



**Ngatya (Suing on behalf of Henry Agnatia Bwire) v Otabat & another (Environment & Land Case 132 of 2015) [2023] KEELC 17073 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17073 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 132 OF 2015**

**BN OLAO, J**

**APRIL 25, 2023**

**BETWEEN**

**MELISA ANDAYI NGATYA (SUING ON BEHALF OF HENRY AGNATIA BWIRE) ..... PLAINTIFF**

**AND**

**AUGUSTINE OMELE OTABAT ..... 1<sup>ST</sup> RESPONDENT**

**OBARASA ONGATIA BWIRE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 8<sup>th</sup> November 2022, I dismissed the Plaintiff's suit under Order 12 Rule 3(1) of the [Civil Procedure Rules](#) after her then counsel, Mr Ashioya, was unable to demonstrate good cause why this suit which has been in Court since 2015 should not be dismissed. The reasons for the dismissal of the suit are captured in my ruling delivered on 8<sup>th</sup> November 2022.
2. I now have before me for my determination, the Plaintiff's Notice of Motion dated 1<sup>st</sup> February 2023 and premised on the provisions of Article 159 of the [Constitution](#), Section 1A, 3, 3A and 80 of the [Civil Procedure Act](#) and Orders 12 and 7 of the [Civil Procedure Rules](#). The Plaintiff seeks the following orders:
  1. Spent
  2. That this Honourable Court be pleased to re-instate the suit herein upon such conditions and directions as it may deem fit.
  3. That the costs of the application be in the cause.
3. The application is supported by the grounds set out therein as well as the affidavit of Melisa Andayi Ongatya the Plaintiff herein.



4. The gravamen of the application is that although the Plaintiff had filed this suit through the firm of Ashioya & Company Advocates, they failed to keep her in the picture about the progress of the suit which prompted her to instruct the firm of Ouma-Okutta Advocates to act for her. She even paid fees to the said firm. The firm of Ouma-Okutta Advocates filed a Notice of Change of Advocate on 18<sup>th</sup> August 2020 but even they too failed to prosecute the Plaintiff's case. Strangely, the firm of Ashioya & Company Advocates continued to appear in Court on behalf of the Plaintiff including when the suit was dismissed.
5. On 25<sup>th</sup> January 2023, the Plaintiff visited the offices of Ouma-Okutta Advocates to find out the position of her case but did not find counsel. So she visited the Court registry only to discover that her case had been dismissed. She is now threatened with eviction from her only home for the last 30 years and which is her only matrimonial home left to her by her deceased husband. She is also elderly and illiterate. Her suit should be reinstated to enable her protect her interest.
6. Annexed to her application are the following documents:
  1. Copy of this Court's ruling dated 8<sup>th</sup> November 2022 dismissing her suit.
  2. Receipt dated 15<sup>th</sup> August 2020 issued by Ouma-Okutta Advocates for Kshs 10,000 being professional fees.
  3. Copy of advocates-client instruction form dated 1<sup>st</sup> August 2020 issued by Ouma-okutta Advocates.
  4. Copy of OB report dated 3<sup>rd</sup> August 2022 from Adungosi Police Station.
  5. Notice of change of Advocate dated 17<sup>th</sup> August 2020 and filed by Ouma-okutta Advocates.
7. The application is opposed and Augustine Omele Otabat the 1<sup>st</sup> Defendant herein has filed two replying affidavits the first one dated 6<sup>th</sup> March 2023 and the second one dated 13<sup>th</sup> March 2023. He describes the application as amorphous, incompetent and lacking in merit. He adds that the Plaintiff's suit was dismissed on 8<sup>th</sup> November 2022 after an application by her advocate Mr Ashioya seeking an adjournment was dismissed. That although Mr Ouma filed a Notice of change of Advocate to act for her, the same was not served upon the defendants' counsel. That if the said firm of Ouma-Okutta Advocates was indeed instructed to act for the Plaintiff, they did not participate in these proceedings. That the Notice of change of Advocate filed by the firm of Ouma-Okutta Advocate may have been sneaked into the file for purposes of this application. That Mr Ashioya should have filed an affidavit to explain why he continued acting for the Plaintiff yet her case had already been taken over by the firm of Ouma-Okutta Advocates. And in any case, the Plaintiff has a remedy against her then counsel for professional negligence.
8. Annexed to the replying affidavit are the following documents:
  1. Copy of a ruling delivered by Kaniaru J on 29<sup>th</sup> April 2020 with respect to an application for injunction.
  2. Copy of the Notice for dismissal of suit issued on 14<sup>th</sup> February 2022.
9. The application has been canvassed by way of written submissions. These have been filed by MR MULAKU instructed by the firm of Mulaku & Company Advocates for the Plaintiff and by MR BOGONKO instructed by the firm of Bogonko-Otanga Advocates for the defendant.
10. I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.



11. This is a clear case where the Plaintiff has been let down by her counsel and this Court must intervene to ensure that she has her day in Court. The right to be heard is a fundamental one. Justice will be offended if a party is denied that right.
12. When this Court dismissed the Plaintiff's case on 8<sup>th</sup> November 2022, it had no reason to doubt that MR ASHIOYA was appearing for her. Where a counsel appears in Court and addresses it on behalf of a party, the Court cannot start interrogating such counsel on whether he or she actually has instructions to do so unless that issue is raised by the client or by the other party. The Plaintiff has annexed to her supporting affidavit a Notice of change dated 17<sup>th</sup> August 2020 and filed by the firm of Ouma-Okutta Advocates on 18<sup>th</sup> August 2020. It is not clear if the same was in fact served upon the firm of Ashioya & Company Advocates. I have no doubt, however, that if Mr Ashioya had been served, he would not have addressed the Court on 8<sup>th</sup> November 2022 seeking time to put in an application to cease acting for the Plaintiff. If anything, that would have relieved him of the burden of having to file that application. I am persuaded that Mr Ashioya was not aware that another counsel had already taken over the case on behalf of the Plaintiff.
13. Having filed a Notice of change to act for the Plaintiff in place of the firm of Ashioya & Company Advocates as far back as 18<sup>th</sup> August 2020, it became the responsibility of the firm of Ouma-Okutta Advocates to peruse the Court file and make whatever applications that were necessary in prosecuting the Plaintiff's suit. I have perused the proceedings herein and at no time did any counsel from the firm of Ouma-Okutta Advocates appear in Court on behalf of the Plaintiff. I have seen a supporting affidavit by Mr Wycliffe Ouma Okutta dated 14<sup>th</sup> February 2023 in which he has deposed, inter alia, that on 15<sup>th</sup> August 2020, the Plaintiff instructed him to take over this suit from the firm of Ashioya & Company Advocates. He therefore filed a Notice of change of Advocates on 18<sup>th</sup> August 2020 and on 2<sup>nd</sup> February 2023, the Plaintiff visited him complaining that her suit had been dismissed without her knowledge. It was then that he perused the Court file and discovered that the suit had been dismissed. Counsel adds that the notice of dismissal was not served upon him. To begin with, there was no need for any notice of dismissal to be served upon any counsel because the suit was dismissed in the presence of Mr Ashioya when it came up for hearing. The dismissal was under order 12 rule 3(1) of the [\*Civil Procedure Rules\*](#). It was not dismissed under order 17 rule 2(1) of the [\*Civil Procedure Rules\*](#) which provides for a notice to issue.
14. It is of course true that a party has the responsibility of pursuing his case and should not blame his advocate for any lapses. Counsel for the Defendant has submitted that the Plaintiff was indolent and ought to sue her advocate for professional negligence. But that is not to say that an advocate has no such duty at all. Section 1A (3) of the [\*Civil Procedure Rules\*](#) provides that:

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”  
Emphasis added.

Each case must however be considered on its peculiar circumstances. In this case, the firm of Ouma-Okutta Advocates was retained by the Plaintiff who made it clear that her suit had been dismissed without her knowledge. In paragraphs 4, 5 and 6 of her supporting affidavit, she has deposed as follows:

“4. That the above (ouma-Okutta Advocate) had assured me that he had taken over the matter from Ashioya & Co. Advocates and would proceed with it on my behalf.



5. That I am an elderly illiterate widow who verily believed the assurances given to me by her new advocate.
6. That in a double-tragedy, I have later learnt upon perusal of the Court file that my newly instructed advocate never kept his promise to me and that he failed to prosecute the matter as per the rules of procedure.”

The fact that the Plaintiff did instruct the firm of Ouma-Okutta Advocates to act for her is not disputed. It is infact conceded by Mr Wycliffe Okutta in his affidavit filed in support of this application. What is not clear is why counsel did not attend Court nor file an application to protect the Plaintiff’s interests knowing too well that the Plaintiff’s suit had been dismissed. Apart from retaining her new counsel, the Plaintiff paid a deposit of Kshs 10,000 leaving a balance of Kshs 60,000 out of the agreed fees. Surely given the history of this suit of which Mr Wycliffe Okutta then counsel for the Plaintiff had been fully briefed, it was the responsibility of counsel to walk with this “elderly and illiterate widow” and approach the Court to set aside the order dismissing her case. This became more urgent after the Plaintiff had informed counsel that she was facing imminent eviction from the land in dispute. The Plaintiff had performed her obligation after paying a deposit of the agreed fees after which it became the duty of Mr Wycliffe Okutta to act on her instructions. Surely the Plaintiff was not expected to camp outside the offices of Ouma-Okutta Advocates awaiting a brief from them with regard to what action they had taken. I do not think the Plaintiff was indolent as suggested by the Defendant. She acted promptly upon learning that her suit had been dismissed but as is now clear, her new advocate failed to act on her instructions.

15. There is no doubt that this Court has the discretion to reinstate a suit which has been dismissed. A Court’s main mandate is to do justice to the parties before it. Such discretion must be exercised judiciously to avoid any injustice to the opposite party. There was a mistake on the part of Mr Wycliffe Okutta in failing to act on the Plaintiff’s instructions and it would be an injustice of profound proportions to let the dismissal order stand. I have not heard the Defendants allege any prejudice that they will suffer if this suit is reinstated other than the delay in having he case determined and which can be atoned for by an award of costs. As has been held by superior courts, the mistake of a counsel should not be visited on the party – *Tana & Athi River Development Authority v Jeremiah Kimicho Mwakio & 3 others* eKLR. See also *Patriotic Guards Ltd v James Kipchirchir Sambu* CA Civil Appeal No 20 of 2016 [2018 eKLR].
16. I am not persuaded that the Plaintiff herein has sought deliberately to obstruct or delay the cause of justice. It is clear that she was let down by her counsel and it would be unfair to allow the dismissal orders dated 8<sup>th</sup> November 2022 to stand.
17. Ultimately therefore, the Notice of Motion dated 1<sup>st</sup> February 2023 is allowed as follows:
  1. The orders dated 8<sup>th</sup> November 2022 dismissing the Plaintiff’s suit are set aside.
  2. The Plaintiff’s suit is hereby reinstated to hearing.
  3. The parties to appear before the Deputy Registrar on 9<sup>th</sup> May 2023 to confirm compliance under Order 11 *Civil Procedure Rules* and take a date for hearing.
  4. The Plaintiff shall meet the costs of this application, agreed or taxed.

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL AT BUSIA ELC  
ON THIS 25<sup>TH</sup> DAY OF APRIL 2023.**

**BOAZ N. OLAO**



**JUDGE**

**25<sup>TH</sup> APRIL 2023**

