



Atieng & 2 others v Omusolo & 2 others (Environment and Land Case 37 of 2016) [2026] KEELC 1177 (KLR) (26 February 2026) (Ruling)

Neutral citation: [2026] KEELC 1177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 37 OF 2016
BN OLAO, J
FEBRUARY 26, 2026**

BETWEEN

**MAGDALINA ATIENG 1ST PLAINTIFF
MICHAEL ELEKOTU OBARI 2ND PLAINTIFF
STEPHEN OMUSOLO 3RD PLAINTIFF**

AND

**CHRISTIAN WAFULA OMUSOLO 1ST DEFENDANT
EVALINE AKISA OMELA (BOTH SUED IN THEIR CAPACITY AND AS
THE LEGAL REPRESENTATIVE OF THE ESTATE OF ENJESLOYO OMUSOLO
OBARI – DECEASED) 2ND DEFENDANT
ROMANO ERONE ITADI (SUED ON HIS OWN BEHALF AND ON BEHALF OF
THE ESTATE OF ITADI OBARI – DECEASED) 3RD DEFENDANT**

RULING

1. The dispute between Magdalena Atieng, Michael Elekotu Obari And Stephen Omusolo (the 1st, 2nd and 3rd Plaintiff respectively) as against Christian Wafula Omusolo, Evalina Akisa Omela And Romano Erone Itadi (the 1st, 2nd and 3rd Defendant respectively) over the land parcel no. South Teso/Asinge/377 (the suit land) was heard and determined by A. Omollo J who, *vide* a judgment delivered on 27th September 2022. In that judgment, the Judge decreed as follows:
 1. “That they are entitled jointly and generally (3 Plaintiffs and the 3 Defendants to 3 acres subject to provision of road of access of title no. South Teso/Asinge/377 which rights accrued to them by virtue of their relationship of co-ownership of the suit title.”
 2. “no customary trust could arise against a co-owner.”



3. “That an injunction (sic) for permanent injunctions is issued restraining the Defendants jointly and severally, their agents, servants, family members and/or persons working under them from evicting the Plaintiffs, their families and their licences from land parcel no. South Teso/Asinge/377 or in any other manner interfering with, selling, disposing off, sub-dividing and/or transferring the 3 acres part in land parcel no. South Teso/Asinge/377.”
4. “That the Deputy Registrar of this Honourable Court is empowered to sign all relevant documents to effect sub-division and transfer and the Land Registrar to dispense with production for the 3 acres of original title should the Defendants be unco-operative.”
5. “Costs of this suit awarded to the 1st and 2nd Defendants.”

A decree followed and there is nothing to suggest that any of the parties filed an appeal against the judgment.

2. The 1st and 2nd Defendants/Applicants have now approached this Court vide their Notice of Motion dated 16th June 2025 in which they seek the following orders:

1. Spent
2. That the County Surveyor Busia be authorized to demarcate the Applicant’s portion comprised in South Teso/Asinge/377 as awarded to them *vide* the judgment of this Honourable Court delivered on 27th September 2022.”
3. “That the Officer Commanding Station Adungosi Police Station be directed to ensure law and order during the demarcation exercise.”
4. “That the costs of this application be provided for.”

For some inexplicable reasons, the Motion is premised on the provisions of the Law of Succession Act but I will invoke the relevant provisions of the Constitution to save it i.e. Article 159 (2) (d). The gist of the Motion is that the 1st and 2nd Defendants/Applicants were awarded 6.1 acres comprised in the land parcel no. South Teso/Asinge/377 vide the judgment delivered on 27th September 2022 and are desirous of having the said portion be shared between them. It is therefore necessary for the Defendants/Applicants share to be identified on the ground so that each party gets their share.

3. The Motion is opposed and Michael Elekotu Obari (the 2nd Plaintiff/Respondent) has filed a replying affidavit dated 22nd September 2025 in which he has deposed, inter alia, that the orders which the Defendants/Applicants are seeking are unenforceable. That the Defendants/Applicants are aware that whereas the parcel no. South Teso/Asinge/377 is shown on the register to belong to two people remedy Itadi Obari And Enjesloys Omusolo Obari with each owning equal shares, the position on the ground is totally different as the land is occupied by three (3) brothers being:

1. Augustino. Wafula – 11 Acres
2. Itadi Obari – 9 Acres
3. Enjesloys Omusolo Obari – 2 Acres

4. That the boundaries are clearly marked on the ground and the Defendants/Applicants are aware that all the 11 acres initially belonging to Augustino. Wafula have been bought by purchasers who were awarded titles vide *Busia ELC no. 35 of 2016 (O.S)* and so too are the 9 acres belonging to the late Itadi Obari. That the said purchasers occupy 14.75 acres while the family of Itadi Obari occupy 5.2 acres



and the Defendants/Applicants occupy 2 acres as per cadastral map. That the Defendants/Applicants are aware that the County Surveyor Busia visited the land parcel no. South Teso/Asinge/377 on 11th June 2025 and surveyed it in the presence of the Defendants/Applicants and with their participation. It will not therefore be possible or practicable for the same surveyor to re-visit the same land and carry out a survey that will run counter to the earlier survey and which will amount to an academic exercise. That the Defendants/Applicants are seeking orders which will be contrary to the Decree in Busia ELC Case no. 35 of 2016. In any case, there is a pending appeal over this matter in *Court Of Appeal Kisumu no. E229 of 2022* and so this Motion is premature.

5. The following documents are annexed to the Motion.
 1. Copy of judgment delivered on 21st July 2022 by A. Omollo J in Busia ELC Case no. 35 of 2016 (O.S) over the land parcel no. South Teso/Asinge/377.
 2. Copy of the decree issued on 1st March 2024 in Busia ELC Case no. 35 OF 2016 (O.S).
 3. Copy of cadastral map.
 4. Copy of a report dated 20th June 2025 by the County Surveyor Busia implementing the Court order issued in Busia ELC Case no. 35 of 2016 (O.S)
 5. Copy of Memorandum of Appeal challenging the decision in Busia ELC Case no. 35 of 2016 (O.S)

By a further affidavit dated 29th October 2025 with leave of the Court, the 1st Defendant/Applicant has deposed that the judgment in this case was specific that the 12.245 acres was to be shared among the 2 families which was 6.1 acres to the family of Itadi and 6.1 to the family of Omusolo. That the judgment in Busia ELC Case no. 35 of 2016 has nothing to do with the judgment in this case. That all that the Defendants/Applicants seek is to be given their shares as decreed in this case.

6. The Court directed that the Motion be canvassed by way of written submissions. The same have been filed by Mr Osia instructed by the firm of Osia & Company Advocates for the Defendants/Applicants and by Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the Plaintiffs/Respondents.
7. I have considered the Motion, the rival affidavits and annexures as well as the submissions by counsel.
8. I shall start with the submission by counsel for the Plaintiffs/Respondents, that the Motion is incompetent for non-compliance with the mandatory provisions of Order 9 of the [Civil Procedure Rules](#). Order 9 Rule 9 of the [Civil Procedure Rules](#) provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court -

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

The record is clear that upto the time the judgment herein was delivered on 27th September 2022, the Defendants/Applicants were represented by the firm of Tom Mutei Advocates who even filed their Bill of Costs on 6th February 2023. This Motion was filed by the firm of Osia & Company Advocates



on 17th June 2025 and there is nothing to show that there was compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. Counsel for the Plaintiffs/Respondent has submitted, therefore, that this Motion is incompetent and should be struck out.

9. That issue was considered in the case of *Tobias M. Wafubwa v Ben Butali C.a. Civil Appeal no. 3 of 2016* [2017 KECA 142 KLR] where the Court of Appeal having considered other cases had the following to say with regard to the lapse to comply with Order 9 Rule 9 of the *Civil Procedure Rules*:

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice then, Article 159 of the *Constitution* and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of *Boniface Kiragu Waweru v James K. Mulinge* 2015 eKLR...”

The Appellate Court went on, to agree with the trial Judge that “failure to comply with rule 9 was a procedural lapse that did not go to the root of the appeal and duly invoked the directions of Article 159 of the *Constitution*.”

10. In this case, other than drawing the Court’s attention to the failure by the Defendants/Applicants to comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, there is nothing to suggest that following that lapse the Plaintiffs/Respondents have suffered any miscarriage of justice or been prejudiced or that the core of the dispute has been affected. I am bound by the superior Courts judgment in the case of *Tobias Wafubwa v Ben Butali* (supra) and I will treat the Motion as properly filed. However, should the motion prevail, the Defendants/Applicants will be denied costs.
11. From the submissions by the Plaintiffs/Respondents, it has become obvious that other than this suit, there is also Busia ELC Case no. 35 of 2016 (O.S) over the same suit land. I have looked at it and the judgment therein was also delivered by Omollo A. J. However, while the Defendants in that suit are the same Defendants in this suit, the Plaintiffs were Jared Anyiko Etyakoro, Wycliffe Ejakait Omare, Willimina Akol, Firingina Abali, Jesca Ejakai Orubia, David Ologe Oporu And Michael Erapu Richard Odeke. I have also looked at the surveyor’s report dated 20th June 2025. It is in respect to the same land parcel no. South Teso/Asinge/377 but was prepared following orders issued in Busia ELC Case no. 35 of 2016 (O.S). That report cannot be of use in this case. Therefore, it cannot be correct for the 2nd Plaintiff/Respondent to aver, as he has done in paragraph 13 of his replying affidavit:

13: “That the orders sought will be contrary to the Decree in Busia ELC 35 of 2016.”

A Decree issued in one case cannot be used to determine the remedies available to parties in another case even if the subject matter is the same. Unless, of course the Court has directed that the judgment in one case should apply to another case. That is not the position herein. It cannot therefore be correct for the Plaintiffs/Respondents counsel to submit, as he has done in page 4 of his submissions, that:

“... there exists another Decree *vide* Busia ELC no. 35 of 2016 OS which has already been executed by the same surveyor in favour of third parties who were the Plaintiffs in that suit. The second intended survey will not only run counter to the earlier survey but will bring a lot of confusion as it is likely to run counter to the earlier survey.”

The truth is that by the time A. Omollo J delivered the judgment in this case, on 27th September 2022, she was already aware about the judgment delivered on 21st July 2022 in Busia ELC Case no. 35 of 2016 (O.S) because she had also heard that case. If for any reason she thought that the disposal orders



in this judgment would “bring a lot of confusion as it is likely to run counter to the earlier survey,” she would not have crafted the said order as she did awarding the Defendants/Applicants portions of the suit land as she did.

12. Counsel for the Plaintiffs/Respondents has asked this Court to expunge the further affidavit by the 2nd Plaintiff/Respondent dated 21st October 2025 referring to it as an alien document un-known in law and in particular Order 51 Rule 14 (3) of the *Civil Procedure Rules*. That is true as the said affidavit should have been referred to as a supplementary affidavit. However, again that is a mere slip curable under Article 159 (2) (d) of the *Constitution* and this Court need not take the draconian route of expunging it from the record and I decline the invitation to do so.
13. Finally, the un-deniable fact is that vide a judgment delivered on 27th September 2022, A. Omollo J issued clear disposal orders which entitle the three (3) Defendants/Applicants to three (3) acres out of the land parcel no. South Teso/Asinge/377. That can only be done if the said land is surveyed as prayed. Failure to do so will mean that the Defendants/Applicants have a judgment which is hollow and whose fruits they cannot enjoy yet it has not been set aside on appeal or review. Court orders are not issued in vain and it is the duty of the Surveyor to ensure that the disposal orders are implemented as directed.
14. The up-shot of all the above is that having considered the Defendants/Applicant’s Notice of Motion dated 16th June 2025, I issue the following disposal orders:
 1. The Notice of Motion is allowed.
 2. The parties shall meet their own costs.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 26TH DAY OF FEBRUARY 2026 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

Explanatory notes:

This ruling was due on 28th January 2026. However, following my transfer from Busia to Iten Court w.e.f 15th January 2026, I had to prioritize the hearing of my part heard cases. This has contributed towards the delay. The same is regretted.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

