



REPUBLIC OF KENYA



KENYA LAW
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**Opiyo v Olima (Environment & Land Case 853 of 2017)
[2023] KEELC 16728 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 853 OF 2017
MN KULLOW, J
MARCH 28, 2023**

BETWEEN

PETER OMEDDAR OPIYO PLAINTIFF

AND

PETER NYAKWAKA OLIMA DEFENDANT

RULING

1. By Notice of Motion dated 7th July, 2022, the Plaintiff/Applicant sought the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to Review and/or set aside its Order dated 14th December, 2021 striking out the Plaintiff/ Applicant's Originating Summons dated 17th October, 2017 herein and instead proceed to reinstate the same for hearing and determination.
 - c. Costs of this Application be provided for.
2. The application is based on the 5 grounds on its face and the Applicant's Supporting Affidavit sworn on even date. It is his contention that Kisii ELC Case No. 497 of 2013 was transferred to ELC Migori and given a new case number Migori ELC No. 551 of 2017. That his previous advocate M/S Agure Odero, who had conduct of the said matter; had the matter withdrawn on the 17th September, 2018 but failed to inform him of the same
3. It is his claim that the said Kisii ELC No. 497 of 2013 (Migori ELC No. 551 of 2017) having been withdrawn on the 17.09.2018, the instant suit cannot be deemed to be sub judice.
4. He therefore urged the court to set aside its orders issued on the 14.12.2021 in the interests of justice and to reinstate the instant suit for hearing and determination on merit.



5. The application was opposed. The Respondent filed a Replying Affidavit sworn on 24.08.2022. It is his claim that at the time of the alleged withdrawal of Migori ELC Case No. 551 of 2017 (formerly Kisii ELC Case No. 497 of 2013), he had already raised a Preliminary Objection and the same was awaiting determination.
6. He maintained that the Applicant was fully aware of the previous suit which was later transferred and was pending in this court before the filing of the present suit and his actions thus amounted to an abuse of the court process. He thus urged the court to dismiss the Application with costs.
7. The Application was disposed of by way of written submissions; both parties filed their rival submissions which I have read and taken into account in arriving at my decision as hereunder;

Analysis and Determination

8. This court is of the considered opinion that the sole issue arising for determination is: -
 - a. Whether the Plaintiff/Applicant has made out a case for setting aside the Orders issued on 14.12.2021 and all the consequential orders.
9. The grant of an Order of setting aside an order is discretionary in nature and the court in exercising such discretion ought to take into account the circumstances of the case and exercise such powers judiciously. This position was reiterated by the court in *Mbogo vs Shah* 1968 E.A 93 where it was held that: -

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice”
10. I have looked at the Orders of this court of 14/12/2021 and I have noted that the Plaintiff's suit was struck out on account of being sub judice. It suffices to state that at the time of the delivery of the said Ruling, based on the material before it, this court was of the opinion that there was another pending suit between the parties herein and over same the subject matter, hence the said orders.
11. However, the new development only came to light on the filing of the instant Application. I have carefully considered the averments by the Applicant herein and further called for the said file Migori ELC Case No. 55 of 2017 (formerly Kisii Case No. 497 of 2013) for purposes of ascertaining the said averments. I have confirmed that the said suit was withdrawn on the 17/09/2018 as stated by the Applicant.
12. The doctrine of sub judice as provided under section 6 of the *Civil Procedure Act*, prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with a previously instituted suit, between the same parties, pending before the same court of a court with jurisdiction. The doctrine is aimed at preventing conflicting decisions and/or outcomes in respect to the same subject matter
13. Therefore, in light of the said withdrawal of the previous suit, Migori ELC No. 55 of 2017 (formerly Kisii Case No. 497 of 2013); it follows that there is no any other suit pending over the same parties and in respect of the same subject matter. As a result thereof, the matter cannot be said to be sub judice.



14. In view of the foregoing, this court finds that the Applicant has sufficiently proved the conditions set out under section 80 of the Civil Procedure Act and Order 45 of the [Civil Procedure Rules](#) to warrant the exercise of discretion in his favor by granting the orders sought.

Conclusion

15. In the upshot, I accordingly find that the Application dated 7th July, 2022 is merited and I proceed to allow the same on the following terms;
- a. An Order be and is hereby issued setting aside the Orders of 14th December, 2021 striking out the Plaintiff/ Applicant's Originating Summons dated 17th October, 2017 and all consequential orders ensuing therefrom.
 - b. An Order is hereby issued reinstating the Plaintiff's Originating Summons dated 17.10.2017 for hearing and determination on priority basis.
 - c. Costs of the Application in the cause.

DATED SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL AT MIGORI ON 28TH DAY OF MARCH, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Court Assistant - Tom Maurice/ Victor

