



**Ogola v Alila (Environment & Land Case 28 of 2021)  
[2022] KEELC 15006 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 28 OF 2021  
AY KOROSS, J  
NOVEMBER 24, 2022**

**BETWEEN**

**JOHN OWITI OGOLA ..... PLAINTIFF**

**AND**

**JARED ODONGO ALILA ..... DEFENDANT**

**RULING**

1. The application that is the subject of this ruling is a notice of motion by the plaintiff against the defendant dated June 3, 2022. The motion has been moved pursuant to the provisions of article 159 (2) (d) of the *Constitution* of Kenya, sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and orders 45 and 51 (1) of the *Civil Procedure Rules*. He sought the following reliefs;
  - a) That this honourable be pleased to review its orders made on the May 23, 2022, set aside the order dismissing it and reinstate the suit; and
  - b) Costs be provided for.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the plaintiff John Owiti Ogola dated June 3, 2022.
3. He deponed inter alia, the matter was set down for hearing on January 26, 2022; which date was taken *ex parte*; a hearing notice was served upon his counsel M/s Ashioya & Co Advocates by the defendant's counsel on December 6, 2021 but his counsel Mr Ashioya received it under protest because he had other matters before other superior courts; his counsel wrote an email to the defendant's counsel M/s Bruce Odeny & Co Advocates on January 25, 2022 to convey his absence from court on January 26, 2022 which did not elicit any response; when he attended court on January 26, 2022, he discovered that the suit had been dismissed for want of attendance and thereafter his counsel filed an application for reinstatement on January 27, 2022. This application was dismissed by this court.



## defendant's case

4. In opposition, the defendant Jared Odongo Alila filed a replying affidavit sworn on June 29, 2022. He deponed *inter alia*, the motion was bad in law, fatally defective and an abuse of the court process; the plaintiff had not been keen to prosecute the suit and had only attended court twice since the year 2020 despite hearing notices being served hence the dismissal of the suit for want of attendance; the alleged email address alluded to by the plaintiff's counsel did not belong to his counsel; the plaintiff's actions clearly demonstrated that he intended to obstruct the cause of justice; a previous suit being Kisumu ELC No 170 of 2016 (OS) that was filed against him by the plaintiff was similarly dismissed for want of prosecution and the court should not assist the indolent. He urged the court to dismiss the motion.

## Parties submissions.

5. As directed by the court, counsel for the plaintiff filed his written submissions dated July 12, 2022. Counsel submitted that he had sought two orders; reinstatement of the suit and costs. In his submissions, counsel reiterated and amplified the contents of the plaintiff's supporting affidavit stated above and this court need not restate them. Counsel submitted that it was evident from the pleadings that the parties had several disputes in court which could only be addressed after hearing the suit on merits. Counsel contended that the dismissal of a suit was a draconian measure and pursuant to article 159 (2) (d) of the *Constitution*, a party should not be denied his day in court and the defendant would not suffer any prejudice. Despite counsel alluding to two authorities, none was cited or proffered to this court.
6. Counsel for the respondent M/s Bruce Odeny & Co Advocates filed their written submissions dated August 8, 2022. They identified one issue for determination; whether the plaintiff had met the legal threshold to warrant the orders sought.
7. Counsel submitted that one of the conditions to be met by the plaintiff was to demonstrate sufficient cause. According to counsel, the plaintiff had not discharged prove. Counsel cited the case of *Wachira Karani v Bildad Wachira [2016] eKLR* where Mativo J stated as follows:

“sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula for universal application.”
8. Counsel submitted it would be a miscarriage of justice if the plaintiff was allowed to prosecute his case and placed reliance on the case of *Ronald Mackenzie v Damaris Kiarie [2021] eKLR* which stated that; ‘...it is trite that justice is justice for both the plaintiff and the defendant and the plaintiff having dragged the defendant to court, he ought to have expedited the prosecution of the matter’

## Analysis and determination

9. I have carefully considered the motion, its grounds, affidavits and respective parties' rival submissions and the issues falling for determination are;
  - a) Whether the motion is merited; and
  - b) What about costs?
10. Review of court decrees or orders are provided for within the provisions of section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. Section 80 donates power to the plaintiff to move this court and equally grants jurisdiction to this court while order 45 sets out the rules. Reviews



are also pivoted on sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#). Generally they stipulate the objectives of the act and the overarching duties of courts. I will highlight the important provisions of the law as follows;

‘80. Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit’.

11. While order 45 rule 1 (1) provides as follows:

“ Any person considering himself aggrieved:

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay” Emphasis added.

- 12. The plaintiff handled the motion as if it was his first application seeking to set aside the dismissal of the suit for want of prosecution. Nay, if that were so, then this motion would obviously be rendered *res judicata*. The plaintiff for some reason turned a blind eye on the existence of his notice of motion dated January 27, 2022 and its dismissal for want of compliance.
- 13. To refresh the plaintiff’s memory and to bring the defendant into the picture because as evidenced from his replying affidavit he seems to be in the dark, the plaintiff did file a motion dated January 27, 2022 in which he sought to reinstate the suit. He advanced similar grounds as those tendered in the instant motion. The court issued certain directions to the plaintiff on diverse dates of January 31, 2022 and March 9, 2022 but there was no compliance. The court dismissed it on May 23, 2022.
- 14. Though the prayers in the two motions are largely the same, there is a departure. In the instant motion that is the subject of this ruling, the plaintiff has inputted an additional prayer for review of the orders issued on May 23, 2022.
- 15. In my considered opinion, the manner in which the plaintiff has moved this court is an abuse of the court process, bad in law and totally incompetent. There are processes that he should have first adhered to.
- 16. He should have first sought for a review of the orders of the court issued on May 23, 2022 that dismissed his motion dated January 27, 2022. Only when the court had favourably reviewed it, that he could only set down his motion dated January 27, 2022 down for hearing. It is unfortunate that he lumped the instant motion with several inappropriate orders. I am persuaded by the decision of Makhandia J (as he then was) in [re estate of Gitundu Muchira \(Deceased\) \[2008\] eKLR](#) when he expressed himself as follows;



‘He should not have sought the reinstatement of the application without first seeking a review and or setting aside of the order of dismissal’

17. In a nutshell, the plaintiff had a duty to satisfy the conditions for review of the orders issued on May 23, 2022. I have scrutinized the entire motion and I did not come across any whiff of evidence that the plaintiff had discovered any new and important matter or evidence which was not within his knowledge or which could not be produced by him at the time of issuance of the order or the existence of mistake or error apparent on the face of the record or sufficient reason.
18. As this court earlier observed, the plaintiff feigned the existence of the orders that led to the dismissal of his earlier motion dated January 27, 2022 and neither addressed them in his grounds or affidavit to the motion that is the subject of this ruling. Before I issue my disposal orders, it is paramount I address the conduct of the plaintiff in this matter.
19. The plaintiff first instituted suit against the defendant in Kisumu ELC No 170 of 2016 (OS). This suit was dismissed by my brother Ombwayo J on December 17, 2019 for want of prosecution which was 3 years after its filing. Half a year thereafter, the plaintiff instituted this suit on June 5, 2019.
20. When this matter was transferred to Siaya ELC from Kisumu ELC, the court issued a notice of attendance to the plaintiff’s counsel on September 20, 2022 but he did not attend. The defendant’s counsel attended court on diverse dates and the court directed them to serve a hearing notice. Which they did. On the hearing date of January 26, 2022, neither the plaintiff nor his counsel were present and the suit was dismissed for want of attendance. His application for reinstatement was dismissed for want of compliance.
21. Public policy demands that litigation has to come to an end. I agree with the defendant’s counsel that the plaintiff has been indolent. The defendant has been saddled with litigation for close to close to 6 years by a plaintiff who does not seem keen to prosecute his case. article 159 (2)(b) of the Constitution of Kenya provides that justice shall not be delayed. The plaintiff filed the instant suit and it behooved him to prosecute it. I agree with the sentiments of L Njuguna J in Ronald Mackenzie v Damaris Kiarie (Supra).
22. I find the motion not merited and pursuant to the provisions of order 45 rule 3 of the Civil Procedure Rules, I hereby dismiss it for want of sufficient grounds to warrant a review of the orders issued by this court on May 23, 2022. It is trite law that costs follow the event and I award the costs of this motion to the defendant.

**DELIVERED AND DATED AT SIAYA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**HON A Y KOROSS**

**JUDGE**

**November 24, 2022**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

**M/s Mwangi for the defendant**

**N/A for the plaintiff**

**Court assistant: Ishmael Orwa**

