



Wachiye & another v Musamia; Kharakhara (Interested Party) (Environment and Land Miscellaneous Case 246 of 2001) [2025] KEELC 5718 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS CASE 246 OF 2001
EC CHERONO, J
JULY 31, 2025**

BETWEEN

ROBERT WACHIYE 1ST APPLICANT

RISPAH KHARAKHARA 2ND APPLICANT

AND

MAURICE WEKESA MUSAMIA RESPONDENT

AND

ERICK WAMOTO KHARAKHARA INTERESTED PARTY

RULING

1. The Applicant has moved this Honourable Court vide a Notice of Motion application under certificate of urgency dated 17th December 2024 but filed in court on 11/02/2025 seeking the following orders;
 - a. Spent.
 - b. That this Court be pleased to substitute the Applicants with Erick Wamoto Kharakhara and the Respondent with Jacob Wafula Musamia and Obadia Simiyu Musamia.
 - c. That this Court be pleased to vacate the orders given on 23rd November, 2001 and terminate the proceedings herein as the Applicants lacked the locus standi to file the same.
 - d. That the costs of this Application be borne by the Defendants/Respondents.
2. The application is supported by the affidavit of Jacob Wafula Musamia, a supplementary affidavit and grounds apparent on the face of the said application. The application is opposed by Eric Wamoto Kharakhara, the Interested party herein through a Replying affidavit and a Notice of Preliminary Objection sworn and dated 25th March and 18th February 2025 respectively.



Applicants summary of facts.

3. The Applicant in his supporting affidavit deposed that they are co-administrators of the estate of Maurice Wekesa Musamia together with Obadia Simiyu Musamia and that the Applicants and the Respondent have died. He stated that he has been informed by their Advocate on record and he verily believes to be true that there is need to substitute the parties herein before proceeding with this matter to conclusion.
4. The deponent stated that he has also been informed by their Advocate which information he verily believes to be true that the Respondents herein lacked the locus standi to file this matter as by the time of filing the same, they did not have letters of administration.
5. In his supplementary affidavit, the Applicant deposed that on 30th September 2024, the High Court in Succession Cause No. 11 of 2023 directed that parties should proceed to canvass the status of the orders of stay in Bungoma HC MISC. APP. No.246 of 2001 and that the outcome of the same will direct the parties on the course of action to take. He stated that the directive by the court was directed to both the administrator of Robert Wachiye, Eric Wamoto Kharakhara and Maurice Wekesa Musamia, himself and his brother Obadia Musamia. The Applicant further stated that he has been informed by their Advocate on record and he believes it to be true that Eric Wamoto Kharakhara has the mandate to conclude the task left behind by his brother and that he cannot enjoy the fruits of a stay and fail to file the judicial review as ordered.
6. It is further deposed that having readily acknowledged that his brother did not have the capacity to defend the Tribunal case, it is only just that the stay orders are lifted and the application dismissed for being a nullity. He stated that the order issued on 29th November 2001 should not hold the Respondent's family hostage. He deposed that he has been informed by his Advocate which information he believes to be true that this court has the discretion to set aside the orders issued on 23rd November, 2001 and dismiss the entire application by Robert Wachiye on its own motion for being a nullity. He stated that having failed to file a judicial review as directed by the court, the orders issued on 23rd November 2001 should not be indefinite and that this court has jurisdiction to determine the effect of the orders issued on 23rd November,2001 bearing in mind that no application for judicial review was filed.

Interested party's summary of facts.

7. The interested party in his replying affidavit deposed that he was not an administrator to the family of Robert Wachiye Kharakhara and neither Jonathan Kharakhara Khkina for the Applicant to enjoin him in these proceedings. He stated that the letters of Administration issued to him Ad Litem for the estate of Robert Wachiye Kharakhara was specifically to pursue succession cause NO. Bungoma HC Succession cause No.11 of 2023 which case was heard and determined rendering the grant obsolete or spent. That he has no authority from the family to represent the family of Robert Wachiye and Rispah Kharakhara in this suit as alleged by the Applicant hence, the application is incompetent and misplaced.
8. The Interested party further deposed that he has been advised by his advocate on record which advice he believes to be true that limited grants are only issued for specific purpose and that the same becomes obsolete by operation of law once the purpose for which it was issued is determined.
9. That a perusal through the application clearly indicate that the same is bad in law and defective as it seeks to nullify orders which were issued and executed and the court became functus officio and therefore, the orders are not available to be dismissed or challenged hence the application is fatally



misplaced and should be struck out. He deposed that the application seeks to discharge an order issued 24 years ago which order by operation of the law is not available to be discharged. That the Applicant's Counsel has not filed any application or notice of appointment to represent the Applicant which renders the entire application defective and fit to be struck out with costs. That the application is generally incompetent and seeking to align the case with another succession cause which courts and jurisdiction are independent in judgment and decision making and hence cannot be used as a platform to strike orders obtained 24 years by the deceased.

Applicants written submissions

10. The Applicant through the Firm of Emmanuel Wanyonyi & Co. Advocates submitted that Robert Wachiye and Rispah kharakhara (now deceased) and Maurice Wekesa Musamia (also deceased) had a dispute over the suit land parcel No. Bokoli/Bokoli/1127. He stated that the Applicants alleged that they purchased the same and the dispute was referred to Bokoli Land Disputes Tribunal which found in favour of the Respondent. The Applicants were aggrieved with the award and filed the present application for review and after being granted leave to file a substantive motion and an order that the leave so granted was to act as a stay of proceedings before the Land Disputes Tribunal. Unfortunately, the Respondent passed on. Later, the Respondent realised that the Applicants had no capacity to institute the judicial review proceedings as they had not taken out letters of Administration for the estate of the late Jonathan. He therefore filed a citation vide Bungoma HC MISC. APP. No. 173 of 2002 which prompted the Applicants to file Webuye Succession Cause No. 16 of 2003 which was later consolidated with HC MISC. APPL. No. 173 of 2002 and later Bungoma HC P&A No. 11 of 2023. That after hearing the parties in Succession Cause NO. 23 of 2023, Justice D. Kemei (as he then was) directed that parties first deal with Bungoma Misc. APPL. NO. 246 of 2001 which is the current file. A copy of the said Ruling was annexed thereto. He submitted that having established that the instant application was filed by the Applicant without the legal capacity, the law allows this Honourable Court to dismiss and or reverse the orders issued on its own motion.

Interested Parties Submissions.

11. The interested party filed submissions dated 30/03/2025 where he submitted that the suit herein had abated by dint of Order 24 Rules 3 and 4 of the Civil Procedure Rules. It was argued that this court had become functus officio, having pronounced itself of the issues that were before it in the year 2001. He further restated and relied on the averments deposed in his replying affidavit.

Analysis and determination.

12. By way of background, this suit was instituted by the Applicant/Respondents on 20/11/2011 vide a Notice of motion for leave to seek for judicial review orders against orders issued in Webuye SRM Misc. Appln. 23 of 2001. In determining the said application, the court issued orders dated 23/11/2001 granting leave to the Applicant/Respondents to commence judicial review proceedings and the leave so granted was to operate as stay of the orders emanating from the said decision/award. It has been brought to this court's attention that despite being granted leave to commence judicial review proceedings, the Applicants/Respondent did not file the substantive application for the judicial orders and that they are now deceased therefore, the need to substitute them.
13. The allegations that the Respondents/Applicants herein are now deceased casts serious doubt on the competence and legality of the present application notwithstanding that they have suffered prejudice as a result of the stay orders issued in these proceedings. They now seek to have the said stay orders set aside. It is further alleged that the original parties to the application lacked the requisite locus standi, and that the proceedings are therefore incompetent and ought to be terminated forthwith.



14. It is trite that Judicial Review proceedings are governed by Sections 8 and 9 of the *Law Reform Act* as read with Order 53 of the Civil Procedure Rules, 2010. The statutory period for filing a substantive motion after leave has been granted is 21 days as set out under Order 53 Rule 3 of the Civil Procedure Rules which provides as follows;

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty one days by Notice of Motion in the High Court and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for the hearing.”

15. It is evident that after leave was granted, no substantive application for judicial review was ever filed, nor was leave sought to extend the statutory period of 21 days as prescribed under Order 53 Rule 3(1) of the Civil Procedure Rules. In my view, the absence of a specific duration for the stay granted by the trial judge at the time is immaterial, as the applicable timeline is prescribed under the law. In *Wilson Osolo Vs John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995* the court held;

“It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.”

16. Failure to file the substantive judicial review application within the statutory period of 21 days as required under Order 53 Rule 3(1) of the Civil Procedure Rules renders both the leave granted and any consequential stay orders spent. In such circumstances, no proper judicial review proceedings can be deemed to have been commenced before the court. The stay orders issued upon the grant of leave were interim and conditional, meant solely to preserve the status quo pending the timely institution of the substantive motion. They are not intended to operate indefinitely especially in the absence of a properly instituted judicial review application. As such, the orders granted on 23/11/2001 lapsed by operation of law upon failure by the Applicant to file the substantive motion within the prescribed period.

17. In the case of *Republic v. Chairman Amagoro Land Disputes Tribunal & Another Ex parte Paul Mafwabi Wanyama [2006] eKLR*, the superior Court held that the leave and stay granted at the leave stage lapse automatically if the substantive motion is not filed within the 21 days provided. Similarly, in *R v. Minister for Home Affairs & Others Ex Parte Sitamze [2008] 2 KLR (EP) 429*, the court emphasized that leave granted under Order 53 does not exist in a vacuum, and failure to file the motion within the statutory period nullifies any interlocutory relief granted.

18. It is further noted that the original parties to these proceedings are now deceased. In the absence of a substantive judicial review application and without any application for substitution having been made within the prescribed time, the proceedings herein have abated by operation of law. Order 24 Rules 3 and 4 of the Civil Procedure Rules provides that where a party to a suit dies and no substitution is effected within one year, the suit stands abated unless an application for revival is made and allowed. Given the delay from 2013 to 2018 which this court considers inordinate and no action was taken to revive or prosecute the matter, the abatement is deemed final. Accordingly, there exists no competent suit or proceeding before this court capable of being revived or sustained.



19. In view of the foregoing, I find the application dated 17th December 2024 devoid of merit and the same is hereby dismissed with costs to the interested party.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JULY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Aloo H/B for Emmanuel Wanyonyi for the Applicant.
2. Respondent/Advocate-absent
3. Interested party/Advocate-absent
4. Bett C/A.

