



**Saoli (Suing On His Own Behalf And As An Administrator Of The Estate Of Leposo Ole Saoli) & 2 others v Saoli (Environment & Land Case 264 of 2017) [2022] KEELC 2835 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 264 OF 2017  
CG MBOGO, J  
JULY 5, 2022  
FORMERLY NAKURU HCC NO. 28 OF 2010**

**BETWEEN**

**PAUL MOROMBI SAOLI ..... 1<sup>ST</sup> PLAINTIFF  
ANTONY PARSALOI SAOLI ..... 2<sup>ND</sup> PLAINTIFF  
TIMOTHY LETOLUO SAOLI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**SOITARA OLE SAOLI ..... DEFENDANT**

**RULING**

1. What is before this court for determination is the notice of motion application dated May 11, 2022 filed by the defendant/applicant and expressed to be brought under article 48, 50 (1) of the Constitution, section 1A,1B,3 and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
  1. spent
  2. spent
  3. That this honourable court be pleased to set aside the proceedings conducted on February 8, 2022 and February 28, 2022 and all subsequent orders and order that the hearing of the suit on merits commences de novo.
  4. That the costs of this application be provided.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of the defendant/applicant sworn on even date. The defendant/applicant deposed that sometime in the



year 2018, he instructed Mr. Geoffrey Otieno, Advocate of the firm of Geoffrey Otieno & Company Advocates who came on record on 3<sup>rd</sup> April, 2018 and through his sons he made several calls to his advocate to inquire about the progress of the matter who informed him that the suit was not ready for hearing and once a date was fixed, he would be informed. Further, that in January and February 2022, through his sons, he tried reaching the said advocate who did not answer his calls nor return the same. Subsequently, on April 24, 2022 he received information from his sons that the suit had been heard and upon physical inquiry from the said law firm by one of his sons, he was informed that the advocate had ceased acting for him in the matter. Thereafter, he was handed his file and told to instruct another advocate/law firm.

3. The defendant/applicant further submitted that upon perusal of the file, it was established that an amended statement of defence and counter claim had been filed and no compliance documents had been filed to enable the matter be certified ready for hearing. Further, that by an application dated February 21, 2022, Mr. Geoffrey Otieno Advocate sought to cease acting on his behalf in the matter and that upon checking the e filing portal, judgment had been reserved for delivery on May 31, 2022.
4. The application was opposed by the replying affidavit of the 1<sup>st</sup> plaintiff/respondent sworn on May 27, 2022. The plaintiff/ respondent deposed that the application is frivolous, scandalous, inept, bad in law and a non-starter for the reasons that the defendant/applicant has all along been aware of the happenings in court as outlined in paragraph 7 of the replying affidavit and that he was aware of the hearing date but chose to ignore the same for reasons best known to him. The defendant/ respondent further deposed that it is no coincidence that his son was physically present in court on February 28, 2022 when the matter proceeded for hearing. As such, the actions of the advocate bind the client and the defendant/applicant is at liberty to institute disciplinary proceedings against his advocate if he feels aggrieved by his advocate.
5. Further that the defendant/applicant is a lethargic litigant and cannot claim to be unaware of the filing of the amended defence and counter claim that was filed in the year 2018 and if the defendant/applicant disputes service, he has a right under the law to reopen the application and cross examine the process server. That the grounds raised by the defendant/ applicant lack merit and calculated at advancing seemingly convincing reasons and this being an old matter that was filed in the year 2010, litigation must come to an end.
6. The defendant/applicant filed a further affidavit sworn on June 6, 2022 which he buttressed the issue raised in his supporting affidavit.
7. The defendant/applicant filed written submissions dated June 6, 2022. The defendant/applicant raised one issue for determination which is whether the court should set aside the proceedings conducted on 8<sup>th</sup> and February 28, 2022 and all subsequent orders and order that the hearing of the suit on merits commences de novo. In advancing his application, the defendant/applicant relied on the case of *PIO v BO & another* [2021] eKLR and *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR. The defendant/ applicant further submitted that the mistakes of his advocate need not be visited on him as was in the case of *Doa Doa Tented Camps and Lodges Limited v Jubilee Insurance Company of Kenya Limited* [2021] eKLR. The defendant/applicant submitted that there is no evidence of any communication between Geoffrey Otieno and himself on the progress of the matter.
8. The plaintiff/respondent filed written submissions dated June 17, 2022. The plaintiff/respondent raised two issues for determination which are whether the defendant/applicant is entitled to the orders sought and who should bear the costs of this application.



9. The plaintiff/respondent submitted that the defendant/applicant has a legal duty to demonstrate that there exists a sufficient cause to warrant setting aside the proceedings. The plaintiff/respondent relied on the case of *Tabsei Chepngeno Tormoi v John C Koech & 3 others* [2021] eKLR and *Bernard Maina Kamau v Sunripe (1976) Limited* [2014] eKLR, *Pius Mulwa Masai (Suing as Legal Representative of the estate of Masai Kabolelya) v Nzembi Musili & 5 others* [2021] eKLR and *Omwoyo v African Highlands and Produce Co. Limited* [2002] KLR. On whether hearing of the suit should commence de novo, the plaintiff/respondent submitted that it is now 12 years since the suit was filed and it would not be fair to begin afresh. The plaintiff/respondent relied on the case of *Joseph Lekamario & 24 others v African Wildlife Foundation & 4 others* [2016] eKLR and submitted that should the court be persuaded to grant the orders, then a throw away costs of Kshs. 50,000/- should be awarded to them.
10. I have carefully analysed the application, replies thereof and the submissions and authorities cited by both parties and the issue for determination is whether the defendant/applicant has reasonable cause to warrant grant of the orders prayed.
11. I have perused the record in this file and I note that on December 14, 2021, Ms Chepngetich holding brief for Mr. Otieno informed the court that the defendant/applicant had complied with Order 11 of the *Civil Procedure Rules* and thereafter by consent, hearing was slated on February 8, 2022 in open court. On February 8, 2022 the defendant/applicant and his advocate were absent on the hearing date that was taken by consent whereupon I directed that the matter proceeds as scheduled. In the course of the proceedings, Mr Kilele, Advocate addressed court and informed the court that he had instructions from Mr. Otieno who was seeking to file an application to cease acting for the defendant/applicant for lack of instructions from the time the matter was fixed for hearing to the date of the hearing and would be praying for adjournment for 14 days and they would be willing to pay costs to the plaintiff which application is made in good faith considering the nature of the dispute. This court declined to grant an adjournment but gave room for Mr. Otieno to file an application to cease acting. The hearing was adjourned to February 28, 2022 with directions that a hearing notice be served upon the defendant/applicant which was served on the same date and acknowledged by the firm of Mr. Otieno. On March 22, 2022, this court being satisfied with whatsapp service on March 11, 2022 allowed the application to cease acting and granted the same in terms of prayers 1 and 2 respectively. The plaintiff/respondent was further directed to serve the defendant/applicant in person with a mention notice. On March 28, 2022, the plaintiff informed the court that they had filed and served the defendant with the written submissions and an affidavit of service is on record.
12. It is important that I set out the immediate procedural history leading to filing of this case as it would enable this court arrive at a just finding. Following the court's direction on February 8, 2022, and the defendant having been served with a hearing notice, he failed to attend court despite being granted a last adjournment. In my view, I find that the defendant/applicant is not entitled to the orders as sought. This is an old matter with the parties herein at an advanced age. Further, allowing the suit to commence de novo would be unfair to the plaintiffs who were present during trial and which information was well within the knowledge of the defendant and his previous advocate. However, taking into account that the matter had been closed and reserved for judgment, and being mindful of article 50 (1) of the *Constitution* which provides that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." and article 27 (1) which provide that: "Every person is equal before the law and has the right to equal protection and equal benefit of the law" (emphasis mine, I will allow the reopening of the case to allow the defendant/applicant present his defence case for trial and filing of written submissions.



13. Arising from the above, the proceedings conducted on 8<sup>th</sup> and February 28, 2022 are upheld. Costs of the application to be borne by the defendant/applicant. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON 5<sup>TH</sup> JULY, 2022.**

**Mbogo C.G**

**Judge**

**5/7/2022**

In the presence of: -

CA: Timothy Chuma

