



**Okumu v Osalo & another (Environment and Land Case 52 of 2013)
[2025] KEELC 6273 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 52 OF 2013**

**BN OLAO, J
SEPTEMBER 24, 2025**

BETWEEN

SYLVESTER OKUMU PLAINTIFF

AND

JOACHIM OUMA OSALO 1ST DEFENDANT

PASCAL OJIAMBO OSALO 2ND DEFENDANT

RULING

1. The Plaintiff had moved to this Court vide his amended plaint dated 14th November 2018 in which he sought the substantive orders that the Defendants be permanently enjoined from the land parcel No Samia/Budongo/1699 (the suit land) after their eviction therefrom and further, that the Defendants structures on the suit land be demolished and they be made to pay mesne profits and costs. The basis of the Plaintiff's case is that he is the registered proprietor of the suit land on which the Defendants have continued to trespass by ploughing and constructing structures and houses.
2. The Defendants filed a joint defence denying that claim and pleading that in fact it is the Plaintiff who has extended the boundary to his land. Further, that the Plaintiff's suit is aimed at vexing the Defendants' due to his own inability to execute his judgment in Nairobi High Court Civil Case No 6695 of 1992 relating to the land parcel No Samia/Budongo/245.
3. The Defendants also filed their counter-claim in which they sought an order that the Plaintiff has extended the area of the suit land and encroached onto the land parcel no Samia/Budongo/245 and should be permanently enjoined therefrom.
4. After several adjournments, this case came up for hearing on 11th March 2025. On that day, neither the Defendants nor their then counsel Mr Wanyama attended the Court for hearing. The case therefore proceeded to hearing ex-parte and the Plaintiff, led by his counsel Ms Maloba, testified and closed his case. Counsel then sought 7 days to file her submissions which was allowed. However, she had not



done so by 25th March 2025 and when the case was mentioned on that day to confirm compliance the Court was informed by MR J. P. Makokha, who was holding her brief, that Ms Maloba had not filed her submissions because as she was preparing to do so, she was served with a Notice of Motion dated 21st March 2025 by Mr N. W. Amolo who had come on record for the Defendants in place of Mr Wanyama. That Motion is the subject of this ruling.

5. By the Notice of Motion dated 21st March 2025 and filed under Certificate of urgency, the 1st and 2nd Defendants seek the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to stay and arrest the proceedings culminating in the order marking the Plaintiff's case as closed, that submissions be filed and the case be mentioned on the 23rd March 2025 to confirm that submissions had been filed and the Honourable Court be pleased to re-open the proceedings so as to accord the Defendants the opportunity to cross-examine the Plaintiff and to call their witness(es) and render evidence.
 - c. That the Honourable Court be pleased to assign an early date for trial and hearing of the suit.
 - d. That the costs of this application be provided for.
6. The Motion is premised on the provisions of Sections 1A, 1B, 3 and 3A of the [Civil Procedure Rules](#) as well as Order 51 rule 1 of the [Civil Procedure Rules](#) as well as on the grounds set out therein. It is also supported by the affidavit of Joachim Ouma Osalo, the 1st Defendant herein, also dated 21st March 2025.
7. The gravamen of the Motion is that the Defendants failure to attend the Court during the hearing on 11th March 2025 was because they were directed to the wrong Court by the person on duty at the Court's Customer Care Desk. That by the time they arrived at the correct Court, it had already heard and finalized this case and when they went to see their then counsel Mr Wanyama, he advised them to get help elsewhere. That the Defendants are keen to defend the claim against them which is related to Busia ELC Case No 55 of 2015.
8. In response to the Motion, the Plaintiff filed a replying affidavit dated 16th April 2025 in which he has deposed, inter alia, that this suit was filed in 2013 and the Defendants have been attending this Court and therefore they cannot have confused it with another Court. That when this file was called for hearing, neither the Defendants nor their counsel attended and in any event, the Defendants had not paid the Kshs.24,000 as earlier directed by this Court. That Busia ELC Case No 55 of 2015 is pending judgment on 29th July 2025 and is in respect to the Land Parcel No Samia/Budongo/245. That the land parcel No Samia/Budongo/1699 which is the subject of this suit has since been surveyed on the request of the Defendants. This Court did not therefore act out of the law by proceeding with the hearing of the suit ex-parte and should not be used to validate the Defendants' lies and disobedience of the Court's orders. The Defendants had the opportunity to be heard but squandered it.
9. By a supplementary affidavit dated 6th May 2025, the 1st Defendant deposed that on 17th April 2023, 3rd May 2023 and 30th November 2023, the Defendants paid the firm of Ms Wanyama & Company Advocates the sums of Kshs.3,000, Kshs.9,000 and Kshs.7,000 making a total of Kshs.19,000 towards costs as per the attached receipts. Then on 24th April 2025, the Defendants paid directly to the firm of Ms Maloba & Company Advocates the sum of Kshs.6,000. The Defendants were not aware that the remittances of Kshs.19,000 were never passed over to the firm of Ms Maloba & Company Advocates until this issue was raised by the Plaintiff in his replying affidavit. The relevant receipts are annexures JOO1 and JOO2.



10. The Motion has been canvassed by way of written submissions filed by Mr Amolo instructed by the firm of Amolo & Kibanya Advocates for the Defendants and by Ms Maloba instructed by the firm of Maloba & Company Advocates for the Plaintiff.
11. I have considered the Motion, the rival affidavits and annexures as well as the submissions by counsel.
12. It is common ground that the Plaintiff prosecuted and closed his case on 11th March 2025 in the absence of the Defendants who did not attend Court on the hearing date and neither did their then advocate Mr Wanyama who has since been replaced by Mr Amolo. The Defendant's explanation for failing to attend the Court during the hearing is that they were misled by the Court's Customer Care Desk and went to the wrong Court and by the time they arrived at this Court, the case had been heard and finalized. The Plaintiff's claim is that this case has been in this Court since 2013 and that the Defendants cannot now allege to have been lost and gone to the wrong Court. On that issue, I am aware that when I was transferred to Busia in 2022, I took up the Court previously used by the Chief Magistrate Busia which then became the ELC Court. Prior to that, my predecessor Justice Omollo was utilizing the Court up-stairs as the ELC Court. Given that un-disputed fact, the Defendants' case that they were guided by the Customer Care Desk and ended up in the wrong Court must not be dismissed as untrue. It is also important to note that from the record, there is nothing to suggest that the Defendants have been physically present in Court. Rather, it is their then counsel Mr Wanyama who has been appearing in Court from 16th November 2022 when I started handling this case. There is merit in their claim to have gone to the wrong Court.
13. In paragraph 9 of his replying affidavit, the Plaintiff has deposed that the Defendants failed to obey Court orders by not paying the sum of kshs.24,000 being costs. However, in his supplementary affidavit at paragraphs 2 and 3, the 1st Defendant deposed that on 27th April 2023, 3rd May 2023 and 30th November 2023 they paid their then counsel Mr Wanyama the sum of Kshs.3,000, Kshs.9,000 and Kshs.7,000 respectively making a total of Kshs.19,000 as costs and were issued with receipts. Then on 24th April 2025, they paid the firm of Ms Maloba the sum of Kshs.6,000. They were not aware that the sum of Kshs.19,000 was not remitted by their then counsel Mr Wanyama to Ms Maloba. I have seen the annexed receipts annexed as JOO1 and JOO2 which confirm that those payments were made. It cannot therefore be correct for the Plaintiff to submit that the Defendants are in contempt of the orders of the Court by failing to pay the costs of Kshs.24,000 as directed by this Court. The record shows that the sum of Kshs.19,000 was indeed paid to the firm of Wanyama & Company Advocates who however did not remit it to the firm of Maloba & Company Advocates and if he did, there is nothing to show for it.
14. From all the above, there is no evidence to suggest that the Defendants deliberately refused to attend Court when this matter came up for hearing on 11th March 2025. On the contrary, their then counsel appears to have abandoned them for reasons which are not clear. To condemn them un-heard given those circumstances will be an injustice. I am also guided by the words of Sheridan J in the Ugandan case of *Sebei District Administration v Gasyali* 1968 EA 300 in which he adopted the wise words of Ainley J in the case of *Jamnadas Sodha v Gordandas Hemraj* 1952 7 ULR 7 that:

“The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be last resort of a Court.” Emphasis mine.

That decision has been adopted by the Court of Appeal in the case of *Pithon Waweru Maina v Thuka Mugiria* 1983 KECA 75 KLR [C.A. Civil Appeal No 27 of 1982] as well as in other cases of the



Superior Court in cases of setting aside *ex parte* judgments. This case is not about the setting aside of an *ex parte* judgment but I have no doubt that the same principles apply in a case such as this one where the Defendants seek an order that they be heard in their defence of the claim against them.

15. The up-shot of all the above is that having considered the Notice of Motion dated 21st March 2025, I allow it and make the following disposal orders:
1. The Court's orders issued on 11th March 2025 closing the Defendants' case and directing the Plaintiff to file his submissions is set aside.
 2. The case is re-opened but only for the Defendants to cross-examine the Plaintiff and to prosecute their defence.
 3. As this is a part-heard case and I shall be proceeding on transfer, this hearing shall proceed on 3rd November 2025.
 4. The firm of Wanyama & Company Advocates shall within 30 days of this ruling remit to the firm of Maloba & Company Advocates the sum of Kshs.19,000 being part of the costs received by them and payable to the Plaintiff.
 5. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

24TH SEPTEMBER 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 24TH DAY OF SEPTEMBER 2025.*

BOAZ N. OLAO

JUDGE

