



**Oyugi v Misiani & another (Civil Case E005 of 2021)
[2024] KEHC 4911 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL CASE E005 OF 2021
KW KIARIE, J
MARCH 14, 2024**

BETWEEN

DR. LINDA MERCY ANYANGO OYUGI PLAINTIFF

AND

DR. SAMUEL MISIANI 1ST DEFENDANT

DR. MAURICE RAUTE 2ND DEFENDANT

RULING

1. The first application is by the second defendant through a Notice of Motion dated the 20th day of January 2024 for an order of dismissal for want of prosecution under Order 7 Rules 3 and 4 of the Civil Procedure Rules. The said Order provides:
2. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.
3. Notwithstanding anything contained in rule 2, a person shall not be entitled to avail himself of any set-off or counterclaim in any proceedings by the Government for the recovery of taxes, duties or penalties, or to avail himself in proceedings by the Government of any other nature of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties or penalties.
4. The Order cited, which is in respect of Set-off and counterclaim and proceedings by the Government, is not applicable to the current case and the issue of dismissal. This suit has taken a long time to



commence, but since the parties have shown the desire to have it concluded, it would not be fair to dismiss it.

5. . The second application, brought by the plaintiff, is a Chamber summons dated the 1st day of February 2024. The applicant is seeking specific orders as follows:
 - a. This honourable court be pleased to order that the plaintiff, Dr Linda Mercy Anyango Oyugi, be produced before the court for an inquiry to establish whether, because of unsoundness of mind or mental infirmity, she is incapable of effectively managing her affairs and reasonably protecting her interests in this suit.
 - b. This honourable court be pleased to review and consider the medical report of Prof. James Jowi, a Neurologist at the Neurosciences Center in Kisumu, dated 2/6/2020 and filed before the court, regarding the plaintiff's mental infirmity and incapacity.
 - c. Subsequent to the determination made in (1) and (2) above, the plaintiff's father and next friend, Michael Oyugi Oimo, will be allowed to unconditionally prosecute this suit on behalf of the plaintiff.
 - d. Costs of this application be in the cause.
6. The application is premised on the following grounds:
 - a. The plaintiff herein suffered, amongst other injuries, a hypo-trophic brain injury that left her with neurocognitive impairment, global aphasia and memory deficit, amongst other impairments.
 - b. The plaintiff's health challenges have substantially affected her speech and memory and rendered her incapable of effectively protecting her interests in this suit.
 - c. This suit is still pending and is yet to be determined.
 - d. It is necessary and in the interest of justice and fairness that the plaintiff's father, who is conversant with the matters pertaining to this suit, be allowed to prosecute this suit on behalf of the plaintiff.
 - e. None of the parties herein will be prejudiced in any way should the orders sought be granted.
7. The second defendant did not oppose the application. The 1st defendant, however, opposed it on the following grounds:
 - a. That the application is an afterthought.
 - b. That the counsel on record has no capacity to swear an affidavit on issues of fact.
8. I agree with the second defendant that the plaintiff's advocate is not competent to swear on matters of fact raised in the supporting affidavit. This can only be done by a medic. Secondly, I have noted that several persons have been lumped together as one. If this has to be done, it must comply with the law that dictates who can be sued. The application cannot be allowed as it is.
9. In the interest of justice, the plaintiff is granted 30 days' leave to make the necessary amendments and any application before the matter is scheduled for a pre-trial conference.
10. Costs will abide by the outcome of the suit.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF MARCH 2024



KIARIE WAWERU KIARIE
JUDGE

