



**Simba & another v Sagwe & another (Environment & Land Case
493 of 2015) [2025] KEELC 897 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 493 OF 2015**

M SILA, J

FEBRUARY 26, 2025

BETWEEN

PETER WILLIS O SIMBA 1ST PLAINTIFF

JOHN BOSCO MBOGA 2ND PLAINTIFF

AND

MARIA GESARE SAGWE 1ST DEFENDANT

LAWRENCE OMARIBA NYAATA 2ND DEFENDANT

RULING

1. The application before me is one dated 3 July 2024 filed by Graham Rioba Sagwe, the legal representative of the estate of one Sagwe Nyakundi (deceased). The substantive orders sought in the application is that the judgment of 9 October 2019 to be set aside; that the applicant be joined as 3rd defendant; and that the suit to be heard de novo with the participation of the applicant. The application is opposed by the 2nd plaintiff who is the surviving plaintiff after the 1st defendant died.
2. To put matters into perspective, through a plaint filed on 4 November 2015, the plaintiffs claimed to be the rightful owners of the Plot No. 27 Nyakoe Market. They averred that they had in 2012 discovered that the defendants were claiming ownership of the same land purporting it to have been subdivided into Plot 27A for the 1st defendant and Plot 27B for the 2nd defendant. They sought orders for cancellation of the purported Plots No. 27A and 27B and restoration of the original Plot No. 27 in their names. I need to mention at this juncture that the 1st defendant, Maria Gesare Sagwe is wife of Sagwe Nyakundi (deceased) whose estate the applicant contends to be representing in this application. Her defence was that her late husband bought the suit land from one Okiambo Nyagoe in 1968 and that the subdivision of the Plot was approved by the County Council. That was more or less the same defence raised by the 2nd defendant. The suit was heard by Mutungi J who delivered judgment on 9 October 2019 in favour of the plaintiffs. He found that the purported subdivision of the Plot No. 27



into the Plots No. 27A and 27B was unlawful and null and void. They were also condemned to pay general damages of Kshs. 100,000/= together with costs of the suit.

3. It would appear that despite the judgment the defendants did not move out of the disputed plot which led the 2nd plaintiff to file an application dated 13 February 2024 for eviction. I allowed that application through a ruling delivered on 8 April 2024. It is subsequent to those events that this application was filed and I have already set out the prayers sought.
4. The application is based on the grounds inter alia that the suit plot No. 27 is neither owned by the plaintiffs nor defendants, but by Gilbert Sagwe Nyakundi who died on 19 July 2008 before the case was filed and no succession done in respect of his estate. It is contended that the deceased bought the plot on 23 December 1968 via Minute 37/68 (c) (10) and at no time did he transfer it to the plaintiffs, or subdivide it and have it transferred to the names of the defendants. It is contended that the proceedings herein are a nullity ab initio.
5. The 2nd plaintiff swore a replying affidavit to oppose the motion. He deposed that the applicant and defendants are close family members and the applicant cannot feign ignorance of this suit. He has asserted that the Plot in dispute was allocated to himself and the 1st plaintiff who is now deceased. His view of the Minutes annexed by the applicant is that they are illegal and fraudulent.
6. The defendants did not oppose the application.
7. I have considered the application together with the submissions of counsel.
8. I am not persuaded to allow the application and this is why.
9. The suit filed by the plaintiffs was against Mary Gesare and Lawrence Omariba Nyaata. The complaint in the suit was that the defendants have illegally subdivided the Plot No. 27 into the Plots No. 27A and 27B which they claimed ownership of. In their defence, the defendants indeed asserted that the plot No. 27 was subdivided and that they bought the portions thereof from Sagwe Nyakundi. The judgment of the court was that there was never a subdivision of the Plot No. 27 into the Plots No. 27A and 27B and thus the defendants hold no title to the disputed plot.
10. In this application, the applicant asserts ownership of the suit plot as Plot No.27 for the estate of Sagwe Nyakundi. That, as far as I can see, is a completely separate cause of action from the cause of action presented by the plaintiffs against the defendants. The Legal Representative of Sagwe Nyakundi does not claim the Plots No. 27A or 27B. It is his allegation that he is the one who owns the Plot No.27. If the legal representative of Sagwe Nyakundi believes that the Plot No. 27 is still in the name of Sagwe Nyakundi then he needs to file his own separate case to assert that position. I do not see how he can now seek to set aside a judgment entered against persons who are strangers to him and whose claim over the disputed plot is different, for their claim for the plot was that it had been subdivided into Plots No.27A and 27B.
11. In my view the cause of action being presented by the applicant is different and separate from the cause of action between the plaintiffs and defendants herein which has already been litigated and decided. Such claim can only be heard vide an independent suit. There would certainly be no purpose of setting aside the judgment in respect of the decision against the defendants, which is not being challenged, so that we can start all over again on a completely separate claim.
12. From the above discourse, it will be seen that I find no merit in this application and it is hereby dismissed with costs to the plaintiffs.
13. The interim orders given are hereby set aside.



14. Orders accordingly.

DATED AND DELIVERED THIS 26 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

Mr. Nyangacha for the applicant

Mr. Ochwangi for the plaintiffs/respondents

Mr. Ayienda for the defendants/respondents

Court Assistant – Michael Oyuko

