



Ododa & 2 others (Suing as the administrators of the Estate of Patricia Adipo Ododa) v Ododa & 2 others (Environment & Land Case 50 of 2017) [2023] KEELC 18697 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 50 OF 2017
SO OKONG'O, J
JULY 6, 2023**

BETWEEN

**HARRY OTIENO ODODA 1ST PLAINTIFF
ELIZABETH ACHIENG OCHIENG 2ND PLAINTIFF
BARRACK ODODA 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF PATRICIA ADIPO
ODODA**

AND

**FIDELIA AGOLA ODODA 1ST DEFENDANT
BENEDICT DAVID ODODA 2ND DEFENDANT
PAUL ODHIAMBO OBURA 3RD DEFENDANT**

RULING

Background

1. The plaintiffs brought this suit in the High Court against the defendants on 17th February 2011 seeking the following reliefs; a declaration that the purported sale of all that parcel of land known as Kisumu/ Municipality/Block 5/199 (hereinafter referred to as “the suit property”) and the transfer thereof from Patricia Adipo Ododa (hereinafter referred to only as “the deceased”) to the 3rd defendant was unlawful, an order for the cancellation of registration of the 3rd defendant as the owner of the suit property and restoration thereof to the name of the deceased, and costs and interest. The plaintiffs averred that the suit property was at all material times registered in the name of the deceased and that the 1st and 2nd defendants caused the same to be sold and transferred to the 3rd defendant illegally without a valid confirmed grant of letters of administration in respect of the estate of the deceased. The plaintiffs



- averred that the grant of letters of administration on the strength of which the 1st and 2nd defendants purported to sell and transfer the suit property to the 3rd defendant was subsequently revoked and the plaintiffs issued with a new grant in respect of the deceased's estate.
2. The 1st and 2nd defendants filed a defence and counter-claim against the plaintiffs on 6th December 2012. The 1st and 2nd defendants denied that the suit property was sold to the 3rd defendant unlawfully. The 1st and 2nd defendants averred that the suit property was registered in the name of the deceased jointly with the 1st defendant and as such the 1st defendant was entitled to half share thereof as of right and the other half in her capacity as the sister of the deceased. In her counter-claim, the 1st defendant averred that she was registered together with the deceased as joint proprietors of the suit property in equal shares. The 1st defendant averred that she was the one who developed the suit property. The 1st defendant averred that as a sister of the deceased, she was entitled to a share of her estate.
 3. The 1st defendant sought judgment against the plaintiffs for; a declaration that the suit property was registered in the joint names of the 1st defendant and the deceased in equal shares, a declaration that only half share of the suit property formed part of the deceased estate that could be administered by the plaintiffs, a declaration that the 1st defendant was entitled to a half share of the suit property and that being a sister of the deceased, she was also entitled a portion of the share of the suit property forming part of her estate, and the costs of the counter-claim and interest.
 4. The 3rd defendant filed his defence on 5th September 2011 in which he denied the plaintiffs' claim in its entirety. The 3rd defendant averred that he lawfully purchased the suit property from the 1st and 2nd defendants who were the registered owners thereof. The 3rd defendant averred that the suit property must have been owned by the deceased jointly with the 1st and 2nd defendants who had exclusive possession thereof. The plaintiffs filed a reply to defence and defence to the 1st defendant's counter-claim on 21st May 2013.
 5. The hearing of the suit commenced before Kaniaru J. on 7th February 2016 when the 1st plaintiff gave his evidence in chief partially and was stood down. The matter was subsequently adjourned from time to time. On 8th July 2019, the court was informed that the 1st defendant had died. From that date, the matter was again adjourned from time to time to give the 1st defendant's advocates an opportunity to substitute the 1st defendant. The 1st defendant was never substituted. On 4th October 2021, the court was informed that the 3rd plaintiff had also passed on. On 12th July 2022 after several mentions, the parties appeared before the Deputy Registrar for the mention of the matter. The Deputy Registrar ordered that the matter be mentioned before the judge on 5th October 2022. The plaintiffs' advocate who was present was directed to serve a mention notice upon the 1st and 2nd defendants' advocates who were not present. On 5th October 2022, none of the parties appeared in court. The court ordered that the parties be served with a notice to appear in court on 24th November 2022 and show cause why the suit should not be dismissed.
 7. From the record, the court served a notice upon the advocates for the parties through e-mail on 17th October 2022 to appear in court on 24th November 2022 to show cause why the suit should not be dismissed. On 24th November 2022, only the advocates for the defendants appeared in court. The advocate for the 1st and 2nd defendants informed the court that the 1st and 3rd plaintiffs and the 1st defendant were deceased. The advocate for the 3rd defendant urged the court to dismiss the suit. Since the plaintiffs did not attend court to show cause why the suit should not be dismissed, the court dismissed the suit for want of prosecution with costs to the defendants.



The application before the court

8. On 10th March 2023, the plaintiffs brought an application by way of a Notice of Motion dated 9th March 2023 seeking to set aside the order of dismissal of the suit that was made on 24th November 2022 and the reinstatement of the suit for hearing on merit. This is the application which is the subject of this ruling. The application was brought on the ground that the plaintiffs were not notified of the date of 24th November 2022 when the matter came up for notice to show cause. The application was supported by the affidavit of the plaintiff's advocate Bruce Odeny in which he reiterated that his firm was not served with a notice to appear in court on 24th November 2022 to show cause why the suit should not be dismissed. He stated that his firm learnt of the dismissal of the suit on 8th March 2023 after the plaintiffs were served with a letter dated 14th January 2023 by the 3rd defendant's advocates which the plaintiffs brought to his office. He stated that it was after that that they perused the court file and noted that the suit had been dismissed on 24th November 2022.
9. The application was opposed by the 3rd defendant through a replying affidavit sworn on 27th March 2023. The 3rd defendant averred that the plaintiffs' advocates were aware of the date of 24th November 2022 when the matter came up for notice to show cause since they were served with a notice. The 3rd defendant termed the application malicious and frivolous.
10. The application was argued on 9th May 2023. The advocate for the 1st and 2nd defendants told the court that he was not opposing the application. He however informed the court that the 1st and 3rd plaintiffs and the 1st defendant were deceased. In his submissions, the plaintiffs' advocate submitted that the 2nd plaintiff was still alive and could prosecute the suit if the suit was reinstated. The plaintiffs' advocate reiterated that his firm was not served with the notice to show cause. The plaintiffs' advocate submitted that the matter was in court last in less than a month prior to its dismissal. He submitted that the suit could only be dismissed for want of prosecution if the matter had taken at least a year without action.
11. In his submission in reply, the 3rd defendant's advocate reiterated that the evidence on record showed that the advocates for the plaintiffs were served with a notice to show cause. The 3rd defendant's advocate submitted that the plaintiffs' advocate had not given any explanation why he did not attend court on 24th November 2022 when the suit was dismissed. He submitted that the 1st and 3rd plaintiffs died several years ago and that the suit had been mentioned on several occasions to confirm their substitution that was never done. The 3rd defendant's advocate submitted that the suit was properly dismissed. He urged the court to dismiss the application as no cause had been shown to warrant the reinstatement of the suit.

Analysis and determination

12. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the 3rd defendant in opposition to the application and the submissions by the parties. What I need to determine is whether valid grounds have been put forward by the plaintiffs to warrant the setting aside of the order made herein on 24th November 2022 dismissing this suit for want of prosecution. There is no dispute that the court has power to reinstate a suit that has been dismissed for want of prosecution. The power is however discretionary. An applicant for reinstatement of a suit has to satisfy the court that he deserves the exercise of the court's discretion. I have at the beginning of this ruling given the history of the dispute between the parties and the progress of the suit. From the evidence on record, I am satisfied that the plaintiffs' advocates were served with a notice to show cause.



13. The plaintiffs have contended that since the suit had not remained inactive for at least one year, the same could not be dismissed for want of prosecution. I am of the view that in addition to the power given to the court under Order 17 Rule 2 of the [Civil Procedure Rules](#), the court has inherent power to dismiss a suit where a plaintiff fails to comply with directions given by the court or where considering all the circumstances of the case such dismissal would serve the ends of justice. As I mentioned earlier in the ruling, this suit was filed in 2011 and not 2017 as its heading suggests. The 2017 case number was given to it when it was transferred to this court. At the time the suit was dismissed, it had been pending for 11 years. From 2016 when the matter was partly heard by Kaniaru J. no other serious steps had been taken by the plaintiffs to prosecute the suit. Two of the plaintiffs died after that hearing and were not substituted although the suit kept being mentioned year in and year out to confirm substitution. The 3rd defendant also passed on. Again this was another reason to keep mentioning the matter to confirm substitution.
14. When the parties appeared before the Deputy Registrar on 12th July 2022, the Deputy Registrar ordered the parties to appear before the court on 5th October 2022 for directions in the matter. The plaintiffs' advocate was present and was directed to serve the 1st and 2nd defendants' advocates who were absent. On 5th October 2022, none of the parties appeared. In view of the history of the matter that I have set out above, this court had inherent power outside Order 17 Rule 2 of the [Civil Procedure Rules](#) to summon the parties to appear before it and show cause why the suit should not be dismissed and to proceed and dismiss the suit if no cause was shown. The plaintiffs' advocates did not give any explanation why they failed to attend court on 5th October 2022 when the matter came up for directions as a result of which the order for the notice to show was issued. There was also no explanation given by the plaintiffs' advocates why they did not attend court on 24th November 2022 to show course why the suit should not be dismissed. The dismissal of this suit was therefore regular and lawful.
15. That said, in view of the nature of the dispute between the parties which concerns a property of a deceased person said to have been illegally sold, I will give the plaintiffs a chance to prosecute their suit. I am not persuaded that the defendants would suffer such prejudice that cannot be put right by payment of costs. I am therefore inclined to exercise my discretion in favour of setting aside the orders of dismissal of the suit made on 24th November 2022. The procedural infractions mentioned above cannot fetter this court's discretion in an application of this nature. In [Nchapi Leiyagu v IEBC & 2 others](#), Civil Appeal No 18 of 2013,[2013] eKLR, the court stated that:

"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality."

16. In [Philip Chemwolo & another v Augustine Kubede](#) [1982-88] KAR 1033 at 1040, Apaloo JA stated as follows:

Blunder will always 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 merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."



Conclusion

17. In conclusion, I allow the Notice of Motion application dated 9th March 2023 in terms of prayer 2 thereof. The 3rd defendant shall have thrown away costs and the costs of the application assessed at Kshs 30,000/- payable forthwith.

DELIVERED AND DATED AT KISUMU THIS 6TH DAY OF JULY 2023

S. OKONG'O

JUDGE

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

Ms. Akinyi for the Plaintiffs

N/A for the 1st and 2nd Defendants

Mr. Anyul for the 3rd defendant

Ms. J. Omondi-Court Assistant

