



REPUBLIC OF KENYA



**Omolo v Registered Trustees Dala Hera Church (Environment & Land
Case 302 of 2017) [2022] KEELC 140 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 302 OF 2017**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

BONIFACE OMULO OMOLO PLAINTIFF

AND

REGISTERED TRUSTEES DALA HERA CHURCH DEFENDANT

RULING

1. Boniface Omulo Omolo has come to this court vide application dated 17/5/2021 agents the Defendant seeking orders that:
 - a) The Honourable Court be pleased to certify the present application as extremely urgent and to be heard on priority basis and ex-parte at the first instance.
 - b) The Honourable court be pleased to set aside the dismissal orders issued on the 12th day of April 2021 with a view to restraining the suit for hearing and final determination.
 - c) Upon grant of prayer (b) above, the Honorable Court be pleased to have the matter herein reinstated for hearing and determination on merit.
 - d) Costs of the application be provided for.
2. The application based on grounds that:
 - i) By reason of the applicant's Counsel being bereaved he was unable to attend court when the matter was slotted for hearing.
 - ii) Unless the suit herein is reinstated the respondents continued encroachment on the suit parcel shall greatly affect the applicant's proprietary rights.
 - iii) Failure to attend out was neither deliberate nor intended



3. The application is supported by the affidavit of Dick Anyul who states that the Plaintiff has been religiously attending court but on 12/4/2021 he was bereaved having lost his nephew and was involved in the funeral arrangements. He conveyed the message of bereavement to the applicant hence he failed to attend court. His clerk also failed to inform an advocate to hold brief.
4. The application is opposed by the respondent who states in the replying affidavit that the date was taken by consent before the Honourable Deputy Registrar on 21/1/2021.
5. That on the hearing date 12/4/2021, the advocate of the Defendant/Respondent and the Respondent's only witness Arch-Bishop Habbakuk Onyango Abongo were present in open court ready to proceed with the hearing of the plaintiff's case.
6. That your Lordship was gracious enough to briefly place the file aside to await the arrival of the Applicant or his advocate but to no avail.
7. That no one was sent to court or requested to hold the Applicant's advocate's brief despite the Honorable Court giving time to the Plaintiff/Applicant to appear before it.
8. That the onus was on the applicant to prosecute the suit or take steps to ensure the same.
9. That with due respect, the Applicant's assertion that they were bereaved is at best a lame excuse and if that was the case, the Plaintiff themselves or a representative of his advocate would have either logged into the virtual court session or proceeded to open court where their request of not be able to proceed which in turn would have been taken into consideration and appropriate orders made thereof.
10. That the Applicant took the court for granted, the parties therein and such was punished accordingly by the suit being dismissed for lack of attendance.
11. That the Honourable Court has pronounced itself on the issue of dismissal where it awarded the Defendant/Respondent costs of the suit.
12. That the proceedings before a Honorable Court should be taken seriously especially one from a superior court of record such the Environment and Land Court presided by a Honorable Judge.
13. That soon after dismissal of this suit, the Applicant served the Respondent with another application, an originating summons E9 of 2020 (Boniface Omulo Omolo vs The Registered trustees Dala Hera Church & Another.
14. I have considered the application and the response to the same and do find that the explanation by counsel for the plaintiff for his failure to attend court is not satisfactory because he has not explained the exact role he played in his nephew's death to cause him not to attend court. He does not even disclose the name of his nephew and when he was buried. He does not annex any evidence of his communication to his client.
15. Setting aside such decision of the court is a discretion of the court which should be exercised comprehensively but rather Judiciously. The applicant's counsel has not explained to the courts satisfaction for the setting aside this court's decision.
16. However, I have perused the whole court file and do find that the plaintiff is in possession of the land and he is likely to be punished due to the negligence of his lawyers and therefore I do exercise my discretion by allowing the application on condition that the plaintiff pays the defendant thrown away costs of Kshs. 30,000/= within 30 days failure of which the suit will remain dismissed. Orders accordingly.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 6th DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th // March 2020.

