



**Shiramba & another v Odwogo & another (Environment & Land Case
18 of 2015) [2023] KEELC 16621 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 18 OF 2015**

DO OHUNGO, J

MARCH 28, 2023

BETWEEN

RESTUTA FLORA KHAVERE SHIRAMBA 1ST PLAINTIFF

TITUS LUSESO SHIRAMBA 2ND PLAINTIFF

AND

WELINGTON AKHONYA ODWOGO 1ST DEFENDANT

PATRICK LUMUMBA ODWOGO 2ND DEFENDANT

RULING

1. The plaintiffs filed this suit on 24th February 2015 seeking eviction of the defendants from land parcel number Butso/15827 (the suit property), demolition of the defendants' structures thereon and a permanent injunction.
2. Hearing of the plaintiffs' suit commenced on 17th October 2017 and was concluded on 30th May 2018. A total of three witnesses testified in support of the plaintiffs' case. After several adjournments, defence hearing was scheduled, by consent in open court, on 21st March 2022. Come 21st March 2022, there was no appearance by the plaintiffs. Upon an application by counsel for the defendants, the court dismissed the plaintiffs' suit for non-attendance.
3. The plaintiffs reacted to the dismissal by filing Notice of Motion dated 30th June 2022, seeking setting aside of the dismissal. The application is supported by an affidavit sworn by the first plaintiff. She deposed that failure to attend court was not intentional since the plaintiffs had closed their case and her advocate was not aware of the hearing date of 21st March 2022. That the advocate who held her advocate's brief when the hearing date was fixed did not inform her advocate of the date.
4. The defendants opposed the application through a replying affidavit sworn by the first defendant. He deposed that the grant pursuant to which the plaintiffs obtained title to the suit property was revoked



and the suit property redistributed in Kakamega High Court Succession Cause No. 358 of 2010. He annexed a copy of a certificate of confirmation of grant dated 28th July 2022 and added that in the circumstances, there is no need to reinstate this suit since it will be an academic exercise.

5. The plaintiff filed written submissions through which they urged the court to allow the application. On their part, the defendants relied entirely on the aforesaid replying affidavit sworn by the first defendant.
6. I have considered the application, the affidavits, and the submissions. When dealing with an application such as the present one, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogob & Another v. Shah* [1968] EA 93 which were reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. Simply put, the court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not meant to assist a party who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.
7. The record herein shows that the hearing date of 21st March 2022 was fixed by consent in open court on 8th December 2021. On that date, Mr Mulama held brief for Mr Khayumbi for the plaintiffs. It is thus possible, as contended by the plaintiffs, that Mr Mulama overlooked to inform Mr Khayumbi. Needless to state, it would have been better if Mr Khayumbi swore an affidavit to vouch for those facts. Further, since the plaintiffs' case was closed way back on 30th May 2018, it is possible that the plaintiffs did not need to personally attend court on 21st March 2022.
8. I am alive to the defendants' contention that the hearing of the suit will be an academic exercise. At this point, I have no basis upon which to conclude that the hearing will in fact be an academic exercise. That remains to be seen at trial. I note that the certificate of confirmation of grant which has been exhibited by the defendants concerns distribution of land parcel number Butsotso/Shikoti/2835 which seems to be the parcel that gave rise to the suit property herein. It is up to the parties to take whatever position they find appropriate to take at trial, in view of the certificate of confirmation of grant.
9. I am persuaded that the plaintiffs have demonstrated a case to warrant exercise of discretion in their favour. I find merit in Notice of Motion dated 30th June 2022. Even so, I note that this is a very old matter. Parties will have to be more proactive in ensuring early hearing of defence case and final determination of the suit. I will give a date for defence hearing immediately upon delivery of this ruling.
10. In view of the foregoing, I make the following orders:
 - a. The order made on 21st March 2022 dismissing this suit for non-attendance is hereby set aside.
 - b. The defendants shall have costs of the application.

Dated, signed, and delivered at Kakamega this 28th day of March 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Toloyi holding brief for Mr Khayumbi for the plaintiffs

No appearance for the defendants



Court Assistant: E. Juma

