



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyambok v Akoko & 3 others (Environment & Land Case  
6 of 2022) [2022] KEELC 3730 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 6 OF 2022  
GMA ONGONDO, J  
JULY 26, 2022**

**BETWEEN**

**ROSE JUMA NYAMBOK ..... APPLICANT**

**AND**

**SAMWEL AKOKO ..... 1<sup>ST</sup> RESPONDENT**

**TOBIAS OUMA OTIGO ..... 2<sup>ND</sup> RESPONDENT**

**JULIUS OKEYO OMOLO ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH OTIEGO OMOLO ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

- 1) By a notice of motion application dated March 8, 2022 and filed herein on even date, the applicant, Rose Juma Nyambok who appears in person, is seeking the following orders;
  - a) Spent
  - b) That the suit which was dismissed for want of prosecution the December 10, 2018 be re-opened and or reinstated.
  - c) That upon granting of prayers (1) and (2) above, the honourable court do proceed to order this matter transferred to Homa Bay Environment and Land Court for hearing and final disposal.
  - d) The cost of this application be borne in the course.
  - e) Any other orders the court may deem fit, necessary and/ or just to grant.
- 2) The application is founded upon the applicant's affidavit of thirteen paragraphs sworn on even date and the accompanying documents namely a copy of a list of transferred cases and a notice of intention to act in person.



- 3) Briefly, the applicant laments that she lodged the suit at Kisii High Court in the year 2014 through the firm of Oguttu Mboya and Company Advocates and the last action in the matter was in the year 2016. That she visited the offices of the said firm as well as the court registry several times to inquire about the position of the suit in vain. That in March this year, she was informed that the suit was transferred to Migori Environment and Land Court and that the same was dismissed on March 2, 2022.
- 4) It is the applicant's complaint that failure to prosecute the suit in time to its logical conclusion was on the part of her counsel who did not inform her of its transfer. That she is desirous to prosecute the suit and that she is likely to suffer irreparably if the suit is not reinstated. That therefore, the application be allowed in the interest of justice.
- 5) In a replying affidavit of twelve paragraphs sworn on May 18, 2022 by the 1<sup>st</sup> defendant/respondent, Samwel Akoko for and on behalf of the other respondents and himself and filed herein on May 23, 2022 through the firm of Mimba and Company Advocates, the application is opposed. The 1<sup>st</sup> respondent deposed, inter alia, the applicant who is related to the 3<sup>rd</sup> respondent approached them for the withdrawal of the suit. That the respondents agreed to the proposal and the applicant agreed to pay costs of Kshs. 100,000/= to them as revealed in the consent and undertaking dated April 6, 2017 signed by the parties and annexed to the affidavit herein (FAO-1-2). That the suit was marked as withdrawn with no orders as to costs and the said consent has not been set aside.
- 6) The 1<sup>st</sup> respondent further deposed that the he is not aware of the alleged dismissal order which is misplaced. That the application is an afterthought, null and void and devoid of merit.
- 7) On May 4, 2022, the court ordered and directed that the application be heard by way of written submissions pursuant to order 51 rule 16 of the *Civil Procedure Rules*, 2010 and Practice Direction number 32 of the Environment and Land Court Practice Directions, 2014.
- 8) On the said date, the applicant sought indulgence of the court to file submissions in respect of the application. The court granted her ten days to file and serve submissions. Be that as it may, the applicant failed to file submissions herein.
- 9) The respondents' submissions dated May 18, 2022 were filed simultaneously with the replying affidavit stated in paragraphs 4 and 5 hereinabove. Their counsel submitted that the suit was formally withdrawn and that it was not dismissed as alleged by the applicant. That the application is an afterthought, made in bad faith and an abuse of the court process hence it be dismissed with costs.
- 10) I have duly considered the application, the replying affidavit and the respondents' submissions. So, are the orders sought in the application merited?
- 11) Originally, the suit was filed at Kisii Environment and Land Court. The plaintiff generated it by way of a plaint filed on March 19, 2014 seeking, inter alia, a declaration that the applicant is the sole and exclusive owner of the suit land, LR No. Kalanya/Kanyada/2840 and an order of eviction against the respondents in respect of the suit land.
- 12) On March 23, 2017, the suit was transferred from Kisii Environment and Land Court to Migori Environment and Land Court for hearing and determination. Mention of the suit was fixed for May 11, 2017 when Mimba learned counsel for the defendant attended court but there was non-appearance on the part of the plaintiff.
- 13) By the parties' consent dated April 5, 2017, the suit was marked as withdrawn with no orders as to costs. The same is disclosed in the court proceedings of May 11, 2017.



- 14) The withdrawal of the suit was within the discretion of the court and in the spirit of article 159 (2) (c) of the Constitution of Kenya, 2010; see also Council of Governors-us-Senate and another (2014) eKLR.
- 15) Apparently, on December 19, 2018, the suit was dismissed under order 17 rule 2 (1) of the Civil Procedure Rules, 2010.
- 16) On March 9, 2022, the suit was further transferred to this court for hearing and determination.
- 17) It must be borne in mind that the parties were accorded an opportunity to have the suit withdrawn as stated in paragraphs 13 and 14 hereinabove. A fair opportunity to be heard is a fundamental principle of justice; *Halsbury's Laws of England* 5<sup>th</sup> Edition 2010 Volume 61 paragraph 639 and James Kanyitita Nderitu and another-us-Marios Philotas Gbikas and another 2016 eKLR.
- 18) Plainly, the suit was withdrawn as noted in paragraphs 13 and 14 hereinabove. Therefore, the dismissal order of December 19, 2018, was made in error as discerned in the proceedings and orders of December 19, 2018.
- 19) It is noted that the applicant sought any other order the court may deem necessary and or just to grant. This court has the powers under sections 99 and 100 of the Civil Procedure Act chapter 21 Laws of Kenya to correct any apparent error in its proceedings, orders and or judgment; see also Charles Karatbe Kiarie and 2 others-us-Administrator of the Estate of John Waliace Mathare (Deceased) and 2 others (2020) eKLR.
- 20) Moreover, I invoke sections 1A, 1B, 3 and 3A of the said Civil Procedure Act as read with sections 3 and 19 ELC Act, 2015 (2011) aligned to article 159 (2) (b), (d) (c) and (e) of the Constitution of Kenya, 2010. I find the application devoid of merit.
- 21) A fortiori, the application dated March 8, 2022 and filed on even date, is hereby dismissed with costs to the respondents.
- 22) It is so ordered.

**DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 26<sup>TH</sup> DAY OF JULY 2022**

**G M A ONGONDO**

**JUDGE**

**PRESENT**

1. Ms Oriche holding brief for Dennis Otieno, learned counsel for the plaintiff
2. Defendants
3. Angela and Fiona, court assistants

