



**In re Estate of Okoth Owuor (Deceased) (Succession Cause  
215 of 2011) [2024] KEHC 5193 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 215 OF 2011  
WM MUSYOKA, J  
MAY 17, 2024**

**RULING**

1. What pends for determination, in this matter, is the Motion, dated 23<sup>rd</sup> October 2023. It seeks the setting aside or vacation of the orders that were made on 11<sup>th</sup> March 2015, dismissing an application dated 22<sup>nd</sup> December 2010, for want of prosecution, and the reinstatement of that application.
2. The background is given by the applicant, James Otieno Okoth, through his affidavit of 23<sup>rd</sup> October 2023. The application in question was for revocation of grant. It initially came up for hearing on 9<sup>th</sup> December 2014, when it was put off to 11<sup>th</sup> March 2015, on account of lack of service. He did not attend court on 11<sup>th</sup> March 2015, as he was unwell, and his application was dismissed. He then filed an application, dated 30<sup>th</sup> March 2015, seeking reinstatement of the application, dated 22<sup>nd</sup> December 2010. He thereafter instructed an Advocate to prosecute that application on his behalf. That Advocate, Mr. Obwatinya, withdrew that application, and filed another, dated 16<sup>th</sup> November 2015. He instructed another Advocate, to replace Mr. Obwatinya, who withdrew the application that Mr. Obwatinya had filed. The matter then stalled. In the meantime, he was sued in Busia ELC No. 111 of 2017, for eviction, which suit was subsequently dismissed. He avers that he was the son of the deceased, and that he was the closest relative of the deceased compared with the petitioner. He argues that the petitioner had his own land, which he inherited from his own father.
3. Attached to that affidavit are treatment notes, bearing a date stamp of 10<sup>th</sup> March 2015; the judgement in Busia ELC No. 111 of 2017, delivered on 26<sup>th</sup> January 2023; a letter from the Chief, dated 13<sup>th</sup> October 2023; and a certificate of confirmation of grant, dated 29<sup>th</sup> October 2015.
4. Stephen Jagongo Wanzala responded, vide an affidavit sworn on 15<sup>th</sup> February 2024. He avers that the withdrawal of the applicant's applications ought not to be taken to disadvantage him. He argues that the fact of the applicant's sickness was of no consequence. He states that the present application is intended to render a pending appeal, on the judgement in Busia ELC No. 111 of 2017, nugatory. He argues that it is now 9 years since the dismissal of the application sought to be reinstated.
5. Both sides canvassed the application by way of written submissions, which I have read through and noted the arguments made.



6. The applicant appears to say that since he was ill when the matter came up on 11<sup>th</sup> March 2015, then the orders made on that day ought to be reversed. I note that the applicant did take action after 11<sup>th</sup> March 2015. He filed an application, dated 30<sup>th</sup> March 2015, to address the orders made that day to dismiss his claim. I note, from the record, that the application, dated 30<sup>th</sup> March 2015, was withdrawn on 12<sup>th</sup> November 2015, by the Advocate for the applicant. The proceedings, of 18<sup>th</sup> November 2015, indicate that that Advocate filed another application dated, 16<sup>th</sup> November 2015. The application, dated 16<sup>th</sup> November 2015, came up on 18<sup>th</sup> January 2018, and was adjourned, at the instance of the Advocate for the applicant. It came up again on 25<sup>th</sup> May 2016, and it was also withdrawn. The matter was dormant between 25<sup>th</sup> May 2016 until 30<sup>th</sup> January 2024, when it was placed before me on the application, dated 23<sup>rd</sup> October 2023. So, the applicant made 2 attempts to have the application of 22<sup>nd</sup> December 2010 reinstated, but the 2 applications that he filed were all withdrawn by his Advocates. He had chances to obtain the setting aside orders then, but he squandered them when he filed and withdrew 2 applications. Surely, there ought to be an end to litigation. A party ought not be allowed to approbate and reprobate.
7. He says the suit brought against him at the Environment and Land Court derailed him. Did it? The last court appearance, in respect of this probate matter, before the suit in Busia ELC No. 111 of 2017 was filed, was on 25<sup>th</sup> May 2016. Busia ELC No. 111 of 2017 was filed sometime in 2017. I am not able to tell the exact date, as I only have a copy of the judgement. The applicant had at least 7 months between May 2016 and January 2017 to take action, before the suit was filed against him. He did nothing. So, if he was really keen on having the orders of 11<sup>th</sup> March 2015 vacated, to pave way for prosecution of the application dated 22<sup>nd</sup> December 2010, why did he not file another application after the withdrawal of the earlier application on 25<sup>th</sup> May 2016.
8. Moreover, the judgement in Busia ELC No. 111 of 2017 was delivered on 26<sup>th</sup> January 2023. The instant application, dated 23<sup>rd</sup> October 2023, was not filed until 3<sup>rd</sup> November 2023. If he was really keen on upsetting the order of 11<sup>th</sup> March 2015, why did he have to wait another 9 months after that judgement, if indeed that suit had derailed him, to move this court.
9. I am not persuaded that the applicant has a meritorious case, to warrant grant of the orders that he is inviting me to make. Consequently, I hereby dismiss the Motion, dated 23<sup>rd</sup> October 2023. Each party shall bear their own costs.

**DELIVERED BY EMAIL, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 17TH DAY OF MAY 2024**

**W MUSYOKA**

**JUDGE**

**Mr. Arthur Etyang, Court Assistant.**

**Parties**

**Mr. James Otieno Okoth, the applicant, in person.**

**Mr. Stephen Jagongo Wanzala, the administrator, in person.**

