



**Abade & another v Onyango & another (Environment and Land Appeal
E009 of 2024) [2025] KEELC 7380 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E009 OF 2024
FO NYAGAKA, J
OCTOBER 9, 2025**

BETWEEN

JOHN AMATA APPELLANT

AND

THOMAS CHARIGA ONYANGO AND ANOTHER RESPONDENT

RULING

1. During the just concluded Judiciary, Sports and Culture event at Utalii College, Nairobi, between 11th and 13th September 2025, one of the regional team that participated marked its entry into the games with the song, “My enemies are suffering”. It is a song portraying a situation where the singer or performer rejoices at the misfortunes that befall the opponent or adversary. That scenario is totally different from how the Holy Bible teaches. In Proverbs 24:17 and 18 it is written, “¹⁷ Do not gloat when your enemy falls; when they stumble, do not let your heart rejoice, ¹⁸ or the Lord will see and disapprove and turn his wrath away from them.”
2. However, in the instant appeal, it seems that was what the Respondents were happy to, as will be seen in the facts of the instant application. The result was an unpleasant lesson to them and to anyone who may be of like mind in times to come because even judges and judicial officers who represent God in these earthly temples of justice see or ought to see things from the lens of a just God. That is what He calls us to do.
3. That said, before me is a Notice of Motion dated 1st July 2025. It is brought under Order 3 Rule 9A and Order 12 Rule 7 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and all the enabling provisions of the law. It seeks:
 1. ...Spent
 2. That this honorable court be pleased to set aside the order of dismissal of this suit (sic) issued on the 30th day of June 2025 and reinstate the same.



3. That the costs of this application be provided for.
4. The application was based on the grounds on the face of it and the Affidavit sworn by John Amata Abade. In brief, the grounds were that the applicant had resolved to appoint the law firm currently on record after judgment had been delivered. Initially, the Appellant was acting in person.
5. There was a settlement agreement entered between the parties and consent are adopted on the 6th of February 2025. By it the parties had an exclusive arrangement which would settle the dispute between them. According to one of the terms of the agreement the parties were to undertake a survey exercise in which they were to share the expense equally between the appellants on the one part and the Respondents on the other. The Court directed that the said amount be paid by 25th June 2025. The Appellants paid their share on 30th June 2025, which was four days later.
6. The delay was not adverted to or intentional because the appellants were engaged in the process of sourcing it, and the land registry portal, “Ardhi Sasa”, through which the registry informed the parties that they were to pay through was most of the time hence the failure to meet the deadline. The parties did not deliberately fail to comply with the directions of the court, but due to unforeseen circumstances beyond their control they could not comply. The delay resulted also since the Respondents failed to cooperate or assist in paying the shared fees despite the court giving directions to that effect.
7. Consequently, the court dismiss the appeal on the 30th June 2025. The dismissal greatly affected the parties' interests yet they still desired to adhere to the terms of the consent. It would be in the interest of justice that the orders of 30th June 2025 be set aside and the parties be allowed to proceed as per the consent. The dismissal also affected the criminal case in the Mbita Law court which case ought to have been withdrawn by the 2nd June 2025. By that date this matter had not been dismissed. They added that no prejudice would be occasioned to the parties if the application was allowed.
8. The respondents opposed the application through a Replying Affidavit sworn in by Thomas Chariga Onyango, the 1st Respondent on 8th October 2025. He deponed that he had authority to swear on behalf of the second Respondent, whom he said was indisposed and in Nairobi seeking treatment at the time. He deposed that on the 6th of February 2025 the parties entered into an agreement or compromise through which a settlement agreement was adopted by the court. Through it, the parties agreed that they contribute equally toward the cost of the survey to be conducted to establish the boundaries which would have assisted in settling the dispute between them. Further, the court had directed earlier on that day survey fees be paid on or before 30th April 2025. The Respondents paid by 29th April 2025. He annexed a copy of the payment receipt and marked it TCO 2.
9. He added that the receipt marked TCO2 which was matched with payments for other parcels of land and therefore the person who issued it would be ready to testify as to the discrepancy if questions arose. He prayed then that the issuing officer in charge of Homabay Survey office or his deputy be summoned to testify about the same.
10. Further, that due to the failure and negligence on the part of the applicant to honor the court order, the court extended the deadline of payment to 26th June 2025, which was the last date. Come 25th June 2025, the applicants failed, without any valid reason, to honour the court order. Therefore, the appeal was dismissed.
11. He added that to the best of his knowledge, government systems could not be down from 30th April 2025 to 26th June 2025. Further, if the applicant wanted to prove this fact, he should produce an affidavit from the government offices to show that the system was actually down between those dates mentioned. He concluded that the applicants were given adequate and equal time to make payments,



- but they deliberately failed to comply. Therefore, the appeal was a waste of time and the application should be dismissed with costs to the Respondent. He added that litigation could not continue forever but must come to an end. Therefore, anything beyond the point at which the application was, was an abuse of the process of the court.
12. He added that the applicant's claim that he had no means required that he files an affidavit to show that indeed that was the position. He added that the applicant had a biological son by name George Otieno Amata who was capable and he would have sorted the matter out long before the deadline of 26th June 2025 but due to negligence and arrogance on his part as the applicant, he deliberately failed to meet the deadline. Further, he urged that the court grants him throw away costs should the court find merit in the application.
 13. He added that he had filed a Bill of Costs arising from a case he had in Mbita Law courts, being No. 10 of 2023, and the Bill was due for taxation. He annexed as TCO4 a copy of the Bill of Costs. He added that the Magistrate had indicated to him that the Taxation could only proceed if this Court gave the other a green light. He prayed that this Court directs that it be so. He added that the costs arose from a case he had filed in Mbita Court regarding ownership of the piece of land in issue. He attached TCO 5 a copy of the judgment of the case in Mbita Court. He contended the applicants did not have any valid reason for coming back to court but they were merely on a fishing expedition. Therefore, their application should be struck out. Lastly, he stated that there were two appellants but apparently the applicant was the only one in the matter
 14. When the matter came up for inter partes hearing, it turned out that the Respondents who were the Respondents in the instant application had actually paid their portion of the survey fees. But when the appeal was dismissed, they quickly went and withdrew their payment for their balance of fees. Therefore, when the Respondent proceeded to request to make payment on their part, they were informed that the other party, Thomas Chariga, had not paid their balance of the fees due.
 15. I have considered the application. The law. Under the oral submissions by the parties. The only issue for. Determination before me is whether the application is merited. Or not. Attendant to it. Is the issue put together costs of this sort of application?
 16. In terms of the merits. Off the application. I have stated at the beginning of the. Instant application that this quote in support of justice. It looks Both at the conduct of the parties and the effects of the cases or applications and are presented before it.
 17. It is not in dispute that both parties entered into a consent by which? Service fees, which was to be shared between themselves, was to be paid. To the savvy office in order for them to go to the ground. Harrington. Well, apparently when the time elapsed. And the. Appellants had not by that time paid. Their part of the bargain? The court was of the view that they. Deliberately delayed. To do something. It therefore dismissed the appeal. With the costs. There. Respondent, who had by that time paid his share of this other fees. Knowing well that the appeal no longer existed. Rushed to the. It's sunny office, and with the dreamer, the sun. For which the? Isabella would have. Used in order. 2. Carry out these are the exercise that exercise words to settle. Issues in controversy by the parties. That has not happened. Instead. There. Respondent. The applicant appellant. Decided. To frustrate the exercise by withdrawing the said sun. The respondents who had run LinkedIn making the payment. Started pleading on their part. For the respondents to change their mind and pay and also that the court reinstates the appeal to hearing and determination.
 18. Article 159(2)(d) of *the Constitution* of Kenya obligates courts to determine matters based on substance rather than forma and technicalities. Further, the rules of natural justice and in the interest of justice usually require decision makers to be fair to all parties at all times as long as each of them comes to



the court or decision maker for dispute resolution. In matters which require the exercise of discretion, clean hands are an important prerequisite for a party to be granted orders they seek. In the instant case, the appellants have given sufficient reasons for the delay in making the payment of their share of survey fees. The main reason is that they ran late in getting the fees. In any event they ran late by only three days in between. On their part the Respondents rejoiced the day they heard that the appeal had been dismissed. That was how they quickly smiled all the way to the bank to withdraw it.

19. The conduct of the 1st Respondent in this instance is, in my humble view, one that is predatory: it is conduct which rejoices in the suffering of the adversary and not of a mere litigant seeking justice in the matter.
20. I have carefully analyzed the Replying Affidavit and the depositions therein where, as the Applicants stated, the Respondent did not intend to help in the survey exercise but rather went back to the Survey Office and withdrew the share of the fees which, if the Applicants had paid their part, could have caused the survey exercise to be done by now. It is clear, particularly after entering the consent, that the Respondent showed enthusiasm to complete the survey exercise all along while the appeal was pending. He even offered to pay for the Appellants their share if they were unable to do so, only to turn against them just because the appeal had been struck out. The 1st Respondent even went as far as withdrawing a payment already made towards the survey, yet he was the one who at all times kept urging the court that all the parties should agree to be subjected to a survey exercise to be carried on the suit property. Then he turned to say that there was nothing the Respondent could now do.
21. In my humble considered view, the two Respondents demonstrate that they are not acting in good faith and cannot be trusted even in simple things. Within four days of the striking out of the appeal herein or so soon thereafter they withdrew the funds as stated above, filed a Bill of Costs in other matters and related it to this, and have already praying that the applicants be locked out not only of the appeal but also the survey: an exercise meant to resolve the entire dispute and the criminal case arising therefrom. Little has been given to them, but they have exhibited rashness and impropriety. They are persons intent on taking advantage of others rather than being just and acting in the interest of justice. It is for this reason that this court cannot countenance such conduct of misusing its process.
22. The upshot is that I allow this instant application with costs to the applicants. I reinstate the appeal. Further, I direct that the parties proceed to make their respective shares of the payments for the survey fees as was required by the earlier orders of this court. The appeal shall be mentioned on 9th December 2025 to confirm whether this survey exercise shall have been conducted and the report duly filed in this Court for further action.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 9TH DAY OF OCTOBER 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Ms. Kimberly Advocate for the Appellants/Applicants (online)

1st and 2nd Appellant present in open court

1st Respondent in person (in open Court)

