannot enjoin in a matter as an interested party after delivery of judgment as the interested parties have, and such legal ingenuity is repugnant to justice.
18. Lastly, the applicant averred that this court was functus officio, since the case had already been determined and thus the court lacked jurisdiction to make any orders in the manner sought by the respondents. She placed reliance in the case of Raila Odinga and Others vs IEBC and others (2013) eKLR.

Respondent's Submissions.

19. The bulk of the respondent's submissions reiterated the issues raised in the replying affidavit by the interested parties.
20. The respondents submitted that the application had been overtaken by events as parcel of land No. KAKAMEGA / LUGARI / 2076 was absolutely registered in the names of the interested parties / respondents who had the constitutional right to approach the court for orders as they deemed fit and no one could dictate to the Court what to allow and not.
21. They further averred that the parcel of land No. KAKAMEGA / LUGARI / 101 claimed by the appellant was nonexistence due to the fact that it has been subdivided into many other portions which are being peacefully utilized by other beneficiaries.



22. The respondents submitted that the applicant aimed at disinherit the family of Marko Kusienya Sinino who was the rightful owner of land parcel No. Kakamega / Lugari / 101 and ought to vacate to her rightful and bonafide parcel of land No. Bungoma / Kabisi / 53 that belongs to her late husband Wekesa Sinino Alfunzi in Bungoma.
23. It was the respondents' submission that the applicant ought to have filed their objection against succession proceedings for parcel No. Kakamega / Lugari / 101 which were initiated by the respondent herein Thomas Mutere Kusienya and gave rise to distribution and subdivision of the parcel of land herein into several parcels of land including parcel of land number Kakamega / Lugari / 2076 that belongs to the interested parties / respondents
24. Further, they averred that the various Honourable Courts and more specifically 16 Judges have heard this matter conclusively and gave out their Judgment in favor of the Respondents, and despite various judgments including superior Courts the appellant / applicant has been filing applications upon applications of which all have been dismissed and this clearly shows that she is an intruder in the respondents' parcel of land.
25. They further submitted that the application was a total wastage of the court's time and resources, since the appellant/applicant has employed delaying tactics to defeat justice against the respondents herein who have suffered and continues to suffer for a long time waiting for justice and have been barred from enjoying the fruits of various judgments rendered in this matter hence the application should be dismissed.

Analysis and Determination.

26. I have looked at the application, the supporting affidavit, the replying affidavit and the submissions by both parties.
27. I isolate two issues for determination;
 - i. Whether this Court has Jurisdiction to entertain the Application.
 - ii. If the Application has merit.
28. I have looked at the submissions of the parties, the Applicant counsel in his submission says this court has no jurisdiction, the court became functus officio via Judgement rendered by Justice Jaden Thurinira on 18th April, 2013 thus this court became functus officio, therefore the orders issued by Justice P.J Otieno on 18th December, 2023 amounts to abuse of the principle of finality. The court should not have given orders for reviving a closed file.
29. The counsel for the Applicant also submitted that this court has no Jurisdiction.
30. When an issue on Jurisdiction is raised the court is obligated to determine the issue instantly for the resultant finding will determine whether the court will go a further step. See Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited and 2 others (2012) eKLR.
31. The history of this matter shows that the initial dispute was determined by Lugari Land Dispute Tribunal case No. 9 of 2000. Thereafter one of the parties Wekesa Sinino moved to the magistrate's court vide an application dated 26th May, 2000 to have the award of the tribunal adopted by the court Kakamega chief magistrates court Miscellaneous award no. 106 of 2000. The award was adopted on 19th September, 2000 and orders issued for Executive Officer to the court to execute all the documents required to facilitate the survey and registration of Land Parcel L.R No. Kakamega/Lugari/101. However, Kusienyas filed an application dated 23rd April, 2001 seeking to set aside the orders dated



- 19th September, 2000. Kusienyas application was allowed on 16th November, 2011 and the adoption orders were set aside. Thus, the award of the tribunal remained pending adoption by the lower court. Thereafter, the hearing of the application for the adoption award of the tribunal dated 26th May, 2000 was adjourned severally and later dismissed on 18th December, 2002 for want of prosecution. that dismissal triggered an application dated 21st march, 2003 seeking reinstatement of the application for adoption of the award of the tribunal dated 26th May, 2000. However , in a ruling dated 15th October, 2003, the lower court dismissed the application dated 21st March, 2003 and observed as follows “..... the matter had been finalized. the elders award was adopted. the executive was given powers to sign transfer documents. this is now a matter for appeal purposes in the High Court”
32. The above ruling of the lower court triggered an appeal file don 17th November, 2003, at the High Court vide Kakamega Civil Appeal No. 145 of 2003, between Wekesa (the appellants therein and later substituted by Belinda Waliambila Wekesa) and Kusienya (the respondent therein), wherein on of the grounds was that the learned magistrate failed to take into account that the adoption orders on record; hence, the reason for the application for reinstatement of application of adoption of the award of the Tribunal dated 26th may, 2000. in this regard, the high Court (B. Thurania Jaden, J.) agreed with the appellants’ counsel that the learned magistrate went off the track and did not address his mind to issues that were before him. This, the ramification of the decision of the lower court was that the award of the Tribunal had not yet been adopted, for over 12 years at the time, after the tribunal made its decision; and this stood in the way of further court processes that could have followed the order of adoption. in the circumstances, in a judgment dated 18th April, 2013, the court quashed the lower court’s decision dated 15th October, 2003, and made an order for the hearing of the respondent’s application dated 26th May, 2000.
33. Turning back to the said pending adoption of award of the Tribunal in Kakamega CMC Award No. 106 of 2000, the record shows that the respondents filed a notice of motion application in the Chief Magistrate Court dated 6th March, 2016 (at page 8 of the record of appeal) seeking the following orders:
- i. That pursuant to the adoption of the decision of the Lugari Land Disputed tribunal on 3rd November, 2014 and give effect to the said adoption, all land parcels derived from said parcel formerly known as land parcel L.R No. Kakamega/Lugari/1010 be and hereby cancelled vis:
 - a. Kakamega/Lugari/2075,2076,2077, 2078,2079 and 2080.
 - b. Any other resultant sub-division from the aforesaid parcels.
 - ii. That Land parcel number Kakamega/Lugari/101 be reinstated.
 - iii. That the executive Officer be empowered to execute all transfer documents to the Land Dispute tribunal giving 7 acres to the respondent and the remainder to the Applicant.
 - iv. That the respondent be condemned to pay the cost of this application.
34. From the outset, the issue here was a Land Dispute at the time notice of motion dated 6th March, 2016 a new constitution 2010 had been promulgated and a specialized court dealing with Environment and Land matters created under Article 161 of *the Constitution* of Kenya 2010.
35. Pursuant to that article, the *Environment and Land Court Act* No. 19 of 2011 was enacted and pursuant the powers conferred by the sixth schedule part 5 section 22 and Article 161 (2) (a) of *the constitution* of Kenya 2010 and in pursuance of Section 24, Section 30 (1) and (2) of the *Environment and Land Court Act* No. 19 of 2011 of the laws of Kenya as read with Section 31 of the Act and Section



- 5 (1) and (2) (c) of the [Judicial Service Act](#) No. 1 of 2011 the Chief Justice made practice directions for the Establishment of Environment and Land Courts via Gazette Notice No. 5178 dated 25th July, 2014.
36. Practice direction No. 7 say that all proceedings which were pending before the Magistrate's courts having been transferred from the now defunct District Land Disputes Tribunals shall continue to be heard and determined by the same court.
37. Practice No. 8 Magistrate's courts shall continue to hear and determine all cases related to Environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.
38. Practice No. 13 appeal from the Magistrate's courts and tribunals in the foregoing paragraph 6 or 12 shall lie in Environment and Land court pursuant to section 13 (4) of the [Environment and Land Court Act](#).
39. Judge B. Thurania Jaden judgment delivered on 18th April, 2013 ordered that the application for adoption of the district tribunal be heard in inter-parties before the magistrates court, there was no evidence whether that application was heard inter-parties at any time. So at the time the Chief Justice gave practice directions on 25th July, 2014 the matter was still pending before the Chief Magistrates Court therefore there was nothing pending before the high court. Any issue touching on subject matter will therefore mean that the parties had invoked the jurisdiction of the Environment and Land court but not the High Court.
40. So in view of the above, it's clear that this court has no Jurisdiction to make any order touching on the subject matter. Therefore, the Application dated 11th November, 2024 was filed before the wrong court and is hereby struck off.
41. Given the history of this matter, each party shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Applicant –

Respondent –

Interested parties -

Court Assistant – Elizabeth Angong'a

