



**Omurwa v Orutwa & 4 others (Environment & Land Case
345 of 2016) [2023] KEELC 19145 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 345 OF 2016**

**M SILA, J
JULY 27, 2023**

BETWEEN

MARY OMURWA PLAINTIFF

AND

EVANS ORUTWA 1ST DEFENDANT

JAMES OREKO 2ND DEFENDANT

CO-PERATIVE BANK OF KENYA 3RD DEFENDANT

LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

(Application to re-open the suit; hearing having proceeded in absence of applicant and his counsel; applicant stating that his counsel did not inform him of the hearing date and he had on the day prior to the hearing filed an application to cease acting; each party having a duty to track the progress of the case and special circumstances need to be demonstrated when party is seeking to set aside proceedings for not being informed; filing of applications to cease acting on eve of hearing or very close to the hearing date frowned upon; application allowed, not on the grounds stated, but on discretion of court to allow applicant be heard subject to payment of thrown away costs).

1. The application before me is that dated April 24, 2023 filed by the 1st defendant. The applicant seeks orders to set aside the proceedings and order of March 7, 2023 closing the case of the 1st defendant and upon granting this order the witnesses who testified on that day be recalled for cross-examination by counsel for the 1st defendant. The application is principally based on the ground that the applicant was not informed by his erstwhile advocate on record to attend court on that day. The application is opposed by the plaintiff while the 3rd defendant opted not to oppose it subject to payment of thrown



away costs. The suit against the 2nd defendant abated, while the suit against the 4th and 5th defendants was withdrawn.

2. The background is that through a plaint filed on 25 October 2016, the plaintiff contended that she was the rightful owner of the land parcel West Kitutu/Bomatara/4812 upon which she had developed a three bedroomed house. She avers that she had employed the now deceased 2nd defendant as caretaker as she ordinarily lives in the United States of America (USA). She contends that the 2nd defendant colluded with the applicant to have the suit property illegally transferred to the applicant and thereafter the applicant charged the property to the 3rd defendant. In the suit, the plaintiff seeks orders to expunge the name of the applicant from the register together with the charge and for eviction. The applicant and the 3rd defendant have opposed the suit.
3. I note that the plaintiff has donated a power of attorney to his daughter, one Linnet Omurwa, who testified as the plaintiff's second witness on November 4, 2021 and was stood down for cross-examination. The date for cross-examination was fixed for March 7, 2023. On that day, there was no appearance on the part of Mr. Ochwangi, learned counsel appearing for the applicant, though Mr. Nyamari, held his brief. There was however an application filed the previous day, March 6, 2023, by his law firm, to be granted leave to cease to act for the applicant, and Mr. Nyamari sought an adjournment which I declined, on the basis that there had been time to file the application and that as at that day, Mr. Ochwangi was still on record. I allocated time for hearing but neither Mr. Nyamari nor his principal, Mr. Ochwangi, attended court. The matter proceeded and Ms. Omurwa was cross-examined by Ms. Anuro, learned counsel for the 3rd defendant. The plaintiff called her 3rd witness and closed her case. Ms. Anuro proceeded to call her witness in defence and closed her case. I then gave directions for filing of submissions and directed that the matter be mentioned on 18 May 2023. Before that date, this application was filed and I have already pointed out that it seeks orders to have the case re-opened and the witnesses who testified on 7 March 2023 be recalled for cross-examination.
4. In the supporting affidavit, the applicant has deposed that he instructed the law firm of M/s Ochwangi & Company Advocates to represent him in this suit. He avers that he was not informed by his advocates about the hearing date of March 7, 2023 until the same day of hearing when Mr. Ochwangi called him at 8.30 am and asked him to proceed to his chambers immediately. He states that he was away at Busia and that he informed Mr. Ochwangi that he could only get to Kisii in the afternoon. He deposes that he drove from Busia and arrived at Kisii at 2.30pm. He was then informed that the case was coming up for hearing and Mr. Ochwangi did not know what transpired in court. He was advised that he should go and peruse the file. He states that he perused the file and found that his advocates had filed an application to cease acting the previous day. He avers that he was never served with that application so he was not able to look for another advocate to proceed. He reiterates that he never received communication in respect of the hearing date from his then counsel though he used to inform him of mention dates and advised that his attendance was not necessary for such mention dates. He states that he has a good defence and counterclaim and he stands to suffer irreparable loss if he is not given a chance to present his evidence.
5. The plaintiff has opposed the application through the replying affidavit of Linet Omurwa. She has given the history of the matter which is more or less what I have already outlined above. It is also deposed that the applicant had a duty to follow up on the case and track the progress of it and he cannot now turn round and feign ignorance and seek to shift blame on his advocates. She decries the delay in the proceedings and referred to the overriding objective stipulated in Section 1A and 1B of the [*Civil Procedure Act*](#). In her view, there is no valid reason to allow the application.



6. Both counsel for the applicant and counsel for the plaintiff filed written submissions which I have taken into account before arriving at my decision.
7. The main reason upon which the application is based is that the applicant was not informed by his counsel of the hearing date of 7 March 2023. He adds that he was also not aware that his counsel had filed an application to cease acting the previous day. The theme of the submissions of Mr. Bosire, learned counsel, who took over the matter from the law firm of Mr. Ochwangi, and who is now on record for the applicant, is that the mistakes of his erstwhile counsel ought not to be visited upon his client. On the other hand, Mr. Otieno, learned counsel for the plaintiff, has provided various authorities which are to the effect that it is not in all cases that a litigant will not be burdened by the acts of his advocates. Among the cases referred to me by Mr. Otieno is the dictum in the case of *Frera Engineering Company Limited vs Morris Mureithi Mutembei* (2020) eKLR, where the court stated as follows:-

“...the appellant has solely blamed his previous advocates for its quandary but has failed to show what efforts it made on its part to follow up with its advocates to establish the progress or status of the litigation so that it could take appropriate action to protect its interest.”

8. I agree with the above dictum. Parties have a duty to track and follow up on the progress of their cases. I find it strange that the applicant would say that he did not know that the matter was coming up for hearing on March 7, 2023. He is definitely cognizant of the fact that he has a case where he has been sued, which is this case. I assume that he was aware that the matter proceeded for hearing on November 4, 2021 when Ms. Omurwa testified and was stood down for cross-examination. The applicant has not demonstrated what efforts he made from 2021 to follow up on the case and find out any new date given. I am not persuaded that an applicant can simply go to sleep, fail to follow up on his case, and use that as an excuse to set aside proceedings. Litigants need to appreciate that the cases in court belong to them, not to the advocates, and they therefore have a primary duty to ensure that they are aware of the position of their cases. There will really need to be special circumstances for a litigant to present the excuse that he was not aware of the position of his case in order to obtain relief. As I have mentioned in our case, the applicant has not given any intimation of what he ever did to ensure that he is fully apprised of the case and he therefore cannot present this as a good reason for setting aside the proceedings of March 7, 2023.
9. While am on this, it will be observed that Mr. Ochwangi filed an application to cease acting on the eve of the hearing. Such practice must be condemned for it has potential to derail hearing of cases. An advocate is bound by the overriding objectives outlined in Sections 1A and 1B of the *Civil Procedure Act*. The same provide as follows :-

1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) 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.



1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

10. From the above, it will be observed that both an advocate and a party to civil proceedings, have a duty to assist court further the overriding objectives. These objectives include the timely disposal of proceedings. This practice of filing applications to cease acting on the hearing date, or so close to the hearing date, so that it cannot be heard in good time before the hearing date, needs to be frowned upon. I will not be afraid to state that it is defeating to the above overriding objectives, for an advocate to appear in court on the date of hearing, and state that he/she has no instructions and wishes to cease acting, and therefore the matter should automatically be adjourned for this reason. A hearing date is ordinarily given way in advance. By the time the hearing date approaches, both the litigant and the advocate, would know whether they are in a good place with each other, and whether instructions to proceed have been provided. If there is any fallout, then this should be settled in good time before the hearing date of the case, so that the matter proceeds as scheduled. The reality of the matter is that courts are backlogged, and because of that, litigants ordinarily have to wait for months, sometimes even years, to get another hearing date after a matter has been adjourned. It is not fair for parties and counsel to keep matters in court and contribute to the backlog because they do not settle their issues before the date of hearing. It should indeed be remembered that at the time of the hearing, the advocate appearing is still on record, and if an application for adjournment is declined, he/she is duty bound, as a professional, to proceed and act in the best interests of his client.
11. Back to the case at hand, I have already stated that the applicant has not given any indication of what steps he took to ensure that he is apprised of the status of his case. If it is true that he was never aware of the hearing date, then he was negligent in failing to follow up on the progress of his case, and he ought to bear the consequences of his negligence.
12. In my opinion, no good reason has been given for the applicant's non-attendance on March 7, 2023, and the failure on his part to see to it that the case proceeds for hearing as it was scheduled. I have every reason to decline this application, but I wouldn't wish to completely shut out the applicant from the seat of justice. I observe that this is a land matter and the applicant also has a counterclaim. I will give him a chance to be heard. But because, as I have stated, he had no good reason for failing to attend court on March 7, 2023, I will allow his application but subject to payment of thrown away costs, which I assess at Kshs. 40,000/= to the plaintiff and Kshs. 30,000/= to the 3rd defendant, to compensate the said parties for having to come back to court a second time. The said costs be paid within the next fourteen (14) days and in default, this application will stand dismissed. If the said costs are paid, the hearing of the case will be re-opened and the witnesses who testified on March 7, 2023 be recalled for cross-examination, and the applicant can also tender his evidence.



13. Despite allowing the application, the costs of it will be to the plaintiff.

14. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 27 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

