



**Chesa v Okwalo (Environment & Land Case 31 of 2018)
[2023] KEELC 18149 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 31 OF 2018
DO OHUNGO, J
JUNE 21, 2023**

BETWEEN

PATRICK OKOTH CHESA PLAINTIFF

AND

FRANCIS SHIRIMA OKWALO DEFENDANT

RULING

1. This suit was dismissed on June 21, 2021 for non-attendance. By Notice of Motion dated May 5, 2022, the plaintiff now seeks reinstatement of the dismissed suit. The application is supported by an affidavit sworn by the plaintiff. He deposed that he did not receive three notices which the Deputy Registrar had issued and that his advocates on record did not receive the notices either. He added that he is desirous of prosecuting his case.
2. The defendant opposed the application through a replying affidavit in which he deposed that the issues raised in the suit had been resolved in Kakamega ELC No 609 of 2014 where the court declared him owner of the suit property by adverse possession. That the plaintiff had severally sought adjournments in this matter and that the plaintiff has not explained the reasons for not taking any action from the date of dismissal to the date of filing of the present application. He further deposed that the plaintiff is disinterested in prosecuting the matter.
3. The application was canvassed through written submissions. The applicant invoked the duty of the court to substantive justice by hearing parties and argued that it has not been shown that his advocates and him had developed a habit of not attending court. He therefore urged the court to allow the application.
4. The respondent opted to rely entirely on his replying affidavit.
5. I have considered the application, the affidavits and the submissions. The plaintiff seeks setting aside of the order made on June 21, 2021 dismissing this suit for non-attendance. While considering an



application such as the present one, the court is called upon to apply the principles laid down in *Mbogoh & Another v Shab* [1968] EA 93 and reiterated in *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR as follows:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. ... In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment ...

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right.

6. The record herein shows that after several adjournments, the matter was listed for mention on December 14, 2020. Counsel for the plaintiff attended court on December 14, 2020 when the court granted a final adjournment and scheduled the matter for mention on March 24, 2021. Come March 24, 2021, there was no appearance by the parties. The court then scheduled the matter for mention on June 21, 2021, with an order that the Deputy Registrar serves parties. The record shows that the Deputy Registrar issued a notice dated June 15, 2021, which was served upon the plaintiff's advocates on record through post. There was no appearance by parties on June 21, 2021 and the court proceeded to dismiss the suit. I am persuaded that the plaintiff was served with notice of mention that was scheduled for June 21, 2021.
7. The plaintiff has not explained why he did not attend court on March 24, 2021 despite the said date having been fixed in the presence of his counsel and despite knowing that he had been granted the final adjournment on December 14, 2020. I agree with the defendant that the plaintiff had exhibited a tendency of not attending court. Even after the suit was dismissed on June 21, 2021, it was not until May 10, 2022, a year later, that the plaintiff filed the present application. No explanation has been offered for the inordinate delay.
8. The record herein further shows that in the plaint dated July 8, 2016 which was initially filed at the Environment and Land Court at Kisumu, the plaintiff averred that he was the registered proprietor of the parcel of land known as N/Wanga/Indangalasia/1113 (the suit property) and sought eviction of the defendant who he averred had trespassed into the property. The defendant filed defence admitting the plaintiff's ownership but added that he had filed Kakamega HCCC No 65 of 2005 claiming that the plaintiff herein held the suit property in trust for him. It seems that Kakamega HCCC No 65 of 2005 became Kakamega ELC No 609 of 2014. The defendant has annexed a judgment delivered in Kakamega ELC No 609 of 2014 on July 24, 2019, wherein the court found that the defendant herein had established his case against the plaintiff herein. The court declared the defendant herein the owner of half of the parcel of land known as N/Wanga/Indangalasia/1113. I do not know how the plaintiff will make a case for eviction of the defendant in the face of the judgment delivered in Kakamega ELC No 609 of 2014 on July 24, 2019.
9. In view of the foregoing discourse, the plaintiff has not persuaded me to exercise discretion in his favour. I find no merit in Notice of Motion dated May 5, 2022, and I accordingly dismiss it with costs to the defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF JUNE 2023.

D. O. OHUNGO



JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Mondia holding brief for Mr Kiveu for the defendant

Court Assistant: E. Juma

