



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 90 OF 2017

**PETRONILLA NEKOYE KONG'AN(Suing as Administrator of the Estate
of AINEA WAWIRE KONG'ANI, also known as AINEAH**

WABWILE KONG'ANI)PLAINTIFF

VERSUS

JOHN BARASA WANYAMA.....1ST DEFENDANT

MUSA WANYONYI WANJALA..... 2ND DEFENDANT

FARIDA KHAOYA..... 3RD DEFENDANT

CEPHAS SIMIYU4TH DEFENDANT

ANNA NANDWA..... 5TH DEFENDANT

ALFRED MIDIVA..... 6TH DEFENDANT

RICHARD WETOTO..... 7TH DEFENDANT

JOSEPH OUKO8TH DEFENDANT

PETER BARASA BUSURU.....9TH DEFENDANT

ERASMUS MULONGO KUTA10TH DEFENDANT

HASSAN ASHIBENDE11TH DEFENDANT

MOHAMMED WABWILE WANYAMA..... 12TH DEFENDANT

DORCAS NAFULA TONISIO 13TH DEFENDANT

AND

COSMAS WABWILE WANJALA.... 1ST INTERESTED PARTY/APPLICANT

WAFULA WANJALA2ND INTERESTED PARTY/APPLICANT

R U L I N G

By a Judgment delivered herein on 3rd June 2021, this Court entered Judgment for the plaintiff against the defendants in the following terms:

1. A declaration that the defendant's activities with regard to the land parcels NO WEST BUKUSU/SOUTH MATEKA/800 and WEST BUKUSU/SOUTH MATEKA/629 were fraudulent, illegal and amounted to intermeddling with the property of the deceased AINEAH WABWILE KONG'ANI.

2. The LAND REGISTRAR and COUNTY SURVEYOR BUNGOMA are hereby directed to rectify the register by cancelling the registration of the names of JOHN BARASA WANYAMA, MUSA WANYONYI WANJALA and DORCAS NAFULA TONISIO from the register of the land parcels NO WEST BUKUSU/SOUTH MATEKA/629, 4453 and 4454 and restore the land parcel NO WEST BUKUSU/SOUTH MATEKA/629 in the names of AINEAH WABWILE KONG'ANI.

3. The LAND REGISTRAR and COUNTY SURVEYOR are also hereby directed to re-survey and re-store the land parcel NO WEST BUKUSU/SOUTH MATEKA/629 to its original acreage of 6.4 Hectares and the land parcel NO WEST BUKUSU/SOUTH MATEKA/800 to its original 7.6 Hectares.

4. The defendants herein together with those claiming through them including their agents, servants, employees and whosoever are directed to vacate from the land parcels NO WEST BUKUSU/SOUTH MATEKA 629, 800, 4453 and 4454 within three (3) months of this Judgment and in default, they be evicted therefrom. Should there be any resistance, the assistance of the Police be sought to maintain law and order.

5. Thereafter the defendants, their agents, servants, employees and all those claiming under them are restrained from re-entering the land parcels NO WEST BUKUSU/SOUTH MATEKA/629, 800, 4453 and 4454.

6. Kshs. 500,000/= being damages for trespass.

7. Plaintiff is also awarded costs of the suit.

It's not clear if any appeal was filed against that Judgment. However, there is on record a letter dated 9th August 2021 from the firm of MALALAH & COMPANY ADVOCATES requesting for certified proceedings and Judgment to enable them file an appeal.

I now have for my determination an application dated 30th August 2021 and filed under Certificate of Urgency by COSMAS WABWILE WANJALA and WAFULA WANJALA (the 1st and 2nd Interested Parties/Applicants respectively) predicated under Sections 1A, 3, 3A of the Civil Procedure Rules, Articles 1(1), 2(1), 3, 10, 40(1), 50(1) and 159 2 (d) of the Constitution, Order 21(6) Order 1 Rule 10, Order 22 Rules 22 and 55 of the Civil Procedure Rules. It seeks the following orders: -

1. Spent

2. Spent

3. That an order be granted enjoining COSMAS WABWILE WANJALA and WAFULA WANJALA in ELC CASE No 90 of 2017 as necessary and Interested Parties to the law suit.

4. That pending the hearing and final determination of this application, this Honourable Court be pleased to order stay of execution of the orders issued in BUNGOMA ENVIRONMENT AND LAND COURT CASE No 90 of 2017 issued on 3rd June 2021.

5. That pending the hearing and final determination of this application, this Honourable Court be pleased to order stay of execution of order No. 4 rendered on 3rd June 2021 in BUNGOMA ENVIRONMENT AND LAND COURT CASE No 90 of 2017 ordering the defendants, their agents, servants, employees and whosoever to vacate from land parcels NO WEST BUKUSU/SOUTH MATEKA/629, 80, 4453 and 4454 within three months or in default be evicted therefrom.

6. That the Honourable Court be pleased to issue any other orders to serve the ends of justice.

7. That the costs of this application be provided for.

At this point, it is important to observe that there are infact two applications both dated 30th August 2021 and filed on 31st August 2021. However, one application is supported by the joint affidavit sworn by the Applicants and dated 30th August 2021. The other application is supported by the affidavit of JOHN BARASA WANYAMA the 1st defendant herein and also dated 30th August 2021. Both were filed under the HIGH COURT VACATION RULES. In order to do justice to the Applicants, I will consider the averment in all the affidavits.

From what I can summarise from the two applications, the Applicants are sons to NICHOLAS WANJALA BISAU the original and first owner of the land parcels NO WEST BUKUSU/SOUTH MATEKA/629 and 800 (the suit land). They are also brothers to the JOHN BARASA WANYAMA and MUSA WANYONYI WANJALA the 1st and 2nd defendants in this case. It is their case that they live on the suit land together with their families as they were entitled to inherit it being the property of their father NICHOLAS WANJALA BISAU. They were therefore shocked to learn about this case to which they were not parties. That the plaintiff chose to exclude them from this case and it will be an injustice if they are kicked out of their ancestral land. They should therefore be given an opportunity to defend this suit.

In his supporting affidavit dated 30th August 2021, the 1st defendant confirms that the Applicants are the children of **NICHOLAS WANJALA BISAU** and all live with their families on the suit land which was first registered in the names of the said **NICHOLAS WANJALA BISAU**. That he was never served with the hearing notice and he is also illiterate and can neither read nor write. He adds that the Process Server one **MOSES KULOBA KEYA** who deponed to have served him with the hearing notice dated 19th February 2020 for the hearing on 25th March 2020 hoodwinked the Court when he deponed to have served him. That being illiterate, he could not have signed the hearing notice. Further, that the affidavit of service sworn by the plaintiff's Counsel **MR HENRY WASILWA** is defective as it refers to service having been effected on the "**KNOWN CELL PHONE NUMBER OF MALALA VINCENT MOGAMBI**" yet his Counsel is known as "**CHARLES ANYANGA MALALA**" who did not receive any hearing notice as alleged in the affidavit of service filed herein on 16th February 2021. That **MOSES KULOBA KEYA** the alleged Court process server is known to be a corrupt and fraudulent person who will forge signatures of recipients to look genuine even when he has not served any party. That the said **MOSES KULOBA KEYA** was arrested and charged with the offence of forgery contrary to **Section 345** as read with **Section 349** of the **Penal Code** in **SIRISIA COURT CRIMINAL CASE No E 242 of 2021** for having forged the signature of **HON JOHN K. WALUKE M.P** for **SIRISIA**.

That the Judgment herein affects their ancestral land and if they are evicted, they will be rendered homeless with nowhere to go. That they have a Counter – Claim and this is a scheme by the plaintiff and her advocate to kill their case.

The application is opposed and by her replying affidavit dated 23rd September 2021, **PETRONILA NEKOYE KONG'ANI** (the Respondent) deponed inter alia, that **MR MALALAH** of the firm of **MALALAH & COMPANY ADVOCATES** filed a Notice to act for all the defendants and provided their e – mail as **[Particulars Withheld]** and his telephone number as **0719xxxxxx**. And it is to that telephone number that the hearing notice was transmitted to **MR MALALAH** and that the annexed screen shots of the **WHATSAPP MESSAGES** confirm that Counsel for the Applicants received the hearing notice sent from the telephone number **0721xxxxxx** of her Counsel **MR WASILWA**. Therefore, **MR MALALAH** had full knowledge of the date of hearing in this case.

The application was first placed before **OMOLLO J** the then Duty Judge on 1st September 2021. The Judge declined to certify it as urgent but directed that it be served on all the parties for hearing on 22nd September 2021. However, it was not listed before me on that day.

When the matter was listed before me on 30th September 2021, I directed that the application be canvassed by way of written submissions. Each party was to have 14 days to file and serve and the matter would then be mentioned on 1st November 2021 to confirm compliance and take a date for ruling. There was however no appearance by either of the parties both on 1st November 2021 and 10th November 2021 and neither had any submissions been filed by 6th December 2021. I therefore directed that I would deliver my ruling on 20th December 2021.

I have considered the application, the grounds therein and the rival affidavits by the parties.

The starting point must surely be the nature of the orders sought. In prayers No 4 and 5 of the application, the Applicants seek a stay of execution of the orders issued by this Court in the Judgment delivered on 3rd June 2021. However, the Applicants have not said what action is contemplated pending the stay. If what was contemplated is a stay pending appeal, then the threshold is clearly set out in **Order 42 Rule 6** of the **Civil Procedure Rules**. There has not been even a fleeting reference to the conditions set out in that rule let alone a reference to any contemplated appeal. There is no prayer for setting aside of the Judgment herein. An order for stay of execution cannot be granted ad infinitum. On that basis alone, this application is for dismissal.

Secondly, in his supporting affidavit, the 1st defendant who is a brother to the Applicants has deponed, inter alia, that he was not served with the hearing notice. Further, that one **MOSES KULOBA KEYA** the alleged Court Process Server who swore as having served him with the hearing notice "**is a known corrupt and fraudulent person who will forge signatures of recipients to make service look genuine even where he has not served any party.**" A copy of the charge sheet in **SIRISIA COURT CRIMINAL CASE No E 242 of 2021** has been annexed showing that indeed one **MOSES KULOBA KEYA** was charged on 3rd June 2021 with the offence of forgery contrary to **Section 345** as read with **Section 349** of the **Penal Code**. The particulars of the charge read: -

"MOSES KULOBA KEYA on the 28th November 2020 at unknown place within the Republic of Kenya, with intent to deceive, forged a signature of HON JOHN WALUKE in BUNGOMA CC 97/2020 purporting it to be a genuine signature signed by HON JOHN WALUKE."

It is not known whether that case was heard and determined and with what results. I however consider that to be a heinous crime as it has serious implications in the justice system because proper service of Court processes is cardinal in the administration of justice. It also casts monumental aspersions on the integrity of the said **MOSES KULOBA KEYA**. Obviously, this Court cannot allow a person who forges signatures of parties to continue serving Court processes. I am therefore through this ruling requesting the Deputy Registrar to liaise with **SIRISIA COURT** and appraise me of the results of that trial.

Having said so however, it was not the said **MOSES KULOBA KEYA** who served the hearing notice on the 17th January 2021 for the hearing of this case which was on 16th February 2021. And neither was the hearing notice served upon the 1st defendant as he claims. The record is clear that the firm of **MALALAH & COMPANY ADVOCATES** filed a Notice of Appointment to act for the defendants on 28th October 2020. In that Notice, Counsel provided the e-mail address as **[Particulars Withheld]** and the telephone contact as **+254 – 719 xxxxxx**. The hearing Notice was served by **MR HENRY WASILWA ADVOCATE** by means of **WHATSAPP** to both the cellphone number and e-mail address provided by the firm of **MALALAH & COMPANY ADVOCATES** in their Notice of Appointment. That is clear from the Affidavit of Service by **MR HENRY WASILWA** dated 16th February 2021 and filed herein on the same day. When the case came up for hearing on 16th February 2021, **MR WASILWA** informed the Court that he had served **MR MALALAH** with the hearing notice. As there was no appearance by either **MR MALALAH** or any of the defendants and the Court having confirmed service, the hearing commenced at 10:30 am in the absence of the defendants. The 1st defendant cannot therefore aver, as he has done in paragraph 6 of his supporting affidavit: -

6: “That the Advocate for the defendants was NOT served with the hearing Notice as alleged in the Affidavit of Service by one HENRY WASILWA the ADVOCATE for the plaintiff. The said Affidavit of Service is defective on its face as it refers to service to “the known cellphone number of MALALA VINCENT MOGAMBI.” The defendants’ Advocate is CHARLES MALALA and is not known as MALALA VINCENT MOGAMBI.”

If the telephone number 0719xxxxxx and the e-mail address [Particulars Withheld] do not belong to MR MALALAH ADVOCATE and he did not supply them to MR HENRY WASILWA ADVOCATE, then he should have been the person making those denials. And that would certainly be an arduous task taking into account the fact that those contacts were provided by the firm of MALALAH & COMPANY ADVOCATES when they filed their Notice of Appointment to Act for the defendants in this case.

Finally, both the Applicants and the 1st defendant have deponed at length on how the suit land is their ancestral home since they were born and that they will be rendered homeless if they are evicted therefrom. Further, that the plaintiff and her late husband defrauded them of the suit land and this Court should give them an opportunity to be heard. However, the dispute over the ownership of the suit land started in BUNGOMA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No 81 of 1991 which found in favour of the Respondent’s deceased husband (AINEA WABWIRE KONGANI) and ordered that GELAS WANYAMA BISAU (the 1st defendant’s father) and his family which of course includes his sons the Applicants herein, be evicted therefrom. The 1st defendant and his kin filed KAKAMEGA HIGH COURT CIVIL APPEAL No 66 of 1992 which was dismissed. A related matter being BUNGOMA HIGH COURT SUCCESSION CAUSE No 104 of 2005 in which the 1st defendant was claiming ownership of the suit land went before GIKONYO J who found that the suit land was the property of the deceased husband to the plaintiff herein. The 1st defendant’s further appeal was dismissed on 29th July 2016 by Court of Appeal in CIVIL APPEAL No 271 of 2013 at ELDORET.

There is really nothing else left to agitate in this suit. The Applicants might not have been parties in this suit. But as is clear from the Judgment of the Court of Appeal.

“The Subordinate Court dismissed the case of the appellant and his family and ordered their eviction from the subject titles. The Appellant and his kin were not satisfied and therefore filed KAKAMEGA HIGH COURT CIVIL APPEAL No 66 of 1992. The appeal was dismissed. The Appellant and his family do not appear to have challenged that dismissal on appeal to this Court. Given those facts, we are not at all surprised that the learned Judge of the High Court administered caution against the Appellant that it would not be smooth sailing even if he were to launch an adverse possession claim as long as the orders in those other cases remained on record.”

I will administer the same caution. The Appellant being referred to by the Court of Appeal is the 1st defendant in this case and the Applicants are his family. Their claim to the suit land has really arrived at a cul – de – sac.

The up – shot of all the above is that the Notice of Motion dated 30th August 2021 and filed herein on 31st August 2021 is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO.

J U D G E

20TH DECEMBER 2021

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 20TH DAY OF DECEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES AND WITH NOTICE TO THE PARTIES AS THEY WERE NOT IN COURT WHEN THE RULING DATE WAS TAKEN ON 6TH DECEMBER 2021.

BOAZ N. OLAO.

J U D G E

20TH DECEMBER 2021.