



**Okumu v Okong’o (Environment & Land Case 31 of 2019)  
[2025] KEELC 460 (KLR) (10 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 460 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 31 OF 2019  
SO OKONG’O, J  
FEBRUARY 10, 2025**

**BETWEEN**

**JACK OKUMU ..... PLAINTIFF**

**AND**

**JANE FRANCES OKONG’O ..... DEFENDANT**

**RULING**

1. The plaintiff brought this suit on 12<sup>th</sup> September 2019 through an Originating Summons of the same date. The defendant filed a reply to the Originating Summons on 2<sup>nd</sup> October 2019. The court gave directions on the hearing of the Originating Summons on 22<sup>nd</sup> October 2020 and fixed the same for hearing on 19<sup>th</sup> January 2021. On 19<sup>th</sup> January 2021, only the defendant appeared in court for the hearing. The suit was therefore dismissed with costs for non-attendance. On 20<sup>th</sup> December 2021, the plaintiff applied to set aside the said order of 19<sup>th</sup> January 2021. The application was fixed for hearing on 21<sup>st</sup> February 2022 before Ombwayo J. who directed that the parties file written submissions and that a ruling on the matter would be delivered on notice. Ombwayo J. delivered the ruling on 18<sup>th</sup> March 2022. The court allowed the application, set aside the orders of 19<sup>th</sup> January 2021 and directed the plaintiff to fix the suit for hearing within 30 days. According to the ruling, the same was delivered by electronic mail.
2. From the record, no further action was taken by the plaintiff in the matter after the delivery of the said ruling on 18<sup>th</sup> March 2022. On 20<sup>th</sup> November 2023, the court issued a notice to the parties to appear in court on 14<sup>th</sup> March 2024 to show cause why the suit should not be dismissed. From the record, the notice was served upon the defendant’s advocates, Cecil Kouko & Associates through e-mail address: koukocecil@gmail.com and upon the plaintiff’s advocates, N. E. Mogusu & Associates through e-mail address: ericksonmogusu@yahoo.com. On 14<sup>th</sup> March 2024, none of the parties appeared in court for the notice to show cause. The court noted that no action had been taken in the matter since 18<sup>th</sup> March 2022 and dismissed the suit with costs for want of prosecution for the second time.



3. The defendant filed her bill of costs which was taxed at Kshs. 254,955/- on 5<sup>th</sup> September 2024. On 8<sup>th</sup> October 2024, the court issued warrants of attachment and sale against the plaintiff for the recovery of the defendant's costs amounting to Kshs. 257,955/-.
4. What is before the court is the plaintiff's Notice of Motion application dated 17<sup>th</sup> October 2024 seeking a stay of execution of the warrant of attachment and sale issued against the plaintiff, and setting aside of the orders made on 14<sup>th</sup> March 2024 dismissing the suit for want of prosecution. The application which was supported by the affidavit of the plaintiff's advocate N.E.Mogusu was brought on the ground that the notice to show cause, and the defendant's bill of costs and notice of taxation were not served upon the plaintiff's advocates. The plaintiff averred that the notice to show cause and the bill of costs were purportedly served upon the plaintiff's advocates through the e-mail address:ericksonmogusu@yahoo.com instead of the said advocates' correct e-mail address: ericksonmogusu@yahoo.com.
5. The application was opposed by the defendant through a replying affidavit sworn on 19<sup>th</sup> October 2024. The defendant averred that this was the second application being made by the plaintiff for the reinstatement of the suit after dismissal. The defendant averred that the notice to show cause which the plaintiff claimed to have been sent to the wrong e-mail address was re-sent to the plaintiff's advocates through the e-mail address: ericksonmogusu@yahoo.com which the plaintiff's advocates claimed to be their correct email address and that the plaintiff and his advocates failed to attend court to show cause why the suit should not be dismissed.
6. The defendant averred that the defendant's bill of costs and the notice of taxation were served upon the plaintiff's advocates physically and still the plaintiff neither attended court for the taxation nor took steps to apply for the setting aside of the dismissal order if the plaintiff had not been served as he claimed. The defendant averred that the plaintiff's overall conduct in the matter showed lack of interest. The defendant averred that the plaintiff only developed interest in the matter when he was served with a proclamation of attachment by the auctioneers for the recovery of the defendant's costs.
7. The defendant averred that after the suit was dismissed the first time, she sold the suit property, Kisumu/Ojola/ 545 to a third party one, Mary Ayako Adhiambo on 16<sup>th</sup> March 2021. The defendant averred that to the plaintiff's knowledge, the property the subject of the suit was no longer in her name. The defendant averred that the plaintiff was guilty of indolence and as such not entitled to benefit from the court's discretion.
8. The plaintiff sought and was granted leave to file a supplementary affidavit in response to the defendant's replying affidavit. I have not seen any supplementary affidavit on record. The application was argued orally on 17<sup>th</sup> December 2024 when Mr. Nyamweya and Mr. Kouko appeared for the plaintiff/applicant and defendant/respondent respectively.
9. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit filed in opposition to the application. Finally, I have considered the submissions of counsel. It is not disputed that the court has the power to set aside an ex parte order dismissing a suit for want of prosecution and that the power is discretionary.
10. The court's discretionary power must be exercised judiciously. In *Patriotic Guards Ltd. v James Kipchirchir Sambu, Nairobi* [\*CA No. 20 of 2016\*](#), [2018]eKLR, the Court of appeal stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private



affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

11. The principles to be applied by the court in applications for setting aside ex parte orders were set out in *Shah v. Mbogo* (1967) E.A 116 as follows:

“...the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

12. What I need to determine in the application before me is whether the plaintiff has established sufficient cause to warrant the exercise of the court’s discretion in his favour. Sufficient cause was defined in *Attorney General v. Law Society of Kenya & another* [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

13. ...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.

14. 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.”

15. Applying the foregoing principles to this case, I am not inclined to exercise my discretion in favour of the plaintiff. This is the second application for reinstatement of this suit being made by the plaintiff. The suit was dismissed the first time because the plaintiff failed to attend court on a date fixed for the hearing of the suit. The plaintiff attributed that failure to the mistake of his advocate who had entered a wrong hearing date in his diary. The plaintiff was indulged and the suit was reinstated on 18<sup>th</sup> March 2022. Considering the age of the matter, the court directed that the suit be listed for hearing within 30 days. The plaintiff’s advocate claimed from the bar that the plaintiff was not aware that the ruling on the plaintiff’s first application for reinstatement of the suit was delivered on 18<sup>th</sup> March 2022 and that the plaintiff was directed to list the suit for hearing within 30 days. The plaintiff cannot be taken seriously on this allegation. First, that was the first issue that the plaintiff should have raised in the present application. The plaintiff did not mention anywhere in his application before the court that this suit was dismissed for the second time on 14<sup>th</sup> March 2024 while he was still waiting for a ruling on his application seeking to set aside the first dismissal. Secondly, that was not an issue that should have been raised from the bar. Finally, there is no evidence on record showing that the plaintiff made inquiries about the ruling which according to the plaintiff had remained pending since 21<sup>st</sup> February 2022.

16. Coming to the second dismissal, the plaintiff has not persuaded me that his advocates were not aware of the date of 14<sup>th</sup> March 2024 when the matter came up for the notice to show cause why the suit should not be dismissed. It is common ground that the court served the notice to show cause upon the plaintiff’s advocates through the e-mail address: ericksonmogusu@yahoo.com. The dispute is on whether this was the plaintiff’s advocates’ e-mail address. I have noted from the record that in the plaintiff’s Notice of Motion application filed on 20<sup>th</sup> December 2021 in which he sought to set aside the first order of dismissal of the suit on 19<sup>th</sup> January 2021, the plaintiff’s advocates gave their e-mail address on the face of the application and the supporting affidavit as:



ericksonmogusu@yahoo.com. The plaintiff's advocates did not notify the court that they had changed their e-mail address or that the e-mail address given in the application was erroneous. The court cannot therefore be faulted for using the said e-mail address to serve notices upon the plaintiff's advocates. I am of the impression that the plaintiff's advocates use both e-mail addresses: ericksonmogusu@yahoo.com and ericksonomogusu@yahoo.com. I say so because in their written submissions made in the said application to set aside the first dismissal of the suit, the plaintiff's advocates gave their e-mail address as: ericksonomogusu@yahoo.com. The court was at liberty in the circumstances to use any of the two e-mail addresses to serve the court process upon the plaintiff's advocates. It is also instructive to note that the plaintiff did not respond to the defendant's advocates' contention that apart from being served by the court with the notice to show cause through the said e-mail address which the plaintiff's advocates claimed to be erroneous, the defendant's advocates also took the liberty to forward a copy of the said notice to the plaintiff's advocates on 9<sup>th</sup> December 2023 through what they claimed to be their correct e-mail address: ericksonomogusu@yahoo.com. The defendant's advocates exhibited a copy of the e-mail that they sent to the plaintiff's advocates on 9<sup>th</sup> December 2023 together with a copy of the notice to show cause which was attached to the e-mail. Instead of swearing an affidavit in response to that claim, the plaintiff's advocate just dismissed the defendant's advocates' said e-mail from the bar as "a Photoshop document" created by the defendant's advocate which they never received. I am satisfied from the material on record that the plaintiff's advocates were served with the notice to show cause and failed to attend court on 14<sup>th</sup> March 2024 to show cause for reasons only known to them. The suit was therefore regularly dismissed.

17. Concerning the allegation that the bill of costs and notice of taxation were not served upon the plaintiff's advocates, the defendant swore an affidavit in which she stated that her advocates had served the plaintiff's advocates with the bill of costs and certificate of taxation personally. The defendant annexed to her affidavit, the affidavit of service sworn by Cecil Kouko on 18<sup>th</sup> April 2024 in which he stated that on 18<sup>th</sup> April 2024, he personally served the plaintiff's advocates with the bill of costs and certificate of taxation and that the same was received and stamped by a clerk in the plaintiff's advocates' firm. The plaintiff did not swear an affidavit to controvert the averments in this affidavit by the defendant. Once again, the plaintiff's advocate just brushed off the issue from the bar by stating that his firm had moved out of the building where it was allegedly served and wondered where the defendant's advocate got his firm's stamp. In the absence of an affidavit challenging the affidavit of service, the plaintiff has not convinced me that his advocates were not served with the bill of costs and certificate of taxation.

## **Conclusion**

18. In conclusion, it is my finding that the order dismissing the plaintiff's suit on 14<sup>th</sup> March 2024 was regular and that no sufficient cause has been shown to warrant its setting aside. It is also my finding that the defendant's bill of costs was regularly taxed after notice to the plaintiff and as such the warrants of attachment and sale issued against the plaintiff were similarly regular and lawful. I therefore find no merit in the plaintiff's Notice of Motion application dated 17<sup>th</sup> October 2024. The application is dismissed with costs to the defendant.

**DELIVERED AND DATED AT KISUMU ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2025**

**S. OKONG'O**

**JUDGE**

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

N/A for the Plaintiff



Mr. Kouko for the Defendant

Ms. J. Omondi- Court Assistant

