



**Obilo v Mutswenje & another (Environmental and Land Originating Summons
E017 of 2021) [2025] KEELC 1473 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2021
BN OLAO, J
MARCH 25, 2025**

BETWEEN

KALASINA OUMA OBILO APPLICANT

AND

VENACIUS MUTSWENJE 1ST RESPONDENT

WILFRED OMUKALA THUMAH 2ND RESPONDENT

RULING

1. Kalasina Ouma Obilo (the Applicant) moved to this Court vide his Originating Summons dated 12th October 2021 in which he sought against Venacius Mutswenje (the Respondent) that he is entitled to the land parcel No Bukhayo/mundika/2967 by way of adverse possession. The Originating Summons was subsequently amended on 28th June 2024 to add Wilfred Omukala Thuma as a 2nd Respondent. Before that, Venacius Mutswenje now the 1st Respondent had filed a replying affidavit dated 28th March 2022 opposing the Originating Summons. The amended Originating Summons and the response thereto are not relevant for purposes of this ruling.
2. What is important is that the Applicants not having taken any action towards the prosecution of their Originating Summons, it was listed for dismissal on 19th February 2024 which date was later changed to 11th April 2024 and subsequently to 1st July 2024 when it was dismissed with costs.
3. I now have for my consideration the Plaintiffs Notice of Motion dated 17th July 2024 in which the Plaintiff, citing the provision of Order 45 Rule 2 of the Civil Procedure Rules and Sections 3 and 4 of the Civil Procedure Act seeks the following orders:
 1. Spent
 2. That this Honourable Court be pleased to review and/or set aside its orders issued on 1st July 2024 dismissing the Plaintiff's suit.



3. That this Court be pleased to issue any order reinstating this suit.
4. Costs be in the cause.
4. The Motion is premised on the grounds set out therein and supported by the affidavit of his counsel Toney Seth Omeri.
5. The gravamen of the Motion is that when this case was listed for 1st July 2024, counsel for the Plaintiff went before the Deputy Registrar for mention and was not aware that it was to come up before the Judge. It was only later that counsel for the Plaintiff, upon tracing the movement of the file, found that it had been mentioned before the Judge and dismissed.
6. The Plaintiff's land is in danger of being alienated if the orders sought are not granted.
7. The Defendants opposed the Motion vide a replying affidavit filed by the 2nd Defendant and dated 13th September 2024. Therein, he has deposed, inter alia, that there has been inordinate delay in filing the application and the Originating Summons was filed on 12th October 2021 some three (3) years ago and he is yet to be served with any pleadings yet he lives in BUSIA. He has also not been served with the Motion which should be dismissed.
8. The Court directed that the Motion be canvassed by way of written submissions. These have been filed both by Mr Omeri instructed by the firm of Omeri & Associates Advocates for the Applicant and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Respondents.
9. I have considered the application, the rival affidavits and the submissions by counsel.
10. It is not in dispute that this Court dismissed the Applicant's suit on 1st July 2024 for non-attendance. This application was filed on 17th July 2024 and therefore there has been no inordinate delay in approaching the Court.
11. The reinstatement of a dismissed suit is at the discretion of the Court. In so doing, the Court will consider the grounds set out as to why the Applicant did not attend Court at the time when the suit was dismissed. In the circumstances of this case, it has been sated that the Applicant's counsel went before the Deputy Registrar where he believed the case had been listed for directions yet the same was before the Judge. There is nothing to suggest that infact the Applicant was not before the Deputy Registrar on the date when it was dismissed. I find that explanation plausible.
12. Order 12 Rule 3 of the Civil Procedure Rules empowers the Court to dismiss a suit for non-attendance by the Plaintiff. Rule 2 of the same Order allows the Court to set aside the dismissal order. It reads:

“Where under this order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
Emphasis mine.

While reinstating a dismissed suit, the Court will no doubt consider the constitutional provisions set out in Articles 48 and 50(1) which state:

48: “The Court shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

50(1): Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”



I have not heard the Respondents complain that if the dismissed suit is reinstated for hearing, they may not be able to marshal their witnesses or documentary evidence. Indeed the 2nd Respondent has deposed in paragraph 4 of his replying affidavit that he has not been served with the pleadings in this case. I find this to be a proper case for reinstatement of the dismissed suit without occasioning any prejudice or injustice to the Respondents herein as discussed in *Ivita -v- Kyumba* 1984 KLR 441.

13. Finally, this Court must also be cognizant of the decision in *Sebei District Administration -v- Gasyali* 1968 E.A. 300 that to deny a party a hearing should be the last resort of a Court. In setting aside the dismissal orders, however, this Court must do so on reasonable terms.

14. The up-shot of all the above is that having considered the Notice of Motion dated 17th July 2024, I allow it in the following terms:

1. The dismissal orders issued herein on 1st July 2024 are hereby set aside and this case is reinstated to hearing.
2. All the parties should within 21 days of this ruling file and serve all their necessary documents and pleadings if they have not already done so as suggested by the 2nd Respondent.
3. The matter shall thereafter be listed for pre-trial before the Deputy Registrar on 12th May 2025 to confirm compliance and take a date for hearing of the suit which shall be by way of viva voce evidence.
4. The Applicant shall also within 21 days from today pay to the 1st Respondent throw away costs which I assess at the sum of Kshs.15,000.
5. In default of (4) above, the dismissal orders shall revert.

BOAZ N. OLAO

JUDGE

25TH MARCH 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS ON THIS 25TH DAY OF MARCH 2025.

BOAZ N. OLAO

JUDGE

25TH MARCH 2025

