



**Juma v Ingudi (Environment & Land Case 78'B' of 2019)
[2023] KEELC 21821 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 78'B' OF 2019
BN OLAO, J
NOVEMBER 23, 2023**

BETWEEN

ANDREW FUPI JUMA APPLICANT

AND

GREGORY FRANCIS OBOTE INGUDI RESPONDENT

RULING

1. Order 17 Rule 2(1) and (2) of the [Civil Procedure Rules](#) provides that:
 - 2 (1) “In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”
2. Andrew Fupi Juma (the Plaintiff herein) moved to this Court vide his Originating Summons dated 29th November 2019 seeking the main remedy that he has acquired by adverse possession the land parcel No Bunyala/Bukoma/329.
3. Gregory Francis Obote Ingudi (the Defendant herein) resisted the claim by filing his replying affidavit on 13th January 2020.
4. Nothing much happened in the matter towards having the suit prosecuted. On 14th October 2020, the parties appeared before Hon. P. Y. Kulecho (deputy Registrar) where MS Gona then appearing for the Defendant sought time to trace him in order to file statements of his witness. She was given upto 28th October 2020. However, when the matter came up for mention on that day before the Deputy Registrar, there was no appearance by either party.



5. By notices issued on 9th March 2023, the parties were informed that the suit would be mentioned on 24th April 2023 to show cause why it should not be dismissed pursuant to the provisions of Order 17 Rule 2(1) of the [Civil Procedure Rules](#). On that day, only Mr Mogi holding brief for Mr Manwari for the Defendant attended Court and applied that the suit be dismissed with costs. There being no appearance by the Plaintiff or his counsel and the matter having been last in Court on 28th October 2020, the Court dismissed the Plaintiff's suit with costs. The Defendant thereafter filed his Bill of Costs on 7th June 2023. The same is yet to be taxed.
6. The Plaintiff has now moved to this Court vide his Notice of Motion dated 12th July 2023 seeking the following orders:
 1. Spent
 2. That the dismissal order made on 24th April 2023 by the Court be set aside and the suit against the Defendant be reinstated for hearing.
 3. That the costs of this application be in the main cause.
7. That application which is the subject of this ruling is premised under Section 3A of the [Civil Procedure Act](#) and Order 12 Rule 7 of the [Civil Procedure Rules](#). It is based on the grounds set out herein and supported by the affidavit of the Plaintiff's counsel Alex Masake. I shall revert to that affidavit later in this ruling.
8. The gist of the application is that whereas the suit was dismissed on 24th April 2023 under Order 17 of the [Civil Procedure Rules](#) for want of prosecution, no notice was served upon the Plaintiff. That although the notice for dismissal, as per the affidavit of service by one Hillary Okang'a Ongwete shows that the notice was emailed to the Plaintiff's counsel to alex@masake.com, the proper address is alex@masakes.com and that if Mr Alex Masake had seen the notice, he would have appeared in Court. The Plaintiff has therefore been denied his right to a fair hearing by not being served yet the Defendant received his notice which was served physically. The Plaintiff is desirous of being heard and should not be punished for the mistake of his counsel or the Court.
9. The application is opposed and the Defendant has filed both grounds of opposition and a replying affidavit dated 18th September 2023.
10. In the grounds of opposition, the Defendant states that under Order 17 Rule 2(5) of the [Civil Procedure Rules](#), the Plaintiff's suit stood dismissed by operation of the law after 2 years from the date of the last activity. The claim that the Plaintiff was not served is a red-herring and further, the Plaintiff has not explained why it has taken him more than 3 years to prosecute his suit. That the application is also misguided as it is premised under Order 12 Rule 7 of the [Civil Procedure Rules](#) which deals with hearings and consequences of non-attendance yet that is not why the suit was dismissed.
11. The supporting affidavit by Alex Masake is also incurably defective since it does not conform with the provisions of Section 5 of the [Oaths and Statutory Declaration Act](#) as it purports to have been sworn in Nairobi but before a Commissioner of Oaths in Busia. Further, it talks about annexures yet no documents were annexed to it.
12. In his replying affidavit dated 18th September 2023, the defendant has re-visited the history of this suit which I have already summarized above and adds that the Plaintiff neglected and/or failed to attend Court and show cause why his suit should not be dismissed. He also takes issue with the supporting affidavit of Alex Masake which I have also realized is not actually sworn. One page appears to be missing from the copy filed herein but since the Defendant says it was sworn on 11th July 2023, I can only



conclude that there must have been mis-filing with respect to the Court's copy. The Defendant has deposed further that the Plaintiff was duly served and in any event, has not shown why it has taken him 3 years to prosecute this suit. That the Plaintiff is keen on keeping this case in Court and this application should be dismissed.

13. The application has been canvassed by way of written submissions. These have been filed by Ms Wangusi instructed by the firm of Shabaan Associates LL.P for the Plaintiff and by Mr Manwari instructed by the firm of Manwari & Company Advocates for the Defendant.
14. I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by counsel.
15. I wish to start with the supporting affidavit of Alex Masake which is annexed to the application. The copy of that affidavit and which is the one in this file is not signed by the deponent. It is only commissioned. So, really, there is no affidavit filed in support of the application. And this Court can only go by the records filed before it. On the basis before me, there is no supporting affidavit as known in the law and on that basis alone, this application is for dismissal.
16. It would appear, however, that although the supporting affidavit purportedly deposed by the said Alex Masake and filed in Court is not signed by him, the copy served upon the Defendant is infact signed and commissioned. That lapse notwithstanding, this Court would have been persuaded to rely on the supporting affidavit served upon the Defendant because that fact is not contested.
17. However, the supporting affidavit filed by Alex Masake appears also to be defective. In paragraphs 5 and 6 of the grounds of opposition, the Defendant's counsel has stated as follows:

5: "The affidavit supposedly sworn (by one Alex Masake) in support of the application is incurably defective for failure to conform to the terms of:

- a. the *Oaths and Statutory Declarations Act* (CAP 15), particularly Section 5 thereof; and
- b. the Oaths and Statutory Declarations Rules, particularly Rule 7 and 9 thereof

6: The affidavit supposedly sworn (by one Alex Masake) in support of the application, is incurably defective and cannot possibly suffice as a basis for the application dated 12th day of July 2013. First and foremost, the affidavit purports to have been sworn in Nairobi but before a commissioner for oaths in Busia. Busia and Nairobi are about 425 km apart. Secondly, paragraph 4 of the affidavit supposedly sworn by one Alex Masake in support of the application (the Notice of Motion dated the 12th day of July 2023) make reference to a set of annexures that are supposed to illustrate that the Applicant was not served with a copy of the Notice dated the 9th day of March 2023.

There were infact no documents annexed to the affidavit that the applicant filed in Court (on the 12th day of July 2023) and served upon the Respondent (on the 14th July 2023).

Thirdly, the affidavit was supposedly sworn (at Nairobi/Busia) on the 11th day of July 2023 in support of the application dated 12th day of July 2023.

It would appear that the affidavit was prepared and sworn even before the application was drawn/prepared.

7: The application is devoid of merit and is bad in law."



18. The *Oaths and Statutory Declarations Act* [CAP 15 Laws of Kenya] provides that:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

An affidavit is defined in *Black's Law Dictionary* as:

“A voluntary declaration of facts written down and sworn to by a declarant, usu before an officer authorized to administer oaths.”

As I have already stated above, the supporting affidavit by Alex Masake filed herein is not signed by him though it is commissioned in Busia. On that basis above, this application is for dismissal. It is clear however that the same affidavit served upon the Plaintiff is sworn in Nairobi but before a Commissioner of Oaths in Busia. This Court did not have the benefit of perusing it but I have no doubt that what counsel for the Defendant has stated is true. After all, no attempt was made to rebut that assertion.

A similar situation occurred in the case of *CMC Motors Group Limited v Bengeria Arap Korir trading as Marben School & St. Elizabeth Academy School* [2013] eKLR where the supporting affidavit was signed in Nairobi but Commissioned in Mombasa. Kasango J had no hesitation in striking out the said affidavit and with it, the Notice of Motion which it supported.

19. Again in the case of *Mary Gathoni & Emmanuel John Amboye v Frida Ariri Otolu & John Momanyi* [2020] eKLR, the supporting affidavit was sworn in Eldoret but before a Commissioner of Oaths at Kakamega. Musyoka J addressed that anomaly as follows:

“The affidavits on record, purportedly sworn by Mary Gathoni & Emmanuel John Amboye on 27th September 2019 were not properly Commissioned. They are not on oath. Infact they are not affidavits at all. I accordingly hereby strike them out. They were drawn in support of the interlocutory Motion dated 27th September 2019. The effect of the striking out of the purported affidavits would be that the said application would now be without any evidential foundation. The same is amenable to dismissal and I hereby dismiss it.”

20. In this case, the supporting affidavit by Alex Masake and which is the one annexed to the Notice of Motion only bears the stamp and signature of Wycliffe Okutta Advocate/commissioner For Oaths who commissioned it. It does not bear the signature of the deponent. An affidavit being a solemn document, this Court cannot rely on the affidavit herein and I am not persuaded that it meets the standard required of such a document.

21. I strike out that affidavit and with it, the Notice of Motion herein.

22. The upshot of all the above is that the Notice of Motion dated 12th July 2023 is struck out with costs.

BOAZ N. OLAO

JUDGE

23RD NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO



JUDGE

23RD NOVEMBER 2023

