



**Manyala v Obura & 2 others (Environment & Land Case 56 of 2020)  
[2022] KEELC 14990 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14990 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 56 OF 2020**

**A OMBWAYO, J**

**NOVEMBER 24, 2022**

**IN THE MATTER OF LAND PARCEL NUMBER: KISUMU /DAGO/1024  
NOW SUBDIVIDED INTO KISUMU /DAGO/4424 AND 4425 RESPECTIVELY**

**AND**

**BETWEEN**

**IN THE MATTER OF ADVERSE POSSESSION OF LAND PARCEL NO.  
KISUMU /DAGO/1024 NOW SUBDIVIDED INTO KISUMU /DAGO/4424 AND  
4425 RESPECTIVELY AND IN THE MATTER OF GRACE AUMA MANYALA**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**GRACE AUMA MANYALA ..... APPLICANT**

**AND**

**ALEX OMONDI OBURA ..... 1<sup>ST</sup> RESPONDENT**

**EDZINZI MBONE ..... 2<sup>ND</sup> RESPONDENT**

**ERICK JOSEPH OCHOLA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**BRIEF FACTS**

1. Before me is an Application filed by Grace Auma Manyala the Applicant herein filed under section 1A,1B &3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders:

1. That this Application be certified urgent and heard on priority basis.



2. That this Honourable Court be pleased to reinstate the suit dismissed on February 9, 2022 for hearing.
  3. That any other order this court may deem just and expedient.
  4. That costs of this Application be provided for and be in the cause.
2. The Application was based on grounds that Counsel for the Applicant attended the matter virtually when the case was fixed for hearing and noted in his diary that the case was fixed for February 22, 2022 instead of February 9, 2022.
  3. It was averred that absence of Counsel for the Applicant in court was not deliberate but was occasioned by misdiarising the date and the Applicant's Advocates appeared before the Judge on February 9, 2022 in Kisumu ELC No. E001 of 2021 (O.S).
  4. It was stated that this matter is emotive and the Applicant should be given a chance to ventilate their case as it is in the interest of justice that this suit be reinstated for hearing to enable the dispute between the parties be determined.
  5. The Application was supported by the Affidavit of Grace Auma Manyala sworn on February 25, 2022 which she reiterated the grounds on the face of the Application.
  6. Alex Omondi Obura the 1<sup>st</sup> Respondent herein on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent swore an Affidavit in response to the Application and stated that the Application is incompetent and an abuse of the court process. That the Application is out to deny justice to the Respondents and to waste court's time.
  7. It was the Respondent's case that the Applicant's Supporting Affidavit talks about a different case and not this suit and paragraph 6 of the said Affidavit confirms that Counsel knew that the case was listed for February 9, 2022 but failed to attend.
  8. It was stated that the Applicant is guilty of inordinate and inexcusable delay and the same is an afterthought as it was filed more than two and a half months after the suit was dismissed. That the Applicant is not keen on prosecuting this matter as she has been absent on several dates.
  9. It was further stated that the Applicant has never made any attempt to fix this matter for hearing despite filing it in 2020 and the Respondents are the ones who have been fixing the matter for hearing and serving the Applicant.
  10. This Application was canvassed by way of written submissions.

### **Applicant's 's Submissions**

11. The Applicant filed her submissions on June 10, 2022 where it was stated that the instant Application invokes the discretionary powers of this court. That the Applicant has put forth several grounds to wit misdiarising the date, failure to attend is excusable and in the interest of justice.
12. It was further stated that the hearing date of the suit that was held on February 9, 2022 was taken during the virtual mention of the case and the Applicant's Counsel heard the date as February 22, 2022 and diarized the same as such. It was the Applicant's submission that mistake of the Advocate should not be visited upon the client.
13. It was submitted that the dismissal for non attendance could not solve the dispute the parties and therefore it is in the interest of justice that the dispute that the suit be heard so as to establish the rightful owner of the suit property. The Applicant therefore prayed that the suit be allowed as prayed for.



## Respondents' Submissions

14. The Respondents filed their submissions on June 8, 2022 where a number of issues were raised for determination. On whether the Applicant's Application is frivolous, vexatious and an abuse of the court process and placed reliance in the case of *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* [2015] eKLR.
15. On the issue of whether the Applicant is guilty of inordinate and inexcusable delay, it was stated that the Applicant has been indolent and should not benefit from the seat of justice and relied in the case of *Francis Njoroge vs Stephen Maina Kamore* (2018) eKLR. It was submitted that the inexcusable delay was caused by the Applicant's own lack of commitment to the case by not attending the matter when it was fixed for hearing and they were aware of the date.
16. On whether the Applicant's Application is an afterthought as the Applicant is testing waters to see if the court will reinstate this suit while her Supporting Affidavit mentions another case which her Counsel on record confirms it was the one that he should have attended on that day.

## Analysis and Determination

17. This suit was filed on September 7, 2020 by the Applicant herein seeking orders that she be declared the owner of land parcel Kisumu /Dago/1024 now subdivided into Kisumu /Dago/4424 and 4425 respectively by adverse possession. This matter came up for hearing on February 2, 2022 and the same was dismissed for non- attendance. The Applicant subsequently filed this instant Application where she sought for orders of reinstatement of the suit while the Respondents opposed the Application by stating that the same is an abuse of the court process and is brought in bad faith.
18. In the case of *Phillip Chemwolo & Another v Augustine Kubende* [1982-88]1 KAR 1036, Apaloo, J.A. 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’.
19. 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”.
20. It is the Applicant's case that her Advocate on record misdiarised the matter by fixing the suit for hearing on February 22, 2022 instead of February 2, 2022 and that the said mistake was not deliberate. Although the Respondents have stated that the Application was filed two months after the suit was dismissed, this court is of the view that the Applicant has failed to explain to this court as to why there was inordinate delay in filing the Application.
21. I have seen the annexures attached by the Applicant being copies of the pages of diaries and I am convinced that indeed the Applicant's Advocate misdiarized the matter. I am of the view that this suit should be reinstated so as to determine the dispute between the parties herein in order to ascertain the rightful owner of the suit property.
23. In the upshot, this Application is hereby allowed and I hereby order as follows:
  1. That the suit is hereby reinstated and the orders issued on February 9, 2022 are hereby set aside.
  2. That the matter be fixed for hearing at the registry.



3. That the costs of this Application be in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**A.O OMBWAYO**

**JUDGE**

