



**Owako v Ochieng & 5 others (Civil Miscellaneous Application  
63 of 2021) [2023] KEHC 1474 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1474 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL MISCELLANEOUS APPLICATION 63 OF 2021  
RE ABURILI, J  
FEBRUARY 27, 2023**

**BETWEEN**

**DAVID OSCAR OWAKO ..... APPLICANT**

**AND**

**FA OCHIENG ..... 1<sup>ST</sup> DEFENDANT**

**CHARLES ODENG'S AKA SAMUEL ORWA ..... 2<sup>ND</sup> DEFENDANT**

**EMILY ANYANGO MONG'OA ..... 3<sup>RD</sup> DEFENDANT**

**C.S. LANDS HON. KARONEY ..... 4<sup>TH</sup> DEFENDANT**

**F.I. LUBALELLAH ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**PJ OTIENO ..... PROPOSED DEFENDANT**

**RULING**

1. This matter was transferred from Kisumu High Court to this court on December 16, 2021 by Hon FA Ochieng on account that all the Judges, magistrates and Deputy Registrars who had handled the file had not only been compelled to recuse themselves from hearing the matter, but that they had all been enjoined to the suit as parties on account that they had obstructed justice for the Applicant/Plaintiff, Mr David Owako.
2. The Judges and judicial officers who had previously handled this suit who were enjoined thereto include:
  - (1) Hon Justice FA Ochieng - formerly Presiding Judge, Kisumu High Court and now Judge of the Court of Appeal at Kisumu;



- (2) Hon Lady Justice Jackline Kamau, the current Presiding Judge, Kisumu High Court and who is still handling HCC No 38/2009.
3. From the documents filed on record, which include newspaper cuttings, photographs of Judges including myself, the Chief Justice Hon Lady Justice Martha Koome, Justice FA Ochieng, Lady Justice J Kamau, HE the President of the Republic of Kenya William Samoei Ruto, Retired President HE Uhuru Kenyatta, Justice PJ Otieno of Kakamega High Court, Commissioner Majanja of Judicial Service Commission, among others.
4. It is clear that the Plaintiff drags into his litigation every other person including advocates who act for his adversaries and public officers including the Cabinet Secretary, Lands. The photographs that he attaches to his pleadings show that he takes them from the internet or using his hidden cameras which he carries along on pens, spectacles, porches and he conceded in court that he is an undercover.
5. After his matter was transferred to this court, we notified the plaintiff/applicant to attend court. He then informed the court that he had applied for his case file to be taken to the Chief Justice and that he did not understand why his case had been brought to Siaya High Court. The court assured him that as long as he was ready to be heard on his claim against the defendants, this court would expedite his case as I did not see any impediment.
6. In the course of attending to this file, I noticed that every time it came up, other 'parties' who are non-parties appeared. Mr Otieno David advocate appeared saying his law firm had been a party - the 10<sup>th</sup> Defendant.
7. The Plaintiff then sought to withdraw the suit against some of the parties, which this court allowed on May 9, 2022.
8. Indeed, there were many defendants to the suit before May 9, 2022 when I allowed the Plaintiff to withdraw his case against all except five (5) parties stated.
9. The original defendants as submitted to this court before May 9, 2022 and as per the Plaintiff's Notice of Withdrawal of suit filed in court on April 14, 2022 dated April 20, 2022 were:

- (1) Hon Ezra Dondi Awino,
- (2) Hon R Ondieki
- (3) Hon Odawo
- (4) Hon Wambilyanga
- (5) Hon Onami
- (6) Hon GM Mutiso
- (7) Hon JM Njoroge

All sued in their capacities as magistrates.

The second set of defendants were:

- (1) Hon Wambilyanga
- (2) Hon Onami



(3) Lorraine Ogombe

Sued in their capacities as Deputy Registrars Nairobi / Kisumu.

The third category of defendants were:

Samson Ouma, sued as Executive Officer, Kisumu Law Courts

The 4<sup>th</sup> set of defendants were:

1. Samson Ouma
2. George Ngayo
3. Oliver Komeni (sued in their capacities as Registry Staff in Kisumu Law Courts).

The 5<sup>th</sup> category of defendants are:

- (1) Hon Felix Kosgei
- (2) Hon DS Majanja

(Sued in their capacities as Judicial Service Commissioners, Nairobi)

The sixth category of defendants was Minister of Lands,

The 7<sup>th</sup> Defendant was the Registrar of Lands, Ardhi House,

The 8<sup>th</sup> category of defendants was:

- (1) Kitur & Co Advocates
- (2) Kipkenda, Lilian Magut & Associates
- (3) Nyanga & Co Advocates (sued in their capacities as law firms)

The 9<sup>th</sup> category of defendants was Justices of Appeal in their respective benches:

- (1) Kiage, G
- (2) Gatembu
- (3) Ole Kantai
1. Githinji, Minoti
2. Warsame
3. Daniel Musinga

Sued in their capacities as Appellate Benches.

The tenth category of defendants was:

- (1) Hon AK Kaniaru J
- (2) Hon TW Cherere J
- (3) Hon DS Majanja J



(4) Hon MM Musyoka J

(5) Hon PJ Otieno J

(6) Hon Azangalala J

(all sued in their capacities as High Court Judges)

10. From the proceedings and pleadings emanating from Kisumu in HCC Misc E139/2021, the Defendants were even more but the Plaintiff herein in his citations kept altering the defendants.
11. There are 17 defendants listed in his citation of pleadings filed in court on December 3, 2021 among them are the ones I have listed above. He had also named and enjoined Hon Lokoyoipot as the 4<sup>th</sup> Defendant in his capacity as Deputy Registrar, Kakamega; Hon Karoney, Minister for Lands; Hon Lubulellah, Chief Registrar - Lands, Ardhi House; Otieno Yogo, Ojuro & Co Advocates as 8<sup>th</sup> Defendant; Owiti, Otieno Ragot and Co Advocates as 10<sup>th</sup> Defendant; Kimanga & Co Advocates as 11<sup>th</sup> Defendant, Onyango, Olel & Ingutiah & Co Advocates, Chemelil Sugar Co Limited as the 10<sup>th</sup> Defendant, Kibos Sugar Co Ltd as the 16<sup>th</sup> Defendant and Muhoroni Sugar Co Limited (in receivership as the 17<sup>th</sup> Defendant.
12. Therefore, as this court was preparing itself and ready to hear the Plaintiff on his cause of action, he beseeched the court to allow him to bring an application for joinder of one other party whom he considered as crucial.
13. The court directed him to file and serve the application on all parties which he filed on October 24, 2022. It is dated the same day.
14. The court further gave directions that parties file written submissions to canvass the said application for joinder, after Ms Sarah Juma Litigation counsel filed grounds of opposition on November 8, 2022.
15. The Plaintiff/applicant filed over 600 pages of documents supporting his submissions by way of a link as the documents refused to be uploaded on the Siaya High Court email and even blocked the mail to other court users for a while. Upon the court alerting the plaintiff of the issue, he withdrew the bulky documents and filed submissions and a further affidavit.
16. I then reserved the date for the ruling on November 21, 2022 for delivery on December 28, 2022. The latter date was given in the presence of the Plaintiff and Ms Kimberly Litigation counsel holding brief for Ms Juma.
17. On December 28, 2022, I sat as the regional recess duty Judge for North Nyanza and Western, from 9 am to 5.30 pm. The parties never appeared so I pronounced the Ruling in Open court.
18. When the Plaintiff visited the court registry and obtained copy of the Ruling, dismissing his application for joinder of Hon Justice PJ Otieno of Kakamega High Court as a party to this suit, the plaintiff ran amok and went to the internet and collected all manner of filthy writings and publications some from the gutter press, others from mainstream media reporting about other Judges including Justice Said Chitembwe and Mike Sonko; my photographs as taken of me while in Homabay High Court and other official photograph, and of the Right Hon Raila Amolo Odinga and all the Supreme court Justices from the Chief Justice; retired President Uhuru Kenyatta.
19. In essence, the message that the plaintiff is spreading to the whole world is that by my dismissal of his application for joinder of Justice PJ Otieno as a party to this suit, I had tried to rob him of 1892 acres of land through corruption with a defective Order. He stated that he had declared war on me and wants



the Judicial Service Commission to be aware because I had gone rogue, yet he was hours away from his 7 million decree order from Hon J Kamau hence I should recuse myself from his case or he involves the National Intelligence Service to charge my complicity of the disappearance of his 15.6 million decree file CMCC 105/2015 both against Nyanga Advocates and Deputy Registrar Hon Odawo.

20. In the present two applications dated 26<sup>th</sup> and January 27, 2023, the Plaintiff seeks that the defective orders issued on December 28, 2022 be set aside or stayed, varied and or vacated and the orders of December 7, 2020, April 20, 2020, May 9, 2022 and September 19, 2022 be reinstated and be heard on the merits.
21. The plaintiff also seeks that I recuse myself and be enjoined to these proceedings as a defendant because I have obstructed justice and deprived him of his 1892 acres of land LR 10817/3 in Nandi County, Tinderet District.
22. He claims that I vacated three orders which was an error as only a superior court could do so and that I also polluted my own orders by enjoining a party who is not a party to the suit.
23. That I dismissed his case in absentia on December 28, 2022 when the case came up for ruling during vacation without a hearing date thus the Plaintiff was not accorded a fair hearing hence the order of dismissal should be set aside, stayed, varied and or vacated since he stands to lose his livelihood in the 1892 acres of land.
24. That the defective order has the potential of setting a precedent to disenfranchise Western interests in Kenya locally particularly Brookside Franchise belonging to his former school mate the former President Uhuru Kenyatta that is under threat through utterances from senior politicians that big land owners and cartels will be admonished.
25. That the orders of December 28, 2022 denied him the right to access justice, the ruling is unconstitutional and that I am prejudiced against the Plaintiff.
26. In his supporting affidavit, the Plaintiff swears that I am now as the trial judge, proposed to be the 7<sup>th</sup> Defendant hence I should recuse myself, and hand over to a new Judge for disposal and determination of this suit.
27. The Plaintiff places a red alert on my head for exhibiting deep fear for the suit to be reinstated which will expose what he alleges to be my soft underbelly gross misconduct that Government Land Act rent clearance has cleared him on ownership of the 1892 acres of land that he resided on until various judges evicted him by their frivolous rulings including myself with my defective order deliberately expunging the name of the 1<sup>st</sup> Defendant Judge and illegally replacing him with the Deputy Registrar Kakamega who is not enjoined to the suit, to confuse the process.
28. That the wrongly joined Deputy Registrar Kakamega Hon Lokoioipot signed for the Plaintiff Kshs 112,121,000 request for judgment.
29. The rest of the depositions are repetitive and unnecessary verbose statements. The plaintiff further claims that PJ Otieno who is now a Judge illegally transferred his property of 1892 acres vide HCCC 378/2016 formerly HCC 9/2015. He also annexed D0017 a Notice of Appeal and at paragraph 21 of his sworn affidavit, he deposes that NSS formerly NSIS have tapped my conversation with former lawyer Olel from Ms Onyango Olel & Ingutia Advocates that represented Kibos Sugar Company but left in a huff after stealing Kshs 32,121,000 the plaintiff's proceeds of sugar cane and that there was conspiracy to issue defective order to be promoted as Presiding Judge Kisumu & Olel as duty Judge Kisumu.



30. That my defective order dismissing the entire case goes against section 59 of the Civil Procedure Rules.
31. The Notice of motion dated January 26, 2023 and filed on January 31, 2023 singularly seeks that I recuse myself from this matter because I shall not accord the plaintiff fair hearing. The supporting grounds and affidavit and documents are similar to the ones I have stated above in respect of the application dated January 27, 2023.
32. The Respondents did not file written responses. The court directed the application to be heard by way of written submissions. The applicant filed his submissions while Ms Juma Litigation counsel appeared on the mention date and submitted briefly, to the effect that the application is an abuse of court process as the law provides for avenues of review or appeal. That grounds for recusal are not sufficient and finally that stay of execution cannot be issued against an order refusing joinder of a party.

### **Analysis and Determination**

33. I have carefully considered the two applications, the grounds and submissions filed on February 14, 2023 which reiterate the grounds and depositions by the applicant/plaintiff and the authorities and statute law cited in his submissions dated February 10, 2023.
34. I have also considered the brief submission by Ms Juma Litigation counsel. The issues for determination are:
  - (1) Whether the two applications have merit.
  - (2) What orders should this court make?
35. The two applications dated January 26, 2023 and January 27, 2023 respectively as canvassed together seek for my recusal from this case on account that I issued defective orders dismissing an application to enjoin Hon Mr Justice PJ Otieno to this suit hence I am prejudiced against the Plaintiff and denied him his constitutional rights to access justice.
36. On the application for stay and setting aside the orders dated December 28, 2022, it is alleged that the orders are defective and were made without a hearing on vacation recess and that I am biased and prejudiced to the extent that I am depriving the Plaintiff 1892 acres of land and over 112 million which he is awaiting through a judgment by Hon Lady Justice Jacklyne Kamau. The Plaintiff claims that I set aside orders which I should reinstate.
37. I will first deal with the prayer for recusal and the reasons given.
38. As earlier stated above, the application for joinder was heard interpartes and canvassed vide written submissions and the ruling date was fixed for December 28, 2022. I reserved that date on November 21, 2022 in the presence of both the Plaintiff who acts in person and attends court physically and Ms Kimberly Litigation counsel for the respondents. I was the regional recess duty Judge during the week of December 28, 2022 hence apart from this case, I had fixed other judgments and rulings for delivery and I did deliver the same as scheduled. There is no law that bars a judge or judicial officer from delivering judgment or ruling during the recess. As a duty court, I found it convenient to fix some matters for that week because I was so busy hearing the Homabay Election Petition for over 3 weeks and dedicated one week's services to Kisumu High Court such that Siaya High Court matters were sacrificed during that period hence fixing a matter for ruling within the period when I was the duty court, which date was fixed on November 21, 2022 upon receiving the duty court roaster did not, in any way, prejudice the Plaintiff who chose not to attend court on the ruling date.



39. Secondly, dismissal of an application to enjoin Hon Justice PJ Otieno of Kakamega High Court was not in itself a reason for me to recuse myself from hearing this suit as I considered the merits and demerits thereof and reached my findings and conclusion and if the Plaintiff is aggrieved by that order of dismissal, he was at liberty to appeal to the Court of Appeal. Indeed, the Plaintiff already filed a Notice of Appeal and the Court of Appeal will vindicate him if it finds it merited that it has to upset my ruling.
40. There is no guarantee that every matter that comes before court must succeed. The court determines the merits based on the facts and the law, not on other extraneous matters.
41. It cannot be that anytime the Plaintiff loses a battle in court then the judicial officer or judge is corrupt, the orders are defective and the ruling is prejudicial to the Plaintiff hence the need for the judicial officer to recuse themselves and after they do so, then the Plaintiff belligerently enjoins them his proceedings as defendants.
42. This is the habit adopted by the Plaintiff herein in all proceedings before court and this is evidenced as stated above. Even Deputy Registrars and Court of Appeal Judges and a judicial staff were enjoined to the proceedings because they handled this file.
43. Further, the Plaintiff believes that all his prayers must be granted even when they make no sense. He wants to, and as evidenced from the bulky documents, write ups and photographs annexed, scare away all judges and judicial officers as well as advocates from handling his case or defending his adversaries and calls them corrupt and hopes that the next judicial officer will succumb to his whims and grant him unmerited orders.
44. For example, he claims that I have had communication with Judge Olel who was duty Judge in Kisumu yet he has issues with that Judge, a fact that is obnoxious because I have never met a Judge called Olel and neither have I had any communication with him. I am aware that new judges were recently appointed but I have not met a judge by that name or spoken to him.
45. An application for recusal of a Judge from hearing court proceedings in a particular case is a necessary evil. On the one hand, it calls into question - the fairness of the judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill will, prejudice, political religious or other influence. This is the solemn oath that I took. I never took an oath to help any litigant but to serve diligently and to administer justice in accordance with the Constitution and the law. Where a party deserves the orders sought, I have absolutely no reason why I should deny them of those orders. On the other hand, where after analyzing the facts and the law I am not satisfied that a party deserves the orders sought, I would dismiss the cause and any party who is aggrieved has an opportunity to appeal to a higher court. See the holding by Mativo J in National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers and Planners Limited [2021] eKLR.
46. In Triodas Bank NV v Dubs, R v S (RD) [1997] 118 CCC (3d) 353 (SCC), per Heures-Dubé and McLachlin JJ at paras 35-84, Chadwick LJ had this to say of recusal:

' It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that cause because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him.

Rightly or wrongly, a litigant who does not have confidence in the Judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important



for a judge to resist the temptation to recuse himself simply because it would be more comfortable to so.'

47. In *Ansar v Llyods TSB Bank Plc*, [2006] EWCA Civ 1462, the Court of Appeal stated that a mere complaint cannot give rise to an automatic decision to recuse. In addition, an applicant's argument that his case is unassailable is insufficient. Further, the applicant's belief in the strength of his case does not establish any bias by the court.

48. Courts have also rejected the proposition that the mere fact that someone is criticizing judges renders the judges bound to recuse themselves for bias. Chadwick LJ had this to state:

' The reason is this: if Judges were to recuse themselves whenever litigant criticized them we would soon reach the position in which litigants were above to select judges to hear their cases simply by criticizing all the judges that they did not want to hear their cases.'

49. Thus, the mere fact that a party claims to have no confidence in the fairs of the court is not sufficient. See Denham J in *Talbot v Hermitage Golf Club* [2009] IESC 26, at [9], [16]-[19] (SC, Ireland).

50. It is not lost to this court that a perusal of the entire court file reveals that there has been concerted ferocious personal and scandalous attacks leveled against judges, judicial officers, judicial staff and public servants in this case and the attacks are so strongly worded and scandalous that the dispute pitying the Plaintiff herein and the original defendants before judicial officers were enjoined to the dispute.

51. The Plaintiff is hereby reminded that neither do the threats nor scandalous statements or complaints to the whole world all designed to force recusal and manipulate the judge or judicial system, which rather arise from actual malice scare me.

52. As was held in *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited* (supra) that:

' If such threats, personal attacks to judges or even complaints to JSC were to constitute a recusal of an honest judge, then a dishonest vexatious or disgruntled litigant would, 'readily manipulate the system, threatening every jurist assigned on the wheel until the defendants gets a judge he preferred.'

Also, the defendant could force delays, perhaps making the cases against him more difficult to try, perhaps putting witnesses at great risk. Such blatant manipulation would subvert out processes, undermine our notions of fair play and justice, and damage the public's perception of the Judiciary.'

53. I can't agree more with the above sentiments. In *Yama v Bank South Pacific*, [2008] SC921, the Supreme Court of Papua New Guinea stated as follows:

' It is not the law that a Judge should disqualify himself just because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous.'

Sedley LJ continued, 'Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them however blind the Speaker



is to its consequences, will be indistinguishable from the effect of manipulation. Ward LJ stated:

'The Judicial duty must be performed both without fear as well as without favour.'

54. Lord Newberger JP (the President of the Supreme Court of the United Kingdom and lead judge of the Judicial Committee of the Privy Council) in 'Judge not, that ye be not judged': judging judicial decision-making FA Mann Lecture 2015 (January 29, 2015) stated that: (as cited by Mativo J in the NWCPC case above):

' 36 It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court.'

61. Mativo J continued as follows in the preceding paragraphs: Stanley Burnton J in *R (Toovey and Gwenlan) v The Law Society*[54] stated:-

' Applications for the court to recuse itself have become increasingly fashionable of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the Court when he perceives his case if failing, but that is no justification for counsel to make the application it is for counsel to satisfy himself that there are reasonable grounds for making such an application.'

62. Sir Stephen Sedley in his foreword to *Judicial Recusal* by Hammond [2009] stated:-

'The judicial oath in England and Wales, widely echoed in the common law world, is to do justice; without fear or favour, affection or, ill-will'. Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. That makes the law relating to recusal a serious business.'

Recusal – an odd word, signifying withdrawal, originating in the religious concept of a recusant – is both an assurance of the impartiality of justice and a field of opportunity for manipulation. If not only every litigant who thinks the judge is going to be against him but every party who has waited for judgment and lost cost of litigation will become uncontrollable, legal certainty will become a chimera and the principle that litigants cannot handpick the court will be shot through with exceptions. Thus, there is a risk that a doctrine designed to assure the quality of justice may be used to the opposite effect. But few laws and procedures are not capable of being abused, and the risk of abuse is a price that has to be paid for ensuring, so far as can be done, that judges are independent and impartial.'

55. In this case, it is clear that my dismissal of the application to enjoin Justice PJ Otieno to these proceedings as a defendant is what has given rise to application for my recusal. In other words, the Plaintiff expected a favourable outcome and so he is disgruntled after his application was dismissed. I must remind the applicant herein that many cases involving Hon Judges and magistrates have been handled by myself and I have determined them on merits without fear or favour. Kenya Law Reports speak for itself.



56. In my view, the attack on my decisional independence is an affront to common sense and logic.
57. A party who is aggrieved by the decision of the trial court has a clear remedy by way of an appeal and not seek for recusal of the trial judge. Otherwise, what happens to that unfavourable decision even if the Judge recuses self? The situation would not change.
58. In this case, the Plaintiff has lodged a Notice of Appeal. He is free to pursue an appeal and continue expecting a favourable outcome from the court above and not to ask the trial Judge to recuse self. I have said enough of the reasons why a judge should not be quick to recuse self from proceedings.
59. I find no merit in the prayer for recusal as I am not in any way conflicted or biased and no evidence of bias or conflict of interest or corruption has been laid before the court for me to feel apprehensive. I feel no apprehension by the ferociousness of the applicant herein who has consistently attacked judicial officers and judges who have touched on litigation involving him. I therefore find his application for recusal to be frivolous and vexatious. I decline to recuse myself from this case and dismiss the application dated January 26, 2023.
60. On the prayers for stay and setting aside of the Ruling of December 28, 2022, which prayers are predicated on the same grounds as grounds for recusal, it should be noted that the ruling was a negative order dismissing an application for joinder of Hon. Justice PJ Otieno as a defendant party to this suit.
61. The court having dismissed the application, there is no positive order capable of implementation or enforcement.
62. I am aware that the Plaintiff filed a Notice of appeal. That intended appeal will in no way be rendered nugatory if the ruling impugned is not stayed.
63. The Plaintiff has not prayed for stay of the entire proceedings pending his intended appeal. He has sought for stay and setting aside of the Ruling complained of, dismissing his application for joinder of a party.
64. In the *Western College of Arts & Applied Sciences v Oranga & Others [1976-80]1 KLR*, the Court of Appeal stated as follows:
- ' But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson V Church, the High Court had ordered the Trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in application for stay, it is so ordered.'
65. In this case, I dismissed the application of joinder of a party. I did not even penalize the Plaintiff with costs of the application. Therefore, there being no positive order capable of being executed or complied with, I find the prayer for stay will not serve any purpose; the same is hereby declined and dismissed.
66. On the prayers for setting aside of the ruling of December 23, 2022, I have already outlined the reasons given. The applicant claims that the ruling is defective because it set aside certain named orders and that it is defective for naming a person who was not a party to the suit.
67. First, is that the Plaintiff has filed a Notice of Appeal against the said Ruling. It follows that the ruling is already in the arena of the Court of Appeal hence this court cannot set it aside. Even then, there must be good reasons for setting aside a ruling which was argued inter partes.



68. Secondly, the Plaintiff claimed that I omitted Justice Ochieng and I added Hon Lokoiyoipot as a defendant.
69. The Ruling is as clear as black and white. I never added or removed any party. However, as stated earlier, the Plaintiff himself had in the citation of the pleadings filed from time to time changed parties. That, nonetheless does not add or remove parties to a suit merely because in the citation, a party appears or does not appear. Joinder is either by an originating pleading or by an order of the court.
70. In this case, the record is clear as to who the original parties to the suit are. The Plaintiff then sought leave and I allowed him to withdraw the suit against some of the parties except the ones listed in the Notice of Withdrawal which is on record. It follows that mere omission to list one or more of the parties in the citation of the Ruling, or the name of a party against whom the Order of Withdrawal was made being on record, does not by itself, enjoin or remove/strike out a party.
71. It is for that reason that in most cases, the citations read so and so and others instead of naming or listing of all parties.
72. Furthermore, such omission in this case was not deliberate. It was a typing error which is not prejudicial to the Plaintiff as no such prejudice has been demonstrated to have been suffered by an omission of a party's name in the citation or inclusion of the name of a party against whom the suit was withdrawn.
73. The complaint in the name of a defective Ruling is in my view, frivolous and does not add value to the Plaintiff's case.
74. The 'defect' if any is curable by application of Article 159 of the Constitution which abhors procedural technicalities in favour of substantive justice. The 'defect' if any, does not adversely affect the merits of the Plaintiff's suit and is amenable for a suo moto amendment or correction by the court under section 99 of the Civil Procedure Act. The plaintiff could simply have written a letter to court pointing out the error which as I have stated, is curable. It does not even require review prayer to be made although none was made. On the allegation that I set aside some orders which were made in favour of the Plaintiff, the Ruling impugned is clear. No orders earlier on made were vacated or set aside.
75. An order permitting a party to file an application for joinder which latter application had to be determined on its merits is not an order for joinder and dismissal of the application for joinder is not the same as setting aside the order granting leave to the applicant to file an application for joinder to be considered on its merits.
76. For all the above reasons, I find all the prayers sought by the Plaintiff in the two applications to be devoid of any merit. I dismiss all the prayers for recusal, for stay and for setting aside, I make no orders as to costs.
77. The matter shall be mentioned on March 28, 2023 as earlier ordered, to confirm if judgment in Kisumu HCC 38/2009 (as stated by the plaintiff), pending before Justice Kamau is delivered before all the files mentioned in Kisumu HC Misc 163/2021 are placed before me for perusal and consideration on merit whether the applicant should be declared a vexatious litigant in the already argued application and whose ruling is in abeyance until all these files are placed before me for perusal.
78. I so order.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023**

**R.E. ABURILI**

**JUDGE**

