



**Busienei & 3 others v Cheruiyot & 3 others (Environment & Land Case E044 of 2021) [2024] KEELC 4683 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4683 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E044 OF 2021**

**EO OBAGA, J**

**JUNE 13, 2024**

**BETWEEN**

**WILSON MALAKWEN BUSIENEI ..... 1<sup>ST</sup> APPLICANT  
KIPTOO ARAP KOECH (NOW DECAESED) ..... 2<sup>ND</sup> APPLICANT  
EDWARD KIPLIMO ROTICH ( SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF KIBAI BUSIENEI - DECEASED) ..... 3<sup>RD</sup> APPLICANT  
EDWARD KIPLIMO ROTICH ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JOSEPH ARAP CHERUIYOT ..... 1<sup>ST</sup> DEFENDANT  
PETER BOISIO NGETICH ..... 2<sup>ND</sup> DEFENDANT  
JOHN KIMELI ..... 3<sup>RD</sup> DEFENDANT  
ALEXANDAR AKWAEI TOO ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of motion dated 7.3.2024 in which the plaintiffs/Applicants seek the following orders:-
  1. Spent
  2. Spent
  3. That this case be re-opened for hearing and Peter Boisio Ngetich and Joseph Arap Cheruiyot (1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively), be and are hereby re-called for further cross-examination.
  4. That the plaintiff be and is hereby allowed to file a supplementary list of documents to include evidence that has been discovered in the course of this case but which could not be adduced or



referred to, specifically, the decision of this court dated 18<sup>th</sup> day of April, 2018 in Eldoret ELC Case No. 62 of 2015 (formerly Eldoret HCCC No. 150 of 1999 (O.S)).

5. That costs of this application be in the cause.
2. The Applicants contend that after this case was fully heard and the court had directed that parties file written submissions, their Advocate discovered that a vesting order which was relied on by the Defendants/Respondents had been set aside in Eldoret ELC No. 62 of 2015 and is therefore no longer a valid document. They state that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were parties to the case where the vesting order was set aside but they did not disclose this fact to the court and that they proceeded to rely on it.
3. The Applicants further state that they were not aware of the setting aside of the vesting order as they were not parties to the case which resulted into the setting aside of the vesting order. they further state that the Advocate representing the Respondents was involved in the case but that he did not disclose the fact that the vesting order had been set aside.
4. The Respondents opposed the Applicant's application based on a replying affidavit sworn on 26.3.2024. The Respondents contend that the Applicants' application has been brought too late in the day and that the Respondents have raised many grounds in their defence and that the application lacks merit.
5. The parties agreed to dispose of the application by way of written submissions. The Applicants filed their submissions dated 15.4.2024. The Respondents filed their submissions dated 26.4.2024.
6. The Applicants submitted that the court has power to recall a witness who has been cross-examined and re-examined for further cross-examination and re-examination. They relied on section 146 (4) of the Evidence Act which states as follows:-

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
7. The Applicants submit that it is important for them to be allowed to put in the decision where the vesting order was set aside so that the Respondents can be cross-examined on why they are relying on a document which is non-existent. They relied on the case of Raindrops Limited v County Government of Kilifi (2020) eKLR in which the Court quoted Odoyo Osodo v Rael Obara Ojuok & 4 others (2017) eKLR where it was held as follows:-

“the court's discretion in deciding whether or not re-open a case which the Applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of the Applicant who had established sufficient cause to warrant the orders sought.”
8. The Applicants also relied on the case of Raila Odinga & 5 others v IEBC & 3 others (2013) eKLR for the general proposition that in allowing reopening of a case for purposes of adducing more evidence, the court has to move with abundant caution especially where the evidence intended to be adduced is bulky and may make it difficult for the opposite party to respond.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that prayers 3 and 4 in the application are not precise and that if prayer 4 were to be granted it will be impossible to extract an order from it. The Respondents further submit that though the Applicants appear to be seeking to adduce additional evidence, a look at their submissions show that they only intend to cross-examine.



10. The Respondents also submit that the Applicants have not met the threshold for re-opening a case for purposes of adducing more evidence. They relied on the case of *Mohammed Abdi Mahmud v Ahmed Abdulabi Mohamed & 3 others* (2018) eKLR which set out the principles to be considered in an application to adduce additional evidence which are as follows: -
  1. It must be shown that it could not have been obtained earlier even with reasonable diligence.
  2. The evidence must not be for purposes of filling gaps and or making a fresh case.
  3. The document, if adduced as evidence is likely to impact on the final verdict of the court.
  4. The evidence must be credible/capable of believe.
11. The Respondents further submitted that the document sought to be admitted was not annexed to the application for the court to understand its importance in case the application was to be allowed.
12. I have carefully gone through the Applicants' application, the opposition to the same by the Respondent as well as the submissions by the parties. The only issue for determination is whether the Applicants have made out a case for re-opening this case for purposes of adducing more evidence or cross-examination of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
13. The pleadings filed in this case show that the dispute herein dates back to the 1960's. A white settler known as John Joseph Hughes owned LR. Nos 8822, 6617 and 8637. The three parcels were slightly over 400 acres. A group of individuals purchased the three parcels for a total of Kshs 150,000/= but there was no transfer.
14. There were about 22 members who were entitled to have a share of the three parcels according to their contributions. In 1999, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with one Kimorong Mibei filed an originating summons against the Estate of John Joseph Hughes claiming adverse possession in respect of LR. Nos. 8822 and 6617. On 12.8.1999, a vesting order was issued vesting the two parcels upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as Kimorong Mibei.
15. In 2001 the 1<sup>st</sup> Applicant filed at the Soy Land Disputes Tribunal asking the Tribunal to rule that the three properties which were the subject of the Tribunal case be shared amongst the 22 members according to their contribution. The Tribunal rendered its verdict on 31.12.2001. The Tribunal award was sent to the Eldoret Chief magistrates court where it was filed under Award No. 61 of 2002. It was accordingly adopted and a decree given on 18.6.2002 to the effect that the suit properties were to be shared in accordance with the names and acreages appearing in the decree. The Respondents tried to fight the decree in different court fora but they failed. It is apparent that the Respondents went ahead and subdivided the parcels and shared amongst themselves and others.
16. At some stage the government acquired portions of the land for Kenya Pipeline and other public utilities. What prompted the filing of this suit is that the decree of the lower court which still stands cannot be implemented in view of the fact that the Respondents and others have title but other persons entitled to a share are in occupation but with no title.
17. After this brief background, I now come back to the issue for determination. The Applicants are claiming that they were not party to the suit which resulted in the setting aside or nullification of the vesting order. This is a dispute which has been in existence since 2001.
18. In 2002, one Kibai Arap Busienei together with two others purported to bring a suit on their own and on behalf of 16 others against the Respondents. This was Eldoret HCCC No. 12 of 2002. In this suit the Plaintiffs filed verifying affidavits in which they stated that there were no other proceedings



pending. An objection was raised that there were other previous proceedings pending. The suit was struck out on 18.7.2003.

19. The suit which was originally filed as Eldoret HCCC No. 150 of 1999 (O.S) is what became ELC 62 of 2015 upon being transferred to the Environment and Land Court. This suit featured in pleadings filed in Eldoret HCCC No. 12 of 2002 which was struck out. The Advocate who is representing the Applicants was also the one who prosecuted the preliminary objection which led to the striking out of the suit. The Applicants cannot therefore claim that he discovered the setting aside of the vesting order in 2024.
20. The Respondents filed a defence in this matter in which the vesting order featured in the pleadings. If the Applicants were keen they would have been aware of the setting aside of the vesting order. In any case, the introduction of the judgment where the vesting order was set aside will not have any additional impact in the final outcome of this case. I therefore find no merit in this application which is dismissed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Kipnyekwei for defendants.

M/s Akinyi for Mr. Kuloba for Plaintiffs.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**13<sup>TH</sup> JUNE, 2024**

