

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.111 OF 2013**

PAUL ODUOL ONALO.....PLAINTIFF

VERSUS

DUNCAN OCHIENG OMOLLO.....1<sup>ST</sup> DEFENDANT

PAUL ODHIAMBO OMOLLO.....2<sup>ND</sup> DEFENDANT

HEZBON OTIENO OSAWO.....3<sup>RD</sup> DEFENDANT

JOHN ISWA alias JOHN BIYA MUYESU.....4<sup>TH</sup> DEFENDANT

HEDDA AKINYI OLOO.....5<sup>TH</sup> DEFENDANT

PORTASH AKIDA OLOO.....6<sup>TH</sup> DEFENDANT

HON. ATTORNEY GENERAL..... 7<sup>TH</sup> DEFENDANT

**R U L I N G**

This ruling is in respect of the Notice of Motion application dated 9<sup>th</sup> April, 2025 brought on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

The application seeks for orders that;

- a) The court reviews the judgement dated and delivered on 19<sup>th</sup> September, 2024 on the issue and or findings/orders relating to the payment of interest on the Kshs.2,770,000.00 refundable by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Judgement Debtors/Applicants taking into

account the conduct of the Plaintiff/Respondent/Decree Holder since the institution of the suit and during the pendency of the same.

- b) The court proceeds to and makes an award of damages to the Petitioner/Applicant based on the submissions on record.
- c) Costs of the application be provided for

The application was supported by the averment in the Supporting Affidavit sworn by Paul Odhiambo Omollo on 3<sup>rd</sup> April, 2025.

The application was opposed vide the averment in the Replying Affidavit of the Plaintiff Paul Oduol Onalo on 13<sup>th</sup> May, 2025.

The grounds upon which the application was brought are that the suit was filed vide plaint dated 13<sup>th</sup> September, 2013 which was amended by the Plaintiff on 25<sup>th</sup> September, 2013 and 21<sup>st</sup> July, 2016 a period of about 3 years when the suit would not be set down for hearing because the Plaintiff sought leave to amend the plaint twice. That for that period , it was the Plaintiff who caused the delay in the hearing of the suit. That between February, 2016 and December, 2018 a period of about 2 years, the Plaintiff caused the case not to proceed because he applied for adjournment of the case

on 16<sup>th</sup> February, 2016, 8<sup>th</sup> March, 2016, 1<sup>st</sup> August, 2017, 8<sup>th</sup> November, 2018 and 6<sup>th</sup> December, 2018.

That further the Plaintiff applied for adjournments and had the hearings of the suit adjourned on 12<sup>th</sup> July, 2021, 22<sup>nd</sup> September, 2021, 25<sup>th</sup> November, 2021, 14<sup>th</sup> July, 2022, 27<sup>th</sup> March, 2023 and 28<sup>th</sup> March, 2023 which means that the Plaintiff caused the case not to proceed between July 2021 and March, 2023, a period of about two years.

That cumulatively, the Plaintiff delayed the completion of the hearing of the case for a period of 7 years. That in the judgement, the court awarded the Plaintiff the sum of Kshs.2,770,000/-, interests thereon from the date the money was paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the date of full and final refund to the Plaintiff and costs of the suit.

That the period from the date of money was paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to the date of delivery of the judgement includes the 7 years that the Plaintiff caused the delay of the hearing of the case.

That awarding interest to the Plaintiff for the 7 years he caused delay in prosecuting the case amounts to rewarding him for the delay, laxity and sloppiness while punishing the 1<sup>st</sup> and 2<sup>nd</sup> Defendant for the same.

That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stand to suffer substantial loss given that they are required to pay a total of Kshs.8,741,816.00 being the principal sum of Kshs.2,770,000/- and interest as computed by the Plaintiff as at 2<sup>nd</sup> April, 2025 of Kshs.5,971,816.66.

That the payment of the said interest to the Plaintiff who was the cause of the delay in the prosecution of his case is inequitable, unjust and unfair and hence a good reason for this court to review its judgement and make alternative orders.

That the application was made soon after receipt of the computation of interest hence without undue delay.

The Plaintiff's case is that if the Applicants were aggrieved by the court judgement on the award of interest then they ought to have appealed and not filing application for review.

That the court has since the delivery of judgement become *functus officio* and has very limited role in the matter to do with execution and correction or errors. That the application lacks merit as there is no discovery of new evidence or matter or any sufficient reason that would allow the court to interfere with its judgment with regard to the issue of interest.

That the application has been brought after delay of about 7 months.

That the period between 13<sup>th</sup> September, 2013 and 16<sup>th</sup> July, 2016 the matter could not proceed because of various reason including attempts to have the matter settled amicably and challenge with service of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that hence same cannot be attributed solely to the adjournment sought by the Plaintiff.

That for the period 21<sup>st</sup> July, 2016 to 7<sup>th</sup> October, 2019 the matter had to go through pre-trial stages where the Applicant's advocates were actively involved. That it was only on one occasion when adjournment was sought on grounds that although the Plaintiff was present in court, he was unwell and unable to proceed and that there were medical records. That it was not true that it was the Plaintiff who caused delay.

That what caused the delay after the first hearing in October, 2019 was the failure by the Attorney General to file documents.

That delay in prosecuting the suit cannot be attributed to the Plaintiff alone as there were other issues including service, compliance, transfer of judicial officers which issues cannot be said to be deliberate attempt by the Plaintiff to delay the hearing of the matter.

That it is the Applicants who want to benefit from their wrong doing by taking money from the Plaintiff and again selling the same

parcel of land to the 5<sup>th</sup> and 6<sup>th</sup> Defendants and keeping the Plaintiff's money for a very long period of time and only making a refund when ordered by the court.

That the Applicant did not file application to have the suit dismissed for want of prosecution if they were concerned with the delay.

### Submissions

Written submissions dated 3<sup>rd</sup> June, 2025 were filed by the firm of Onsongo & Company Advocates on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants.

Similarly written submissions dated 15<sup>th</sup> July, 2025 were filed by the firm of P.D. Onyango & Company Advocates for the Plaintiff/Respondent

### Issues for determination

- Whether or not the application has demonstrated grounds for review of the judgement
- Whether the Applicant is entitled to the relief sought.
- Costs.

### Determination

The ground for review of judgement are set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. These are that Applicant must demonstrate;

- (i) discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him/her at the time when the decree was passed or the order made.
- (ii) the existence some mistake or error apparent on the face of the record.
- (iii) any other sufficient reason.
- (iv) The application must be brought without unreasonable delay.

It was submitted on behalf of the Applicants that the Plaintiff was not denied access and use of the land in question. That he cannot be compensated by way of interest on the purchase price for the period he held and occupied the land to exclusion of the Defendant. That it was at the delivery of the judgment that the court determined the amount due and payable to the Plaintiff by way of refund that is the sum of Kshs.2,700,000/-.

That the amount having been determined at the time of delivery of judgement, interest ought to run from the date of judgement till payment in full.

The summary of the submissions on behalf of the Applicant is that because the Plaintiff caused delay of prosecution of the suit for a period of 7 years of the 11 years that the suit was in court, he should not be allowed to take advantage or to benefit from his own wrong doing. Secondly, as the Plaintiff was not prevented from accessing the suit land and since the 1<sup>st</sup> and 2<sup>nd</sup> Defendant did not wrongfully withhold and retain the purchase price, they should not be punished by way of being ordered to pay interest to the Plaintiff whose focus was acquisition of the land.

That further it was not until entry of judgement that the amount payable to the Plaintiff was determined hence interest should be applicable from the date of the judgement.

I have keenly considered the submissions and ground of the application. They go to challenge the propriety and merits of the decision to award interest to the Plaintiff in the manner that the said was awarded. There is no indication or prove of discovery of new or important matter of evidence or mistake or error apparent on the face of the record.

The grounds of the application, in my view, form valid grounds for challenging the court's decision on appeal.

As submitted on behalf of the Plaintiff, upon delivery of the judgement, the court became *functus officio* and is not allowed in law to revisit the judgement and consider whether it was fair to award interest on the refund of the purchase price for the period when the Plaintiff had possession or unhindered access to the suit land, whether it was right/proper to award interest from the date the money was paid to the Applicants or from the date of the judgement and whether or it was the Plaintiff who delayed prosecution of the suit for 7 years and if so, whether it was right to award interest to the Plaintiff for that period. These are issues that go to the merit of the judgement

The doctrine of *functus officio* divests the court of the jurisdiction to revisit these issues.

For the foregoing reason, I find that the Applicant's recourse is in an appeal and not an application for review.

The application is therefore hereby declined. Each party to bear own costs of the application.

**Ruling, dated and signed at Kisumu, read virtually this 4<sup>th</sup> day of December, 2025 through Microsoft Teams Online Application.**

**E. ASATI**

**JUDGE.**

**In the presence of:**

Maureen: Court Assistant.

Onsongo for the Applicant

P.D. Onyango for the Respondent.