



**Owuor v Ogutu (Sued as the Representative of the Estate of the  
Late Hezron Ogutu Owuor) & 5 others (Environment & Land Case  
42 of 2020) [2022] KEELC 13597 (KLR) (19 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 42 OF 2020  
MN KULLOW, J  
SEPTEMBER 19, 2022**

**BETWEEN**

**ZABLON NDISIO OBUYA OWUOR ..... PLAINTIFF**

**AND**

**EUNITA AUMA OGUTU (SUED AS THE REPRESENTATIVE OF THE ESTATE  
OF THE LATE HEZRON OGUTU OWUOR) ..... 1<sup>ST</sup> DEFENDANT**

**PATROBAS ONYANGO (SUED AS THE REPRESENTATIVE OF THE ESTATE  
OF THE LATE ONYANGO OWUOR) ..... 2<sup>ND</sup> DEFENDANT**

**AUSTIN OKEYO (SUED AS THE REPRESENTATIVE OF THE ESTATE OF THE  
LATE ONYANGO OWUOR) ..... 3<sup>RD</sup> DEFENDANT**

**JACOB ONYANGO (SUED AS THE REPRESENTATIVE OF THE ESTATE OF  
THE LATE RAKARA OWUOR) ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR MIGORI COUNTY ..... 5<sup>TH</sup> DEFENDANT**

**LAND SURVEYOR MIGORI COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated January 27, 2022, the defendants/ applicants sought the following orders; -
  - a. Spent.
  - b. Spent.
  - c. The 1<sup>st</sup> - 4<sup>th</sup> defendants/ application November 19, 2021 and filed on November 22, 2021 be heard and determined on its merit ahead of the judgment.



- d. The costs of this application be provided for.
2. In the notice of motion dated November 19, 2021, the defendants/ applicants sought the following orders: -
    - i. The ex-parte proceedings and orders of November 2, 2021 be set aside entirely.
    - ii. This suit be heard afresh, by taking the plaintiff's and the applicants' evidence.
    - iii. The 1<sup>st</sup> – 4<sup>th</sup> defendants be granted leave to file and serve a list of witnesses, witness statements documents and copies of documents regarding their pleaded case.
    - iv. The cost of this application be provided for.
  3. The application dated November 19, 2021 is premised on the 10 grounds on its face and on the supporting affidavit sworn by the 2<sup>nd</sup> applicant, Patrobas Onyango, on his own behalf and on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants. The applicant avers that on November 2, 2021, the suit proceeded and orders were issued ex-parte. It is their position that the failure to attend court and participate in the proceedings of November 2, 2021 was occasioned by genuine inadvertence and an unforeseen, sudden lack of legal representation which were circumstances beyond his control. He further averred that the failure to file and serve their statements and copies of the documents to be relied on was also out of a genuine inadvertence and oversight.
  4. It is the 2<sup>nd</sup> applicant's contention that by a letter dated July 7, 2021 and delivered to him on August 4, 2021; their former advocate informed him (as the contact person of the 4 defendants) of the scheduled hearing date of November 2, 2021 and asked them to do particular things to facilitate the filing and service of documents and witness statements and in addition pay some legal fees towards the hearing of the suit. However, by genuine forgetfulness and oversight, he failed to inform his co-defendants of the contents of the said letter and consequently; they neither filed the compliance documents, paid the required legal fees nor attended court for purposes of the hearing on the scheduled date.
  5. He further deposed that upon inquiry, their former advocate, one Mr Marvin Odero, informed him that he did not attend court on the scheduled hearing date of November 2, 2021 for the reason that they neither facilitated the filing of the necessary compliance documents nor paid the legal fees as requested and/or advised.
  6. They maintained that the respondent will not be prejudiced if the orders sought are granted as any inconvenience suffered would be compensated by an award of costs. They also stated that they were willing to abide by all conditions as may be imposed by the court.
  7. The application was opposed. The plaintiff/ respondent filed an undated replying affidavit in response to the instant application. It is the respondent's assertion that on the June 3, 2021; the matter was confirmed and fixed for hearing on the November 2, 2021, by consent of all parties. However, on the said hearing date, the applicants' advocate elected not to attend court despite being aware of the date.
  8. Consequently, the matter proceeded ex-parte and the defence case was closed. The respondent further contends that the action of the applicants of changing advocates is merely a delay tactic employed to ensure that the instant matter is not heard and determined. He maintained that he will be highly prejudiced if the application is allowed as the same will serve to delay his case unreasonably and urged the court to dismiss the same.
  9. The application was canvassed by way of written submission. Both parties filed their written submissions which I have read and taken into account in arriving at my decision.



10. I am of the considered opinion that the main issue arising for determination is: -
  - i. Whether the applicant has made out a case for setting aside the *ex-parte* proceedings and consequent order made on November 2, 2021.
11. The grant of the order of setting aside an *ex-parte* judgment is discretionary in nature and the court in determining the same ought to exercise such powers judicially, taking into account the circumstances of the case.
12. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause to warrant the setting aside of the *ex-parte* decision or proceedings. In the case of The Hon *Attorney General v the Law Society of Kenya & another Civil Appeal* (Application) No 133 of 2011 sufficient cause was defined as: -
 

“Sufficient cause” or “good cause” in law means: .... the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused”. See Black’s Law Dictionary, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
13. Further, in *Shah v Mbogo and another* [1967] EA 116, the Court of Appeal of East Africa held that:
 

“This discretion (to set aside *ex parte* proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
14. It is the applicants’ claim that the failure to attend court and participate in the proceedings of November 2, 2021 was occasioned by genuine inadvertence and an unforeseen, sudden lack of legal representation which were circumstances beyond his control. Further, it is their case that their failure to file and serve the various compliance documents was also out of a genuine inadvertence and oversight. The applicants went further to indicate that due to their inadvertent failure to pay the legal fees, their former advocates failed to attend court for hearing as scheduled.
15. The respondent on the other hand dismissed the applicants’ claim as mere delaying tactic and a deliberate failure to attend court despite the matter having been fixed for hearing by consent. He urged the court to dismiss the application and proceed to render the final judgment as proposed.
16. The applicant has given a candid explanation as to why their former advocate on record did not attend court on the scheduled hearing date of November 2, 2021; that even though the date was fixed by consent of all parties and further that their advocate vide a letter dated July 7, 2021 and delivered to him on August 4, 2021 informed them of the same; due to genuine inadvertence, forgetfulness and oversight the 2<sup>nd</sup> applicant failed to inform his co-defendants of the advocate’s instructions. He also failed to avail the necessary compliance documents that they needed to support their case and further to pay the legal fees as requested to enable the then advocate on record to attend court for the hearing on the said date. As a result thereof, their former advocate on record failed to attend court on the scheduled date. I find the said explanation as excusable and sufficient in the circumstances.
17. In view of the above, I find that it is in the interest of justice that a party shall not be condemned unheard and to grant the defaulting applicants an opportunity to ventilate their claim on merit. The



main concern of the court is to do justice to the parties herein. Further, this court appreciates the loss that will be occasioned on the respondent by way of delay in concluding the matter however, I am of the view that such loss may still be adequately compensated by way of damages.

18. It is therefore my considered view that the applicants have made a case for setting aside the *ex-parte* proceedings of November 2, 2021 and the proposed judgment pending for delivery as sought.

### **Conclusion**

19. In the premises, I find that the application dated November 19, 2021 is merited and I accordingly allow the same. Leave be and is hereby granted to the 1<sup>st</sup> – 4<sup>th</sup> applicants/ defendants to file their witness statements, list of witnesses, list of documents and the necessary documents in full compliance with order 11 of the *Civil Procedure Rules* within 14 days from the date of this ruling, Corresponding leave to the plaintiff/ respondent to file any additional documents if need be within 14 days of service. Parties to thereafter fix the matter for hearing on a priority basis. Further, the defendants/ applicants are condemned to pay throw-away costs of Kshs 30,000/= before the next hearing date.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 19TH DAY OF SEPTEMBER, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

Mr. Odero holding brief for Mr. Sam Onyango for the 1<sup>st</sup>-4<sup>th</sup> Applicants/ Defendants

Nonappearance for the Plaintiff/ Respondent

Tom Maurice – Court Assistant

