



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

MISC. APPLICATION NO. E006 OF 2023

FREDRICK OKELLO AGENGA

PLAINTIFF/RESPONDENT

= VERSUS =

JOSEPH OKOCH SIKEMBO 1ST

DEFENDANT/RESPONDENT

JOSEPH ONYANGO OCHUNJI 2ND

DEFENDANT/RESPONDENT

NICHOLAS OKADA WANYAMA 3RD

DEFENDANT/APPLICANT

RULING

1. By a plaint dated 15th August 2023, the plaintiff herein instituted the instant suit seeking to inter alia evict the defendants from the parcels of land known as

Bunyala/Mudembi/2711, 2695 and 2712 (hereinafter referred to as the suit properties).

2. As can be discerned from the averments/contentions in the plaint, the plaintiff's suit is premised on the grounds that the suit properties belong to him having acquired them through a court process; that the defendants were in occupation of the suit properties and had persisted in their stay in the land despite there being judgments of courts which adjudged him the owner of the suit properties.
3. Vide paragraph 6 of the plaint, the plaintiff indicated/pleaded that the 1st defendant was in occupation of parcel No. 2711, the second defendant parcel No. 2712 while the 3rd defendant was in occupation of parcel No. 2695.
4. Complaining that during pendency of the instant suit he was unlawfully evicted from the suit property by persons he suspects to be agents of the plaintiff, the 3rd defendant filed

the notice of motion dated 29th January 2026 in which he seeks the following orders: -

- i) An interim prohibitory order of injunction and/or conservatory order restraining the respondents by themselves, their agents, servants, employees or any other person acting under their authority from any dealings, transactions and/or dispositions relating to and/or concerning the portion of land known as Bunyala/Mudembi/2695;
- ii) Leave to file a statement of defence and counterclaim out of time;
- iii) Summons to issue to the area chief Mudembi Sub-location within Busia County to appear before court and give evidence and/or shed light on the demolition of his home on 13th January 2026 at about 5.00 am within his/her area of jurisdiction.
- iv) The area chief be required to produce any documents, records or information within his possession relating to the said unlawful eviction and demolition, if any.
- v) Costs of the application be in cause.

5. The application is premised on the grounds on its face and supported by the affidavit of the applicant on which the grounds on its face are reiterated. The grounds taken up in support of the application are that on 13th January 2026 at about 5:00a.m, the 1st respondent unlawfully stormed into his homestead and demolished his home without any lawful court order, notwithstanding that he is an elderly man aged eighty-one (81) years and there is an active case before this court which is yet to be heard and determined; that as a result of the unlawful demolition, his personal properties were extensively destroyed occasioning significant loss and damage, rendering him homeless, destitute and exposing him and his family to danger and insecurity.
6. He deposes that the area chief, Mudembi sub-location should be summoned to testify as he was the administrative authority in charge of the area at the material time; that he has material and relevant evidence necessary for the just determination of this suit and his testimony is crucial to

establish the circumstances, authorization and persons involved in the demolition.

7. In reply and opposition to the application, the plaintiff/respondent filed the replying affidavit he swore on 9th February 2026 in which he depones/contends that land parcel No. Bunyala/Mudembi/2695 no longer exists as it was closed upon sub-division into Bunyala/Mudembi/3599 and 3600 on 31st January, 2023; that granting orders touching on the parcel No. 2695 shall be in vain as the order cannot be executed because he is not the registered owner of the resultant parcels of land.
8. He avers that the 3rd defendant/applicant has not demonstrated why he should be issued with the orders sought and denies storming into the applicant's homestead and demolishing his home on 3th January, 2026 or sending any agents, servants, assignees and/or persons working under him to unlawfully storm and demolish the 3rd defendant/applicant's home.

9. It is his contention that the area chief Mudembi sub-location, is not a party to this suit and no convincing reason has been given to warrant summoning him to testify.

10. He deposes that that 3rd defendant/ applicant is aware that his predecessor, Francis Bedda Agenga instituted proceedings before the Budalangi Land Disputes Tribunal and the Tribunal made a decision that land parcel No. Bunyala/Mudembi/2695, among others, be transferred to him to hold in trust for himself and other beneficiaries; that the Tribunal's decision was adopted as judgement of the court by the Senior Resident Magistrate's Court Busia after which the 3rd defendant/applicant unsuccessfully challenged that decision in the High Court and Court of Appeal; that the Executive Officer signed transfer documents in his favour and he was issued with a title deed to hold in trust for the proper beneficiaries before sub-dividing and transferring the land to them.

11. He contends that the applicant having admitted all the above facts in paragraph 16 and 17 of his defence and counter-claim, his application over land Parcel No. Bunyala/Mudembi/2695 is not merited.
12. Pursuant to directions given that the application be disposed of by way of written submissions, the applicant and the respondent filed submissions which I have read and considered. I find the sole issue arising from the application, the response and the submissions, to be whether the 3rd defendant/ applicant has made up a case for being granted the orders sought or any of them.
13. Concerning that issue, as pointed out herein above, at the inception of this suit, the plaintiff/respondent pleaded that the 3rd defendant/applicant was in use and occupation of the parcel of land known Bunyala/Mudembi/2695 which he claimed to be his and desired to have the 3rd defendant/applicant and his family evicted therefrom and

permanently enjoined from re-entering the property upon eviction.

14. It is common ground that the 3rd defendant /applicant was during pendency of this suit, evicted from the parcel of land known as Bunyala/Mudembi/2695 or whatever parcel of land it became upon subdivision and transfer of the subdivisions therefrom to the plaintiff/respondent and/or his nominees.
15. Despite his own pleadings showing that the suit property existed and was occupied by the 3rd defendant/applicant at the time of institution of the suit, the plaintiff/respondent in his submissions, inter alia contends that the said parcel of land is none existent. He further submits that the 3rd defendant/applicant has not demonstrated a prima facie case with probability of success because he is not the owner of the suit property. Further, that the orders sought by the 3rd defendant/applicant have been overtaken by events because the applicant has since been evicted from the suit property.

16. Concerning the prayer for the area assistant chief to be summoned to attend court and give evidence and/or produce documents, the plaintiff/respondents submits;-

“The reason why the applicant wants the area chief summoned is given in ground (h) of the Notice of Motion and paragraph 7 of the Applicant’s supporting Affidavit. The Applicants wants the area chief summoned because he was the administrative officer in-charge of the area and is reasonably believed to have knowledge of the demolition. First the area chief is not a party herein. Secondly, he is not a witness herein. Thirdly, the court cannot aid a party in gathering his evidence. No substantive justification has been advanced to grant the orders. Lastly, to be administrative officer does not mean that you can able to witness every action in location.”

17. On whether the applicant will suffer irreparable injury unless the orders sought are granted, the respondent submits; -

“On whether he stands to suffer irreparable injury that cannot be compensated by damages, we submit that he will suffer none. From the intended counter-claim, the applicant intends to pray for (a) A declaration that the eviction was unlawful; (b) General damages (c) Aggravated and exemplary damages (e) costs. He has not demonstrated that he is likely to suffer loss that cannot be compensated by damages.

From his own application, the demolition is alleged to have taken place on 13th January 2026 before he filed the application. The prayers for injunction, from his own assertions, have been overtaken by events. What is left for him, if he proves that his houses were damaged, is to claim for damages.”

18. On balance of convenience, the respondent submits that it tilts in his favour because he is the registered proprietor of the suit property.
19. Have carefully read and considered the issues of law and fact raised in this suit, whereas the applicant is not the owner of the parcel of land known as Bunyala/Mudembi/2695 and/or the resultant parcel upon subdivision and transfer, it is admitted by none other than the plaintiff/respondent that the 3rd defendant/applicant was in possession of the suit property at the time the plaintiff filed the instant suit. By virtue of being in use and occupation of the suit property, the 3rd defendant enjoyed legal protection from eviction from the suit property as he could only be evicted from the suit property or any portion of the parcels of land claimed by the plaintiff/respondent upon compliance with the process/procedure contemplated in **section 152** of the Land Act (revised). That process having not been complied with in the process that led to eviction or removal of the 3rd defendant/applicant from land parcel number 2695, I agree

with the 3rd defendant/applicant that he is entitled to legal protection by reinstatement of the status that obtained before the instant suit was filed, which status I hereby order to be restored as pertains to use and occupation of the suit property and pending the hearing and the suit.

20. As to whether the respondent ought to be granted leave to file a statement of defence and counterclaim, that prayer is not opposed by the plaintiff save for the submission that the applicant should be condemned to pay Kshs.10, 000/- as throw away costs. The prayer being unopposed, I grant it as prayed and order the applicant to within seven of delivery of this ruling, to file and serve his intended statement of defence and counterclaim on the plaintiff, who shall file a reply to defence and defence to the counterclaim within seven days of service. There being no basis made by the respondent for award of the claimed costs, Kshs.10,000/-, I decline to grant him the costs sought.

21. As to whether the applicant has made up a case for summoning of the chief to produce evidence and/or documents, no basis has been made for those orders to warrant this court making them.
22. The upshot of the foregoing is that the 3rd defendant's application succeeds to the extent contemplated herein above.
23. Costs of the application shall be in cause.
24. Orders Accordingly.

**Ruling dated, signed and delivered virtually at Busia this
22nd day of April, 2026**

L. N. WAITHAKA

JUDGE

In the presence of;

Mr Otieno for the 3rd Defendnat/ Applicant

N/A for the Plaintiff/ Respondent

Court Assistant; Tracy

ORIGINAL