



Oketch & 3 others v Mudei & 5 others (Environment & Land Case E056 of 2019) [2025] KEELC 5029 (KLR) (7 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E056 OF 2019**

BN OLAO, J

JULY 7, 2025

BETWEEN

CELESTINE NABWIRE OKETCH 1ST PLAINTIFF
SOFIA MOLA OKETCH 2ND PLAINTIFF
DENNIS OKETCH OROTO 3RD PLAINTIFF
BENARD OKETCH 4TH PLAINTIFF

AND

EUNICE ODHIAMBO MUDEI 1ST DEFENDANT
JOHN BARASA OKELLO 2ND DEFENDANT
NYERERE OKELLO 3RD DEFENDANT
ARTHUR OKELLO 4TH DEFENDANT
SANYO OKELLO 5TH DEFENDANT
CHRISTOPHER OKELLO 6TH DEFENDANT

RULING

1. This suit in which the Plaintiffs claim to have acquired the land parcel No Samia/Budongo/371 by way of adverse possession proceeded to hearing on 24th September 2024 in the presence of Mr Onsongo counsel for the Plaintiffs. Mr Ashioya counsel for the 2nd, 3rd, 4th and 5th Defendants was not present.
2. The 2nd and 4th Plaintiffs testified after which their counsel Mr Onsongo closed the Plaintiffs' case and asked the Court to mark the Defendants' case as closed.
3. The Court obliged and gave Mr Onsongo time to file his submission which was to be done by 24th October 2024.



4. The 2nd, 3rd, 4th and 5th Defendants however moved to his Court vide their Notice of Motion dated 7th November 2024 in which they seek the following orders:
 1. Spent
 2. Spent
 3. The Honourable Court do vary and/or set aside the ex parte proceedings of 24th September 2024 and allow the 2nd, 3rd, 4th and 5th Defendants to give their evidence and cross-examine the Plaintiffs.
 4. Alternatively, this matter do start de novo.
5. The Motion is anchored on the provisions of Sections 1, 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1, 4, 6, 10(1) (2) of the Civil Procedure Rules. It is premised on the grounds set out therein and supported by the affidavit of OYE ASHIOYA counsel for the Applicants/Defendants.
6. The gist of the application is that when this matter proceeded for hearing on 24th September 2024, the 2nd, 3rd, 4th and 5th Applicants/Defendants were not present and neither was their counsel Mr Ashioya. This was because the members of staff in counsel's office did not diarize the matter nor inform counsel of the hearing date. The mistake is regretted and should not be visited on the innocent parties. The Plaintiffs/Respondents will not be prejudiced since the Court is yet to deliver a judgement.
7. The Motion is opposed and Sofia Mola Oketch the 2nd Plaintiff swore a replying affidavit dated 27th January 2025 in which she deposed, inter alia, that the Defendants have admitted that this suit was listed for hearing on 24th September 2024 by consent of the parties and neither they nor their counsel attended the Court on that day. That no good reason has been advanced for the Plaintiffs' non-attendance and the allegation that the matter was not diarize is a lame excuse bordering on indolence and want of seriousness on the part of the counsel. It is also not true because the date was taken in Court in the presence of counsel. In any case, the Plaintiffs have been on the land in dispute from 1978 to date without being evicted. Therefore, they will suffer injustice and be prejudiced if the application is allowed. That this is a delaying tactic and is not a situation where the mistake of counsel should be excused. The application is incompetent and should be dismissed.
8. The Motion has been canvassed by way of written submissions. These have been filed by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Defendants and by Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the Plaintiffs.
9. I have considered the application, the rival affidavits and the submissions by counsel.
10. The Plaintiffs' counsel has raised two issues in his submissions which, though not pleaded in the replying affidavit, I need to deal with them first. The first issue is that the application is incompetent and incurably defective for being premature as there is no provision for setting aside this Court proceedings under Order 51 of the Civil Procedure Rules which has been cited by the Defendants. However, the Defendants have also cited Section 3A of the Civil Procedure Act which grants this Court the power to make any orders as may be necessary for the ends of justice. There is also Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.



11. The second issue is that the supporting affidavit has been sworn by counsel against the general rule that counsel should not swear affidavits in contested matters. It is true that Rule 9 of the Advocates (Practice) Rules provides that:

“No advocate may appear as such before any Court or Tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear;

“Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration of affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.” Emphasis mine

It is clear from the above there is no blanket bar against a counsel from swearing an affidavit in a matter in which he is acting for a party. Counsel can swear an affidavit in non-contentious issues. In the case of *Hakika Transporters Services Ltd -v- Chulah Wamimitaire* 2016 eKLR, the Court of Appeal cited its own decision in the case of *Salama Beach Ltd -v- Mario Ross C.A. Civil Appeal No 10 of 2015* where it held that:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr Munyithia has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily, counsel is obliged to refrain from swearing affidavits on contentious issues particularly where he may have to be subjected to cross-examination (see *Pattni -v- Ali & 2 Others C.A. No 354 of 2004 UR 183 (4)*). Rule 9 of the Advocates (Practice Rules) however permits an advocate to swear an affidavit on formal or non-contentious matters.” Emphasis mine.

Mr Onsongo has submitted as follows on this issue:

“My Lord, in this case there was simple inaction or refusal to act by counsel by failing to attend Court together with the Applicants.

My Lord, we humbly submit that the application is incurably defective as there is no supporting affidavit sworn by the Applicants. It is a well known stand that in contested matters, it is the Applicants who should depone to the facts and not their counsel. For instance, there is not a single explanation as to why the Applicants failed to attend Court on the date fixed for hearing. Had the Applicants been keen to explain their absence, it is them and not their counsel who should have sworn an Affidavit to explain that.”

In his submission on this issue, however, Mr Ashioya counsel for the 2nd, 3rd, 4th and 5th Defendants has submitted as follows:

“Counsel has conceded that upon a date being taken for 24.11.2024, the counsel and by extension members of his staff failed to diarize the same and we therefore failed to inform our client to attend Court for hearing of the matter on that day.

Counsel owns up to the errors and mistakes of his office. It is trite law that mistake of counsel should not be visited upon their innocent client and this being a land matter, we urge the Court to exercise its discretion in favour the Applicant.”



While it is true that the ownership of the land parcel No Samia/Budongo/371 and which is the subject in this suit is contested, the fact that neither the Defendants nor their counsel attended Court on the hearing date is not really contested. Infact, as is clear from paragraphs 4 and 5 of the replying affidavit by Mr Ashioya, the failure to attend Court by both the Defendants and their counsel is conceded. It has been deposed in those paragraphs thus:

- “ 4: That the Applicants have admitted that the matter was fixed for hearing on 24.9.2024 by consent.”
- 5: That the Applicants have also admitted that neither them nor their counsel attended Court on that date.”

The above averments, as is now clear, have been repeated in the submissions by Mr Ashioya which I have already summarized above. Therefore, it is only Mr Ashioya who could have sworn an affidavit explaining why neither him or his clients did not attend the Court on the hearing date. And further, it is only Mr Ashioya who could depone to the fact that there was a mistake on the part of his office in failing to diarize the case and inform the Defendants. The 2nd, 3rd, 4th and 5th Defendants whom he represents could not have been in any position to depone on any reason as to why their counsel did not inform them about the hearing date. It is noted from the record that when the hearing date was taken before the Deputy Registrar on 15th April 2024, the Defendants were not personally present in Court. Therefore, they had to rely on their counsel to inform them of the hearing date and the said counsel has clearly demonstrated why he was unable to do so. And only he could swear an affidavit to explain his absence and that of his clients during the hearing date. The answer to the second issue, therefore, is that only Mr Ashioya could have sworn an affidavit to explain his absence and that of his clients on the date when the case was heard. His replying affidavit is, in the circumstances, clearly on the record and is admissible since it deals with factual matters within his knowledge.

12. The next, and crucial issue is whether this Court should set aside the *ex parte* proceedings of 24th August 2024 and allow the 2nd, 3rd, 4th and 5th Defendants to cross-examine the Plaintiffs and give their evidence or whether the trial should commence *de novo*.
13. As it is now clear that the Defendants and their counsel did not attend the hearing due to the mistake of their counsel in not diarizing the case, it is only fair that the Defendants be given an opportunity to testify in defence of the claim against them and also to cross-examine the Plaintiffs. The wider interests of justice so dictate.
14. The Notice of Motion dated 7th November 2024 is merited and is hereby allowed. The following disposal orders are issued:
 1. The Court's order dated 24th September 2024 closing the 2nd, 3rd, 4th and 5th Defendants' case is hereby vacated and set aside.
 2. The 2nd, 3rd, 4th and 5th Defendants shall pay to the Plaintiffs the sum of Kshs.10,000 as throw away costs within 14 days of the delivery of this ruling.
 3. The matter shall be mentioned on 22nd July 2025 to take a date for the cross-examination of the Plaintiffs by counsel for the 2nd, 3rd, 4th and 5th Defendants and for their defences.
 4. In default of (2) above, this reinstatement order shall automatically lapse and the order issued on 24th September 2024 shall revert and the Plaintiffs' counsel will be at liberty to file his submissions and thereafter take a date for judgment.



5. Costs of this application to the Plaintiffs.
6. On 24th September 2024, Mr Onsongo informed this Court that as per the amended Originating Summons dated 27th March 2023, the Plaintiffs are only proceeding against the 1st, 2nd, 3rd and 6th Defendants after the removal of the 4th and 5th Defendants. This Motion has been filed on behalf of the 2nd, 3rd, 4th and 5th Defendants. Mr Ashioya will have to confirm which of the Defendants he represents on the hearing date should the matter proceed to hearing.

BOAZ N. OLAO

JUDGE

7TH JULY 2025

RULING DATED, SIGNED AND DELIVERED ON THIS 7TH DAY OF JULY 2025 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES

BOAZ N. OLAO

JUDGE

7TH JULY 2025

