



REPUBLIC OF KENYA



**KENYA LAW**  
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**Owako v Chemelil Sugar Co Ltd & 7 others (Civil Suit  
38 of 2009) [2023] KEHC 2839 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2839 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL SUIT 38 OF 2009  
JN KAMAU, J  
MARCH 28, 2023**

**BETWEEN**

**DAVID OSCAR OWAKO ..... PLAINTIFF**

**AND**

**CHEMELIL SUGAR CO LTD ..... 1<sup>ST</sup> DEFENDANT**

**KIBOS SUGAR CO LTD ..... 2<sup>ND</sup> DEFENDANT**

**MUHORONI SUGAR CO LTD (IN RECEIVERSHIP) ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH KENY, DANIEL LELEI, SIMON SERONEY (SUED IN  
THEIR CAPACITY AS ELECTED OFFICIALS OF KAMALAMBEI  
SOCIETY) ..... 4<sup>TH</sup> DEFENDANT**

**JOSEPH CHEPSIROR, DAVID KIMELI, STEVEN YEGO (SUED  
IN THEIR CAPACITY AS ELECTED OFFICIALS OF TUWAPSUL  
SOCIETY) ..... 5<sup>TH</sup> DEFENDANT**

**WILLIAM LANGA'T, DAVID BOEN MUSA (SUED IN THEIR CAPACITY AS  
ELECTED OFFICIALS OF BARMARENG SOCIETY) ..... 6<sup>TH</sup> DEFENDANT**

**KAMALAMBUI FARMERS COMPANY ..... 7<sup>TH</sup> DEFENDANT**

**KARATILI FARMERS CO LTD ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. In his Notice of Motion dated 7<sup>th</sup> April 2022 and filed on 8<sup>th</sup> April 2022, the Plaintiff sought leave to request for judgment in default of defence to be entered in his favour against the Defendants both jointly and severally for Kshs 112,121,000/= plus interest from the date of filing the suit. He also sought



- that if leave was not granted by this court, then the file should be forwarded to the Chief Justice for purposes of giving directions and/or the file be transferred and finalised in any other court save for the High Courts in Nyanza, Western Province and the Rift Valley.
2. He swore an affidavit in support of the said application on 7<sup>th</sup> April 2022. He averred that he was an administrator of the estate of Jonathan Owako and Imelda Akinyi Owako. He contended that he was seeking leave to file a Request for Judgment against (sic) the Ruling dated 4<sup>th</sup> December 2020 issued by Justice Ole Kantai, Justice Gatembu Kairu and Justice Kiage. He added that the said Ruling needed to be reviewed or set aside for execution of Decree liquidated amount of Kshs 112, 121,000/= in Kisumu HCCC No 38 of 2009 and Kshs 7,000,000/= in Kisumu CMCC No 242 of 2020 that was due to him. He stated that he sought for Request of Judgment in default of defence where the default had taken thirteen (13) years as the Defendants had not filed a defence and which issue was solely in Deputy Registrar's docket(sic).
  3. It was his case that Farah and Musyoka JJ developed cold feet to effect his application due to the replication of the Great Gatsby Conspiracy of the USA (sic) that would swallow them in the feuds where volumes mysteriously went missing between Kisumu and Kakamega Law Courts encircling judicial officers. He added that Musyoka J finally directed that the file be placed before this court for directions and disposal.
  4. He asserted that the history of files resurfacing after the intervention of the Kisumu Criminal and Investigation Department (CID) Boss (sic), Mr. Towett and the Director Public Prosecutions Kakamega, Patrick Gumo was illustrated in the machinations of the two (2) stations of Kisumu and Kakamega and the judicial officers who were complicit to deny him the said interlocutory Judgment.
  5. In opposition to the said application, on 24<sup>th</sup> June 2022, the 2<sup>nd</sup> Defendant filed Grounds of Opposition of even date. It was its case that the Plaintiff's application was self-defeating as it sought orders of transfer of the file if the leave sought was not granted. It added that the application was bad in law, misbegotten, misconceived and an abuse of the court process.
  6. On 12<sup>th</sup> July 2022, the Plaintiff filed Grounds of Objection of even date. He also swore two (2) Supplementary Affidavits on 23<sup>rd</sup> May 2022 and 1<sup>st</sup> August 2022. He asserted that since the inception of this suit, certain transgressions against him had occurred with several threats to his life from police and judicial officers and that the courts in this jurisdiction were unable to determine his suit despite the fact that a colossal amount was owed to him and he was evicted from Plot LR 10817 measuring 1892 acres in Nandi County, Tinderet District.
  7. He denied having been served with the 2<sup>nd</sup> Defendant's Grounds of Opposition dated 24<sup>th</sup> June 2020 and its Statement of Defence dated 2<sup>nd</sup> July 2020 but admitted that he was served with the same by email. He added that if the leave to file Request for Judgment was not granted, his constitutional right of access to justice as enshrined in Article 159(2) of *the Constitution* which was embodied in Section 1A, 1B and 3A of the *Civil Procedure Act* would be infringed.
  8. He pointed out that it was the attitude of the Judges in Nyanza and Western Provinces which caused him to be apprehensive of being denied the right to access justice and that he believed that the Chief Justice, being impartial in the matter, could give directions that would enhance his right to access to justice. It was his contention that having waived their rights to file a defence for the last thirteen (13) years, the Defendants should be deemed to have admitted the claim. He was emphatic that the Ruling of Njagi J dated 12<sup>th</sup> March 2020 denied him his constitutional right of access to justice as enshrined in Article 159(2) of *the Constitution* which he stated was embodied in Section 1A, 1B and 3A of the *Civil Procedure Act*.



9. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not file any Written Submission despite having been given time to do so by court. The Plaintiff's Written Submissions were dated 18<sup>th</sup> July 2022 and filed on 19<sup>th</sup> July 2022 while those of the 2<sup>nd</sup> Respondent were dated and filed on 25<sup>th</sup> July 2022. This Ruling is therefore based on the said Written Submissions which the parties relied upon in their entirety.

### Legal Analysis

10. The Plaintiff submitted that the Ruling and Orders of the Court of Appeal delivered on 4<sup>th</sup> December 2020 in Civil Application No 44 of 2020 *David Oscar Owako vs Chemilil Sugar & 7 Others* (eKLR citation not given) should be set aside and stayed. He contended that the court unprocedurally expunged a duly certified interlocutory Judgment and did not specify what points of law they arrived at that decision.
11. He placed reliance on the case of *Hermanus Phillipus Steyn vs Giovanni Gnocchi-Ruscone* (citation not given) where the court set out the principles that determine whether a matter was of public importance.
12. He asserted that the judges were indolent in stopping the interlocutory judgement through underhand tactics, vagaries and corruption methods to circumvent justice upon him. He invoked Order 10 of the Civil Procedure Rules 2010, and contended that he had satisfied the threshold to be granted the orders he had sought.
13. On its part, the 2<sup>nd</sup> Respondent submitted that Prayer No 2 of the Plaintiff's application was in contravention of the Order of court that was issued on 11<sup>th</sup> June 2019 by Njagi J in *David Oscar Owako vs Chemilil Sugar Company Limited & 7 Others* [2019] eKLR where the court observed that the Plaintiff had been filing one application after another to the detriment of the hearing of the main suit and barred him from filing any application or documents without leave of the court. It also ordered that the matter be heard on priority basis.
14. It was its case that the Plaintiff's application was vexatious in nature and was a legal action brought to solely harass or subdue it. It asserted that the suit was in the form of a repetitive, burdensome and unwarranted filing of a meritless motion in the suit which action amounted to an abuse of the judicial process.
15. It contended that for the court to issue the orders sought, the Plaintiff had to demonstrate that the application he sought to file after the grant of leave was necessary and was aimed at expediting the final disposition of the suit or satisfy the court.
16. It further submitted that the proceedings herein indicated that on 21<sup>st</sup> August 2009, the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed their respective Statements of Defence and that the Plaintiff filed a Reply to the Defendants' Statement of Defence but that for unexplained reasons, copies of the said Statement of Defence were not in the court file. It pointed out that having filed its Statement of Defence it could not be faulted, held liable and/or denied a chance of being heard in its defence just because its Statement of Defence filed and placed on the court filed could not be traced.
17. It asserted that by way of abundant caution, it filed another Statement of Defence dated 2<sup>nd</sup> July 2020 on 23<sup>rd</sup> June 2022. It was its contention that it had complied with Order 11 of the Civil Procedure Code by filing and serving all parties with its Witness Statement, List of Witnesses and List of Documents with copies attached thereto. It added that its Statement of Defence had raised several triable issues that entitled it to be heard.



18. In that regard, it relied on the case of *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75 where the court held that the main concern of the court is to do justice to the parties. It contended that the approach by the court should therefore not be to strike out a pleading but to first examine whether the striking out would be in conformity with the overriding objective set out in the Civil Procedure Rules and Article 159 of *the Constitution* of Kenya.
19. It also relied on the cases of *Korir Salat vs Independence Electoral and Boundaries Commission & Others* [2013]eKLR and *Trust Bank Ltd vs Amalo* (2003) 1EA 350 where the common thread was that a court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings.
20. It was its submission that in line with the overriding objectives of the court as set out in Sections 1A and 1B of the Civil Procedure Rules and the provisions of Article 159 (1) (d) of *the Constitution* of Kenya and in compliance with the order made and issued on 11<sup>th</sup> June 2019, it was only prudent that this court do set down this suit for hearing on a priority basis instead of granting the orders sought by the Plaintiff.
21. Notably, the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. The court must always acknowledge that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard and that they should not be precluded from participating in court proceedings.
22. Indeed, as the 2<sup>nd</sup> Defendant submitted, a reading of the proceedings of 21<sup>st</sup> August 2009 showed that the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed their respective Statements of Defence. This meant that the Defendants were fully aware of the case herein and were ready to defend their cases.
23. A further reading of the proceedings and in particular the aforesaid Ruling of Njagi J in reinstating the Plaintiff's suit which had been dismissed on 3<sup>rd</sup> February 2017 by Majanja J, rendered himself at Paragraph 22 as follows:-

“As noted by Majanja J in his Ruling of 3<sup>rd</sup> February 2017, the matter has been in court since when it was filed in 2009. It has been mired in a web and plethora of applications at the instance of the applicant which no doubt made Majanja J to make the orders of 20<sup>th</sup> December 2016 with the view to ensuring expeditious disposal of the matter. The applicant is entirely to blame for failing to comply with the orders of the court.”
24. Having said so, it was outrightly clear that the delay of this matter was majorly caused by the Plaintiff himself and he ought to be estopped by this court from blaming the Defendants without any justifiable cause.
25. The Plaintiff did not demonstrate that there was merit judgment in default of defence being entered in his favour against the Defendants herein both jointly and severally for Kshs 112,121,000/= plus interest from the date of filing the suit without hearing the Defendants herein.
26. This court took a firm view that if the suit herein proceeded to full trial, no party would be prejudiced as they would both have a fair trial as enshrined under Article 50 of *the Constitution* of Kenya, 2010 resulting in substantive justice being done to them.
27. Forwarding this file to the Hon Chief Justice to appoint judges in any other part of the country other than in Nyanza, Western Province and Rift Valley merely because this court did not allow the Plaintiff's application was not procedural. The proper procedure was for the Plaintiff to appeal against the decision of this court in the event he felt aggrieved by the same.



**Disposition**

28. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 7<sup>th</sup> April 2022 and filed on 8<sup>th</sup> April 2022 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.
29. It is hereby directed that this matter be mentioned on 18<sup>th</sup> April 2023 with a view to giving directions on the hearing.
30. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF MARCH 2023**

**J. KAMAU**

**JUDGE**

