



**Osindi v Nyabando & another (Environmental and Land Originating Summons
13 of 2016) [2023] KEELC 21688 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 13 OF 2016**

M SILA, J

NOVEMBER 22, 2023

BETWEEN

ISAAC ONGUBO OSINDI PLAINTIFF

AND

RICHARD GECHURE NYABANDO 1ST DEFENDANT

CHRISTOPHER MAUBI OKINDO NYABANDO 2ND DEFENDANT

RULING

(Application to reinstate suit which was dismissed for non-attendance; application allowed subject to payment of throwaway costs)

1. The application before me is that dated 26 May 2023 filed by the plaintiff. The applicant prays for this court to set aside its orders of 12 October 2022, dismissing this suit, and to have the suit reinstated for hearing on merit. The application is opposed.
2. To put matters into context, this suit was commenced through an Originating Summons which was filed on 21 January 2016 and amended on 9 February 2016. The applicant seeks orders to be declared owner of approximately 3 acres, by way of adverse possession, out of the land parcel Central Kitutu/Mwamanwa/557. On 5 April 2022, the case was mentioned before the Deputy Registrar who directed the case to be heard on 12 October 2022. On the said date the parties were absent, though Mr. Anyona, learned counsel for the respondents was present. In absence of the applicant, I proceeded to dismiss his suit for non-attendance. It is this order that the applicant now seeks to set aside. The application is supported by the affidavit of the applicant. He swears that on the day fixed for hearing, his advocate was held up in Kisii High Court Succession Cause No. 93 of 2007. He avers that upon dismissal of his suit, the file was taken to Kisumu for storage and searching for it took a long time. He asks that his application be allowed.



3. The respondent has filed a replying affidavit to oppose the motion. He deposes that the applicant filed this case more than six years ago and he failed to attend court during its hearing. He does not believe that any satisfactory explanation has been offered as to why the applicant and his advocate did not appear in court. On the allegation that the applicant's counsel was held up in another court, the respondent avers that the applicant could as well have appeared in court and seek permission on behalf of his advocate.
4. I invited counsel to file submissions, which they did, and I have taken these into consideration before arriving at my decision.
5. This is an application to reinstate a suit that was dismissed for non-attendance. The court has power to reinstate such suit pursuant to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010. However, good explanation needs to be given for non-attendance before a dismissed suit is reinstated, otherwise the entire administration of justice will come to a halt if parties simply fail to attend court on the date fixed for hearing and expect the court to automatically reinstate their suits when they apply.
6. In our case, the reason given is that counsel for the applicant was held up in another court, and to prove this, the applicant has annexed what I think is an extract of a diary. That, I am afraid, is not sufficient evidence since this is not an official document. Maybe if the applicant had annexed the cause list showing that counsel was held up in another court, then I would have believed that position. But even assuming that counsel was indeed held up in another court, that by itself, is not reason to allow this application. If his advocate could not personally attend, he could as well have asked another counsel to hold his brief to proceed. Moreover, the applicant has not explained why he absented himself from court. It is his case and it is expected that he would be present in court. He does not give any reason for his non-attendance.
7. From the above, I am actually not persuaded that good reason has been given to warrant a reinstatement of the suit. However, and purely out of the discretion of this court, so that the applicant is not shut out, I will, subject to him satisfy the condition on payment of thrown away costs, reinstate the suit for hearing. I will reinstate suit subject to the applicant paying to the respondent thrown away costs of Kshs. 30,000/= within 30 days of this order. If he does not make payment as ordered, then the only conclusion I will reach is that the applicant is not serious with his case and the case will remain dismissed with costs to the respondent. If he makes the said payment within the stipulated time, then the suit be reinstated for hearing on merits.
8. I have only allowed this application out of grace. The respondent was fully entitled to oppose it and the respondent will thus have the costs of this application.
9. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 22 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

In presence of: -

Mr. Sagwe for the applicant

N/A for respondent

