



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okumu v Odari & another (Environment & Land Case  
745 of 2015) [2023] KEELC 16856 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16856 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 745 OF 2015**

**E ASATI, J**

**APRIL 20, 2023**

**BETWEEN**

**DICKSON OPOLA OKUMU ..... PLAINTIFF**

**AND**

**TOM ODHIAMBO ODARI ..... 1<sup>ST</sup> DEFENDANT**

**JOHN OWINO ODARI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before court for determination is the Notice of Motion dated October 13, 2022 filed in court on October 14, 2022 by the Defendants herein. The application is expressly to be brought pursuant to the provisions of Section 3 and 3A of the [Civil Procedure Act](#) and Order 10 Rule 11 and Order 22 Rule 22 and 25 of the [Civil Procedure Rules 2010](#). The application seeks for orders that the court sets aside the *ex-parte* judgement/Ruling.
2. The grounds upon which the application was brought as shown in the Notice of Motion and the Supporting Affidavit sworn by John Owiro Odari, the 2<sup>nd</sup> Defendant, on October 13, 2022 are that the Applicants are not aware of the decree or judgement in this case, that the Advocate who was conducting the matter on their behalf did not inform them of any hearing of the case, that the ruling relates to land in Maseno which the Applicants are not aware of.
3. The application was opposed vide the grounds of opposition dated November 30, 2022 and filed in court on behalf of the Plaintiff/Respondent on December 7, 2022. It is the Plaintiff's case that the application is misconceived, misdirected, frivolous and vexation and an abuse of the due process of the court. That the provisions of the law cited by the Defendants/Applicants in support of the application cannot afford the orders sought. That the application has no merit and is only meant to delay the Plaintiff from the fruit of the certified costs and interest.



4. The application was canvassed orally in court on February 27, 2023. The Defendants submitted that they were not aware of case No 745 of 2015 and that the case they had in court was No 183 of 2011. That they have never had a case at Maseno court. That they were harassed by police to sign a consent. Counsel for the Plaintiff submitted that case No 183 of 2011 (HCC) was transferred to the Environment and Land Court and registered as No 745 of 2015 hence it is one and the same case. That the decree has been executed. The Defendants/Applicants have already been evicted from the suit land and the only outstanding issue is costs of the suit of which the Defendants/Applicants have paid part and are yet to clear the balance. That on March 1, 2022 the Defendants signed a consent on how they were to pay the costs.
5. I have considered the Notice of Motion, Supporting Affidavit and annexures thereto, the Grounds of Opposition and the rival oral submissions made. Setting aside of judgements, decrees and/or orders is a remedy available in law for a deserving party and as held in *Mureithi Charles & another vs Jacob Atina Nyagesuka* [2022]eKLR “ In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement if necessary upon terms to be imposed.”
6. The ground for the application in the present case are that the Applicants are not aware of case No 745 of 2015 and that they were never informed of the hearing. However, perusal of the court record reveals that the Defendants participated in the proceedings, they filed defence dated July 19, 2012 and were ably represented throughout the trial. That case No 183 of 2011 is what was transferred to the Environment and Land Court to become ELC 745 of 2015. That the decree has been executed save for recovery of the balance of costs.
7. The court record further shows that soon after delivery of the judgement, the Defendants filed an application dated June 12, 2019 seeking stay of execution and setting aside of the judgement. The application was heard and Ruling delivered on October 25, 2019 dismissing the application with costs. Thus, the current application is res judicata.
8. Given this background, I agree with the submissions by the Plaintiff that the application is misconceived and otherwise an abuse of the court process. The recourse open to the Defendants after the ruling of October 25, 2019 was to appeal as per the law provided.
9. In conclusion, I find that the grounds for setting aside of judgement have not been demonstrated. The application dated October 13, 2022 lacks merit. I dismiss the application with costs to the Plaintiff.

It is so ordered.

**Ruling, dated and signed at Kisumu, read virtually this 20<sup>th</sup> day of April 2023 through Microsoft Teams Online Application.**

**E ASATI,**

**JUDGE.**

**In the presence of:**

**Maureen - Court Assistant.**

**2<sup>nd</sup> Defendants/Applicants - Present**

