



**Otema v Land Registrar of Siaya & another (Environment & Land  
Petition 5 of 2021) [2023] KEELC 17308 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17308 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ENVIRONMENT & LAND PETITION 5 OF 2021**

**AY KOROSS, J**

**MAY 11, 2023**

**[ORIGINALLY KISUMU ELC PETITION NO.17 OF 2019]**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS  
UNDER ARTICLES 22(1), 23 AND 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF  
ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION TO THE RIGHT TO PROPERTY**

**AND**

**IN THE MATTER OF PURPOTED REVOCATION  
OF LAND TITLE NO. NORTH GEM/GOTREGEA 887**

**BETWEEN**

**JOHN ONYANGO OTEMA ..... PETITIONER**

**AND**

**LAND REGISTRAR OF SIAYA ..... 1<sup>ST</sup> RESPONDENT**

**PHILLEMOM OUMA KOBONYO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Petitioner's case and submissions**

1. Pursuant to articles 50 and 159 of *the Constitution*, sections 1(A), 1(B) and 3A of the *Civil Procedure Act* and order 45 rules 1 and 2 of the *Civil Procedure Rules*, the petitioner's motion dated 5/01/2023 sought the following orders:



- a. Spent.
  - b. That the honourable court be pleased to set aside, discharge and/or vary the orders of 21/10/2021 which dismissed the petitioner's petition dated 28/10/2019.
  - c. That upon setting aside the said orders of 21/10/2021, the petition dated 28/10/2019 be reinstated and directions issued appropriately.
  - d. That leave be granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the petitioner.
2. The motion was premised on grounds enumerated on its face and supported by an affidavit deposed by the petitioner on 5/01/2023.
  3. Basically, he was never served with notices by the court, the dismissal would expose him to hardship and legal liability, the motion had been filed without unreasonable delay and he had always been keen to prosecute his petition. His previous counsel was reluctant to prosecute his petition hence he filed a notice to act in person. He was the author of the dismissal and in the interests of justice, his motion should be allowed.
  4. As directed by the court, the petitioner's counsel, Mr. Oduol, filed written submissions dated 5/01/2023. Counsel submitted that notwithstanding the court did not err in dismissing the petition for want of prosecution, it should exercise its discretion by considering the right to fair hearing and not dwell on technicalities. Counsel relied on articles 50 and 159(2)(d) of [the Constitution](#) and sections 1(A) (B) and 3A of the [Civil Procedure Act](#).
  5. Counsel relied on the Court of Appeal decision of [D.T. & Co. \(K\) Ltd vs. Joseph Mbaria Muchina](#) CA 37 of 1978 where the court was dealing with reasonable causes of action and the well cited decision of [Ivita v Kyumbu](#) [1975] eKLR where the high court stated thus when it was confronted with an application for dismissal of a suit for want of prosecution: -

‘The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.’

### **Respondents' case and submissions**

6. Despite evidence of service of the motion, the respondents did not file any documents in opposition. Notwithstanding the motion was unopposed, this court has to subject it to merit evaluation based on provisions of law and settled principles.

### **Analysis and determination**

7. Having carefully considered the motion, affidavit and submissions, I shall be guided by the authorities and provisions of law that have been well cited by the petitioner's counsel. The issues that fall for determination are inter alia: -
  - a. Whether leave should be granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the petitioner.



- b. Whether the petitioner has met the legal threshold to warrant setting aside of the orders issued on 21/10/2021 and a reinstatement of the petition.

**a. Whether leave should be granted to the firm of M/s Oduol Achar & Co. Advocates to come on record for the petitioner.**

8. The petitioner having previously acted in person, his incoming advocate was bound by the provisions of order 9 rule 9 of the Civil Procedure Rules to seek leave to come on record. By rule 10 of the same order, such a relief could be combined with other prayers. A dismissal is a judicial determination and carries the same weight as a judgment. See the Court of Appeal decision of *Njue Ngai v Ephantus Njiru Ngai & another* [2016] eKLR. I find that this prayer is competently before me and I hereby allow it.

**b. Whether the petitioner has met the legal threshold to warrant setting aside of the orders issued on 21/10/2021 and a reinstatement of the petition**

9. Article 50 of *the Constitution* recognises the right of a party to fair hearing while sections 1A and 3A of the *Civil Procedure Act* provides that courts in seeking to give effect to the overriding objective, should facilitate the just, expeditious, proportionate and affordable resolution of disputes.
10. The applicable provision of law on dismissal of a suit for want of attendance and its reinstatement is anchored in order 12 rule 7 of the *Civil Procedure Rules* and not order 45 rules 1 & 2 of the same Rules.
11. From the petitioner's motion, it is obvious he cited the wrong provisions of law. In the considered view of this court, this error did not go to the heart of the issues for determination and was curable by order 51 rule (2)(a) of the same rules. Order 12 Rule 7 provides as follows:

‘Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.’

12. The case of *Ivita vs. Kyumbu* (Supra) clearly sets out the principles that have long guided courts in exercising their discretionary powers on whether or not to reinstate a suit and I will adopt the principles outlined therein. The case of *John Waweru Njenga & 5 others v Motor Botique Limited* [2020] eKLR cited with approval the case of *Shah v Mbogo and Another* [1967] EA 116 where the Court of Appeal of East Africa held that:

This discretion (to set aside ex parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.’

13. Before I proceed further with my analysis, I must address an error in the court record. What was served by this court on the respondent and his erstwhile counsel was a ‘hearing notice’ and not a notice to show cause. The use of the word “NTSC” in the proceedings of 4/10/2021 was an inadvertent error which is curable by section 100 of the *Civil Procedure Act*. The rectification will not cause any prejudice or embarrassment to the petitioner.
14. In calling this court to exercise discretion in his favour, the petitioner has laid out 4 grounds; he had never received a hearing notice from this court, his previous advocates had been reluctant to prosecute his claim hence he had filed a notice to act in person, he had not received updates on the progress of his case and this motion had been filed without inordinate delay.



15. I will chronologically examine these grounds and test their veracity. On the 1<sup>st</sup> ground, this court remitted a hearing notice scheduled for 21/10/2021 to the petitioner through his postal address \* 00-100 Nairobi. This was the contact address he remitted to this court through his notice of intention to act in person. The letter was never returned to this court as undelivered.
16. On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds, his erstwhile counsel had long been fired and the petitioner was personally seized of the petition. It fell upon him to track the progress of his case by constantly following up his case with the court. It is strange that he is alluding that in converse, the court was the one that should have updated him on the progress of his case.
17. This is unfortunate, the petitioner must be reminded that having instituted the petition, he sat on the wheel and nobody could drive his case apart from himself. It was not lost to this court that prior to the transfer of this suit to this court from ELC Kisumu, the court had in the absence of the petitioner, mentioned the matter severally.
18. When he failed to attend ELC Kisumu, the court in accordance with order 17 rule 2 of the *Civil Procedure Rules* issued two notices to the petitioner through his postal address \* 00-100 Nairobi. In a similar manner, he did not heed. This communication from the court were never returned as undelivered.
19. On the last ground, the motion was filed on 10/03/2023 which was over one year since dismissal. It was not without doubt filed with unreasonable delay.
20. This petition has been in court for close to 4 years. Having dragged the respondents to court, the onus was on him to prosecute his petition; which he did not. As rightfully admitted by the petitioner, he was the author of his misfortune and this court cannot come to his aid.
21. This court must be reminded that within article 159 (2) (d) of *the Constitution*, justice should not be delayed. It applied to both parties to these proceedings. See *Shah v Mbogo (Supra)*.
22. Utmost and for the foregoing, I find prayers (b) and (c) are not merited while prayer (d) is allowed. Since costs follow the event and considering the respondents have never participated in these proceedings, the petitioner shall bear his own costs. I hereby issue the following disposal orders: -
  - a. The proceedings of 21/10/2021 are hereby rectified in the following terms: ‘the NTSC was served upon the parties. The suit is hereby dismissed with costs.’ is hereby corrected to read as follows; ‘the hearing notice was served upon the parties. The suit is hereby dismissed with costs.’
  - b. The firm of M/s Oduol Achar & Co. Advocates are hereby granted leave to come on record for the petitioner.
  - c. The reliefs that this court do set aside, discharge and/or vary the orders of 21/10/2021 and reinstate the petition are disallowed.
  - d. The petitioner shall bear his own costs of this motion.

**DELIVERED AND DATED AT SIAYA THIS 11<sup>TH</sup> DAY OF MAY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**11/5/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:



Mr. Oduol for the petitioner

N/A for the respondents

Court assistant: Ishmael Orwa

