



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wamalwa & another v Obayo & 2 others (Environment & Land Case 13 of 2014) [2022] KEELC 4936 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4936 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 13 OF 2014**

**SM KIBUNJA, J**

**SEPTEMBER 23, 2022**

**IN THE MATTER OF: SECTIONS 7, 17 & 38 OF THE  
LIMITATIONS OF ACTIONS ACT CAP 22 LAWS  
OF KENYA.**

**IN THE MATTER OF: SECTION 28 & 30 OF THE REGISTRATION  
OF LANDS ACT CAP 300 LAWS OF KENYA.**

**IN THE MATTER OF: ADVERSE POSSESSION IN RESPECT TO  
LR NO 6455/1 (SOY) (CERTIFICATE OF TITLE  
IR NO 11290).**

**BETWEEN**

**MARTIN SHIKUKU WAMALWA ..... 1<sup>ST</sup> APPLICANT**

**PETER BOXTEL MUNIALO (SUING FOR AND ON BEHALF OF THE  
RESIDENTS OF SOY B VILLAGE ON PLOT NO. L.R NO. 6455/1 (SOY)  
(CERTIFICATE OF TITLE LR NO. 11290) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PENTECOASTAL EVANGELISTIC FELLOWSHIP OF AFRICA-SOY THROUGH  
REV. SIMON OBAYO ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**



## RULING

1. The applicants moved the court *vide* a notice of motion dated the May 31, 2021 hinged on articles 28, 29(a), 39, 40, 50(1) & 159 (2)(d) of the Constitution of Kenya, 2010, sections 1A, 1B, 3A of the Civil Procedure Act, and Order 12 rule 6 & 7, Order 51 rule 1 of the Civil Procedure Rules, 2010 seeking for the following reliefs;
  - a) “Spent
  - b) Spent.
  - c) Upon hearing and determination of this application inter parties, the order of this honourable court made on May 11, 2021, directing warrants of arrest to issue against the applicants (judgment debtor) be and is hereby set aside.
  - d) The order of this honourable court made on July 15, 2019 dismissing the applicants suit with costs for want of prosecution be and is hereby set aside.
  - e) The main suit filed herein by way of originating summons dated January 16, 2014 be and is hereby reinstated.
  - f) Costs of application be provided for.”

The application is based on the eleven (11) grounds on its face and supported by the affidavit sworn by Martin Sikuku Wamalwa, the 1<sup>st</sup> applicant, on the May 31, 2021. It is the applicants’ position that the dismissal of suit with costs on July 15, 2019 due to their non-attendance was occasioned by the failure of their then counsel to notify them of the notice to show cause. That the order was prejudicial to them as the suit was dismissed without them being heard. That the failure, shortcomings and or mistakes of their then advocate should not be visited upon them. That the taxation of the 1<sup>st</sup> respondent’s bill of costs dated the August 1, 2019 at Kshs 266,123/-, was done without notice to the applicants, and that they got to know about it on the March 10, 2021 when they were served with a notice to show cause why they should not be arrested and committed to civil jail, dated the March 1, 2021. That they then filed an application for stay of execution dated the April 23, 2021, but were unable to join the virtual hearing on the May 11, 2021 when warrants of arrests were issued. That they have been on the suit land for over fifty (50) years, and the 1<sup>st</sup> respondent had fraudulently obtained the title documents over the property.

2. The application is opposed by the 1<sup>st</sup> respondent through the replying affidavit sworn by Rev Simon Obayo on the October 21, 2021. It is the 1<sup>st</sup> respondent’s case that the notice of dismissal for want of prosecution dated July 4, 2019 was duly served to the applicants by court, but they failed to attend court leading to the court dismissing the suit with costs. The 1<sup>st</sup> respondent proceeded to file their bill of costs, which was duly served for hearing on the September 24, 2019. That again the applicants herein did not attend court and in a ruling that was delivered on the October 4, 2019, it was taxed at kshs 266,123/-. The 1<sup>st</sup> respondent then proceeded to issue and serve upon the applicants a notice of execution dated October 16, 2019 and certificate for costs issued on October 15, 2019, but they failed to settle the costs. The 1<sup>st</sup> respondent then took out the notice to show cause why the applicants should not be arrested dated the March 1, 2021 that was served upon the 1<sup>st</sup> applicant on the March 9, 2021 for hearing on the May 11, 2021. That upon the applicant failing to attend court, a warrant of arrest was issued and the applicant, Mr Sikuku, was arrested and brought to court, and released on bond of Kshs



150,000/-. The applicants then filed this application with the sole aim of denying the 1<sup>st</sup> respondent their costs, and resuscitating a finalized matter.

3. That following the directions issued on the February 21, 2022 the learned counsel for the applicants and 1<sup>st</sup> respondent filed their submissions dated the April 6, 2022 and April 26, 2022 respectively, summarized as follows:

a. In their submissions, the applicants gave a chronological history in relation to Plot No LR 6455/1 (SOY) (certificate Of Title IR No 11290) going back to 1955, when the certificate of title was issued to Soy Settlement Limited. That the applicants moved onto the said land in 1957 to provide labour to the then owners and for their subsistence. The applicants continued living on the land even after the then owners left the country for the United States of America and United Kingdom and asserted ownership. The 1<sup>st</sup> respondent herein was brought to the land by one Joel Chemwe to assist in religious functions. That however the 1<sup>st</sup> respondent started frustrating the applicants in 2004, contrary to the intents of the invitation, and laid claim to the land. It was the applicants' case that the delay in prosecuting its case was occasioned by many factors, including the failure by their advocates on record to attend court, roll out of virtual hearings as well as their efforts to a fact-finding mission from the chief, National Land Commission and the Lands office at Eldoret and Nairobi. To this end, they alleged the existence of some correspondences on the same. They further submitted that their quest to prove ownership to the land parcel were thwarted by the decision of the Eldoret Land Dispute Tribunal which held the 1<sup>st</sup> respondent as the absolute owner of the property. That their efforts for review and appeal against the decision failed for want of jurisdiction, necessitating the filing of the adverse possession suit dated January 16, 2014. The applicants among others relied on the decisions in the cases of *Esther Wamaita Njibia & 2 others v Safaricom Ltd* [2014] eKLR, to the effect that courts exist to do justice to the parties before it, and *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR, in which the case of *Ivita v Kyumbu* [1984] KLR 441 was cited in respect of the three (3) principles to consider when dealing with the application. The principles are as follows: reasons for the delay; whether delay is excusable and if justice can be done despite delay.

b. The 1<sup>st</sup> respondent submitted that the applicants were indolent in prosecuting their case and cannot shift the blame to their advocates as it was their case. They among others cited the decision in the cases of *Multiple Hauliers v Enock Bilindi Musundi & 2 Others* [2021] eKLR, that a case belongs to the litigant and not to her advocate, and *Barnabas Maritim v Manywele Korgoren & another* [2016] eKLR, that the duty to prosecute a case vests with the people who presented it to court. That the application has no merits as the applicants have since been evicted, pursuant to the eviction order of December 7, 2010 that was issued on the May 9, 2014. That there is no pending appeal and all the applicants are trying to do is to evade paying the taxed costs. That further, as costs follow the events they should get costs in this application.

4. The following are the issues for the court's determinations:

- a. Whether the applicants have made a reasonable case for setting aside of the orders of July 15, 2019 and May 11, 2021 dismissing their suit with costs for want of prosecution, and directing their arrest respectively.
- b. Who pays the cost of the application.



5. The court has carefully considered the grounds on the application, affidavit evidence, the submissions by the learned counsel, the superior courts decisions cited thereon, the record and come to the following findings:

- a. It is worthy to note that both the applicants and respondents have captured the background facts of this case and the point of departure being that each affirmed themselves as the true occupants and owners of the land in question. It is equally true that there were proceedings before the Eldoret Land Dispute Tribunal and the award thereof was adopted by the magistrate's court. An application for review by the applicants to the magistrate's court was dismissed for want of jurisdiction, and their appeal to the High Court was unsuccessful. Also not in contention was the efforts by the applicants to follow through the ownership quest of the parcel of land to try and address the dispute in question with other institutions, that are yet to bear fruits. And when no answers were forthcoming, the applicants filed the suit herein on the January 17, 2014, *vide* the originating summons dated the January 16, 2014, seeking to assert prescriptive rights on the parcel of land by way of adverse possession, which suit failed to be prosecuted and was dismissed by the court on July 15, 2019 with costs.
- b. The 1<sup>st</sup> respondent proceeded to tax their bill of costs. The certificate of costs was issued on the October 15, 2019 and duly served upon the applicants, (Mr shikuku), who failed to settle the costs. The matter was scheduled for a notice to show cause why warrants should not be issued against the applicants, being the judgment debtors on May 11, 2019. The applicants deposed that though they were physically in court, the same proceeded virtually in line with the Covid 19 directions, and they were unable to join due to technological challenges. That due to their non-appearance, the warrants of arrest were issued against them. The applicants contend that they had on the April 27, 2021 filed a response to the notice to show cause dated April 23, 2021, and had they been heard, they would have shown reasons why the warrants of arrest should not be issued, as it was on the May 11, 2021 erroneously. This last contention by the applicants was not rebutted anyway by the respondents, either through their submissions or replying affidavit.
- c. As disappointing as the facts of the case may be, it is important to remind the applicants of the well guided decision in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, as cited in *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR, where it was held that;

“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

Further alive to this court is its duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our constitution is “the expeditious delivery of justice”. This means that if justice is not provided in a timely manner to the parties, it loses its importance, and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in the laws worldwide.
- d. That in addition, the applicants are reminded that virtual court proceedings have been part of the country's court processes for over two (2) years, since the early 2020 upon the advent of Covid-19 pandemic. The applicants claim that they were physically in court on the May



11, 2021, but were unable to join the virtual court proceeding at some cyber cafe, through the links given to them by some person has not been proved. That in any case, the links for each court's virtual proceedings are in the public domain, through cause-lists, public notices and other media. It is a fact therefore, that there is no link that is supposed to be sent to litigants in a certain matter specifically, but all join through the given court link.

- e. However, notwithstanding my doubts on the applicants' contention, and in consideration that the applicants appear to have passionately followed up on their claim through various ways, and not to mention that it had been averred, and not rebutted, that they have lived on the suit land for five decades (50 years), I hold the view that their pleadings raises triable issues in adverse possession, which should be given a chance to be heard and determined on merit. In this finding I refer to the case of *Phillip Chemwolo & Another v Augustine Kubende* (1982-88 1 KAR 1036, where the Court of Appeal enunciated the broad equitable approach in these sort of cases as follows:

“I think a distinguished equity judge has said: ‘Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits’.

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

- f. Addressing myself on the issue of warrants of arrest issued against the applicants on the May 11, 2021, it is indeed true, and equally not rebutted, that the applicants herein had responded to the notice to show cause dated April 23, 2021 and filed on April 27, 2021 as is well exhibited in their annexures. I therefore agree with the applicants that though their presence was mandatorily required to attend court on the date fixed, the warrants of arrest ought not to have been issued without factoring in their input, by giving them a chance to prosecute their application of stay that was on record from the April 27, 2021. The applicants have therefore made a reasonable case for setting aside the warrants of arrest issued on May 11, 2021.
- g. That though I find merit in the applicants quest to be given a second chance for their suit to be heard on merit, I am however, inclined to award thrown away cost of this application to the 1<sup>st</sup> respondent, as they were not to blame for the applicants failures to prosecute their claim timeously and attend the virtual court. The thrown away costs are assessed at Kshs 20,000/- and should be paid within thirty (30) days.
- h. That it is highly recommended that the parties herein do coexist in mutual understanding as the holy book calls upon all, and to which the 1<sup>st</sup> respondent undoubtedly lives by, and guides its flock to its dictates, which among others is the providence of peace that surpasses all human understanding, until this land ownership dispute filed on January 17, 2014 is expeditiously heard and determined.

6. That flowing from the foregoing, the court finds and orders as follows:

- a. That prayer 3 of the notice of motion dated the May 31, 2021 is hereby granted and the order of May 11, 2021 for the arrest of the applicant set aside.



- b. That the prayer 4 of the said application is allowed thereby setting aside the order of July 15, 2019 dismissing the suit for want of prosecution.
- c. That prayer 5 of the application is also granted and the applicants' claim commenced through the originating summons dated the January 16, 2014 and filed on the July 17, 2014 reinstated for hearing and determinations.
- d. That this suit be set down for hearing on priority basis.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 23 rd DAY OF SEPTEMBER, 2022**

**S. M. Kibunja, J.**

**Environment & Land Court - Eldoret**

**IN THE VIRTUAL PRESENCE OF;**

**APPLICANTS: Absent**

**RESPONDENTS: Absent**

**COUNSEL: Mr. Mwangi for Applicants**

**Mr. Ogongo for 1st Respondent**

**COURT ASSISTANT: ONI01ALA**

**S. M. Kibunja, J.**

