



**Welime (Legal representative of the Estate of David Wanjala Welime) v
Okimaru alias Kenyatta (Environment and Land Miscellaneous Application
E012 of 2024) [2024] KEELC 13941 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2024
EC CHERONO, J
DECEMBER 18, 2024**

BETWEEN

**NICHOLAS SITATI WELIME APPLICANT
LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID WANJALA WELIME**

AND

GEORGE OKIMARU ALIAS KENYATTA RESPONDENT

RULING

1. The Applicant has moved this Honourable court vide a Notice of Motion dated 8th July, 2024 seeking the following orders;
 1. (spent)
 2. That the Honourable court to hereby order for retrieval of the file Civil Suit No. 128 of 1994; George Okimaru Iraru (as Legal Representative of the Estate of Habel Iraru Okimaru, Deceased) v. Margaret Welime Wanjala (as Legal Representative of the Estate of David Wanjala, Deceased) for purposes of interpretation.
 3. That the Honourable Court be pleased to hereby provide a definitive interpretative declaration of the respective interests of each party, clarifying which party is entitled to the suit land, particularly as at the time the court became functus officio.
 4. That the Honourable Court be pleased to hereby issue an order directing that the Application herein be canvassed by way of oral submissions done in open court.
 5. That the Cost of the Application be provided for.
 6. That this Court makes any further orders as it deems fit and just.



2. The application is based on grounds apparent on the face of the said application supported by the affidavit of the Applicant sworn on even date.
3. By way of a response, the Respondent filed a Replying affidavit sworn on 18th October, 2024 opposing the said application. When the said application filed under certificate of urgency was placed before me sitting as the Duty Judge, I declined to certify it as urgent but directed that the same be canvassed by written submissions. When the said application came for directions on 28/10/2024, the parties confirmed compliance and sought leave to orally highlight on legal points. The request was allowed and each side was given ten (10) minutes to make brief submissions on legal issues.

Applicants Summary of Facts

4. The Applicant in his supporting affidavit gave a brief history of the numerous cases filed with the Respondent in respect of the suit property Respondent herein. At paragraphs 3 and 4 of the supporting affidavit, the Applicant deposed as follows;

“ 3. That in the year 1982 a suit was filed at Bungoma High Court vide Case Number Civil Case No. 127 of 1982; *Habel Iraru Okimaru v David Wanjala Welime* challenging the ownership right of the Applicant over the suit land. The suit was dismissed with Costs to the defendant, now the Applicant herein. (Attached hereto and marked “NW-4” is a copy of the said court ruling dated 18th October, 1982)

4. That pursuant to the aforementioned decision, the Applicant undertook to enforce the eviction order by affirming his rights over the suit land and successfully evicted the trespasser, one Habel Iraru Okimaru. (Attached hereto and marked “NW-5” is a copy of eviction order dated 27th October, 1982)

5. The Applicant also stated that after evicting the said Habel Iraru Okimaru from the suit property, the legal representative of the said trespasser filed another suit. Those averments are contained in paragraph 5, 6 & 7 of his supporting where he deposed as follows;

“ 5. That on 11th November 1994, the Legal representative of the aforementioned trespasser instituted another suit in court, being Civil Suit No. 128 of 1994; *George Okimaru Iraru (as Legal Representative of the Estate of Habel Iraru Okimaru, Deceased) v Margaret Welime Wanjala (as Legal Representative of the Estate of David Wanjala, Deceased)*, challenging the Applicant’s ownership of the land for a second time. This suit was dismissed for want of prosecution by a ruling dated 21st July 2009. (Attached hereto and marked “NW-6” is a copy of the said ruling dated 21st July, 2009).

7. That on 7th March 2012, the then Representative of one Habel Okimaru successfully revived the suit when the High Court granted orders allowing the continuation of the previously dismissed suit. Despite this revival, they failed to prosecute the suit, resulting in its dismissal for want of prosecution on 28th May, 2017, marking the third such dismissal. (Attached and marked “NW-7” and “NW-8” are copies of the said rulings).

8. That following the third dismissal, they belatedly filed a Notice of Motion dated 8th July 2019, seeking leave to file an appeal against the aforementioned



ruling out of time. This application was dismissed on 23rd January 2020, the court citing a lack of merit in the intended Appeal."

6. Aware that this court had dismissed the Respondent's suit for want of prosecution under order 17 Rule 2 *CPR*, the Applicant herein filed a Notice of Motion application dated 26th January, 2024 under the very same suit ELC Case No. 128 of 1994 which was non-existent, having been dismissed for want of prosecution. In a Ruling delivered on 20th January 2024, this court dismissed the application on grounds that the court had become functus officio. The Applicant thereafter commenced the present application.

Respondents Summary of Facts

7. The Respondent filed a Replying affidavit stating that the applicant had by the time of filing it taken a decisive step thereby upstaging the intended interpretation sought herein rendering it an academic and an exercise in futility. He stated that the relief sought has essentially been overtaken by the said step. The Respondent further stated that the step taken by the Applicant herein is by instituting a fresh suit being Bungoma ELC Case No. E018 of 2024 where he seeks substantive orders and reliefs which the Applicant in the present application. He annexed a copy of the plaint marked GOI-1. The Respondent also stated that there is nothing in the Ruling requiring interpretation and that if the Applicant was aggrieved with the ruling, he had the option of appealing or reviewing the ruling or instituting a new suit which last option he has actually exercised by filing the aforementioned suit. He stated that by inviting the court to find that this application raises a question which the Applicant has taken a position on and in engaging the court in an aimless time consuming exercise.

Legal Analysis and Decision

8. I have considered the application, the Supporting affidavit, the Replying affidavit and the rival submissions by Counsel. The present application has been brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, Article 40 & 159 of the *Constitution of Kenya*, 2010. Sections 1A, 1B and 3A *CPR* are general provisions of law inherent in the powers given to the court where no specific provisions are given by statute or the constitution. The same applies to Article 159 of the *Constitution of Kenya*, 2010. Article 40 relates to protection of rights over property in a constitutional petition. The present application has been filed under a Miscellaneous Application. Substantive orders under Article 40 of the Constitution cannot be granted under a Miscellaneous Application.
9. The Applicant in the present Application is seeking for what he refers to as

“a definitive interpretative declaration of the respective interest of each party, clarifying which party is entitled to the suit land, particularly as at the time the court became functus officio.”
10. This court's ruling which the Applicant is seeking interpretation delivered on 20th January, 2024 is self-explanatory and does not require any magic or interpretation. At paragraph 19 of the said ruling, this court rendered itself as follows;

“19. This matter was dismissed for want of prosecution where the court found that there was no sufficient cause shown why the matter should not be dismissed. A dismissal in itself is a judgment that determines a suit. Therefore, as it is, there is no suit pending and the applicant's application is untenable. Having arrived at the above finding, a determination of the other issues becomes moot.”



11. The court finding on the application filed by the Applicant herein in the former suit is as clear as the day is from the night. There is absolutely nothing to be interpreted. In any event, this Court has no jurisdiction under the law to grant the orders sought. I also agree with the Respondent's submission that if the Applicant was dissatisfied with this Court's decision in the said Ruling, he had the option to either Appeal, review or file a fresh suit which he has done by filing Bungoma ELC No. E018 of 2024 now pending hearing and determination. I also agree with the Respondent that the current application raises a question which the Applicant has taken a position on and is engaging the court in an aimless exhibition and consuming the Court's precious time.
12. I have also looked at the decisions cited by Counsel for the Applicant in support of the applicant and find them distinguishable and irrelevant.
13. The upshot of my finding is that the Notice of Motion application dated 8th July, 2024 is devoid of merit and the same is hereby dismissed with Cost.
14. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 18TH DAY OF DECEMBER, 2024

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mrs Chungu & Mr. Obuli H/B Mr. Oringe for Applicants.
2. Respondent/Advocate-absent
3. Bett C/A

