

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND

COURT AT SIAYA

ELC CASE NO. ELC(OS) I OF 2022

FORMERLY KISUMU HIGH COURT CIVIL CASE NO. 163 OF
2014(OS)

**JOHN BARASA ONYANGO1ST PLAINTIFF/
APPLICANT**

**CHRISPINE ODHIAMBO OGOLA2ND PLAINTIFF
APPLICANT**

**BONFACE OTIENO ODUOR3RD PLAINTIFF/
APPLICANT**

**MOSES ODUORI OGOLLA.....4TH PLAINTIFF/
APPLICANT**

VERSUS

**ODA OHAWA
.....DEFENDANT/RESPONDENT**

AND

**GEORGE MUGOYE MBEYA.....1ST INTERSTED
PARTY/RESPONDENT**

BOARD OF MANAGEMENT sr PETER S UGAMBE
SECONDARY

**SCHOOL.....2ND INTERESTED PARTY
RESPONDENT**

RULING

1. This ruling is the subject of the application dated 3/02/ 2025 seeking the following verbatim orders; -

1) SPENT

2) THAT this Honorable Court be pleased to review and set aside its dismissal orders of this suit and have the same reinstated and heard denovo.

3) THAT pending the and determination of this application, this Honorable Court be pleased to grant orders restraining the Respondents either by themselves, relatives, family members, agents or any one acting on their behalf from evicting the applicants or in any manner interfering with their occupancy of the suit land.

4) THAT pending the and determination of this suit, this Honorable Court be pleased to grant orders restraining the Respondents either by themselves, relatives, family members, agents or any one acting on their behalf from evicting the applicants or in any manner interfering with their occupancy of the suit land.

5) THAT the costs of this application be in the cause.

2. The application is premised on the grounds on its face and the supported by the affidavit sworn by Bonface Otieno Oduor on 3/2/2025. The deponent states that this case was initially Kisumu High Court Civil Case No. 163 of 2014 but was transferred to Siaya following the establishment of a High Court in Siaya. That the same was transferred from Kisumu without the applicants notification or that of the co applicants.
3. The applicants states he noticed that the file had been transferred to Siaya upon his efforts to trace it in Kisumu he found out that the suit had been dismissed by this Honorable Court without notification and were therefore not able to rescue the dismissal at that particular time.
4. It is averred that the Respondents have recently commenced a process to evict and also to have the police to charge the applicants in court for an alleged claim of trespass into the suit land **LR. NORTH UGENYA/SEGA/563**. That the intended evictions and charging are illegal and false hood on grounds that the applicants were born and have been occupying the suit land for the entire lifetime of themselves and have families thereon.
5. It is deponed that the applicants have no land to relocate to and that they have overwhelming chances of success in the suit herein. Unless the suit herein is reinstated and heard, the applicants will lose their only ancestral land without an opportunity to be heard.

Replying Affidavit

6. In rejoinder Maryanne Atieno Counsel representing the 2nd Interested Party swore an affidavit on 24/02/2025 wherein she averred that article 159 of the Constitution mandates that the court in exercising its judicial authority are supposed to be guided by the principle that justice shall not be delayed. That the case was filed in Kisumu in 2014 and Notice to Show Cause was issued on 7/11/2022 before it was dismissed on 7/12/2022 one month later. The applicants failed to attend court over a long period of time. Failure to attend court once is excusable but a prolonged failure to attend court is willful negligence.
7. It is stated the application for reinstalment has been filed after 3 years and is an afterthought. That the case has been running from 2014 and as time goes witnesses go missing and evidence grows weak due to disappearance of human memory. The discretion of the court should be exercised justly to avoid injustice.

Further affidavit

8. By a further affidavit sworn on 23/02/2025 the applicant states that the original suit land **UGENYA/SEGA/563** is his ancestral land which was adjudicated to his now deceased father OGOLA OMWANDA in 1976. A copy of the registration for Plot No. 563 is annexed. That thereafter the respondents fraudulently obtained registration of the suit land in 2013 and subdivided

the same to several partitions and occupying some plots causing the current dispute and have been seeking to evict the applicants from their residences inside the suit land and that recently they caused him to be summoned at the DCIO office at Ukwala. A copy of Summons Requiring attendance dated 18/09/2024 is annexed. That he was informed to leave the suit premises or else be evicted and charged with forcible detention of land.

Further that the respondents were clearing the fields ready to plough and permanently evict the applicants. Copies of photographs are annexed.

9. The respondents did not oppose the application despite service as evidenced by the affidavit of service sworn by George Ochieng Wingah filed on 22/03/2025.

Submissions

10. The application was heard by way of written submissions. The applicant filed submissions dated 16/09/2025. The rest of the parties did not file submissions.

ANALYSIS AND DETERMINATION

11. I have considered the application and response thereto as well as the submissions filed by the applicants.

12. The main issues for determination is whether the suit should be reinstated and whether the respondents should be restrained from evicting the applicants pending the hearing of this suit should it be reinstated.
13. The application is brought under the provisions of Section 3 & 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 45 Rule 1 of Civil Procedure Rules 2010.
- 14.** The courts power to dismiss a suit for want of prosecution is donated by order 17. The NTSC was issued under the provisions of order 17 Rule 2. The rationale for these provisions was aptly explained by the court in the case of **Olumbe v Obanyi [2025] KEHC 5386 (KLR)**

‘Dismissal of suits for want of prosecution turns largely on the delay in getting the suit prosecuted. The overriding principle is the mantra that there ought to be no delay in the dispensation of justice, based on the maxim that justice delayed is justice denied. The justification behind the remedy, of dismissal of suits for want of prosecution, is that litigation must be expedited and concluded by the parties. There can be no justice in filing a cause in court, and then leave it parked there, unprosecuted, hanging over the head of the other party like the famed sword of Damocles. Dismissals help in clearing backlogs in court, created by parties who lack appetite to prosecute their cases. Pendency of unmoving cases create a logjam, which generates a crisis

of public mistrust and lack of confidence in the Judiciary. Dismissals reduce the ever-increasing caseloads, and the backlogs, caused by stale suits clogging the judicial system.'

15. Order 17 Rule 6 grants the opportunity to a party to apply to the court where a case is dismissed under the provisions of order 17 herein.

16. The law on setting aside of *ex parte* orders is found under **Order 12, rule 7** of the **Civil Procedure Rules, 2010** which provides thus:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

17. The power donated to the court to set aside is therefore discretionary.

18. In the case of **Shah Vs. Mbogo & Another (1967) EA 116**, the court outlined some guidelines for consideration in exercising the discretion and the importance for an applicant to show sufficient cause. Further that the court must aim at avoiding injustice resulting from an accident, inadvertence or excusable mistake or error.

19. According to the record, the present suit was dismissed on 7/12/2022 for want of prosecution. The record indicates that on the material day none of the parties attended and the court was satisfied that the NTSC was duly served.

20. The NTSC was deferred on several occasions on the basis of service upon the applicants. I note that specifically on 7/11/2022 the court noted that the plaintiff had filed a Notice to Act in Person dated 12/04/2019 and reiterated that they should therefore be served with the NTSC and deferred the same for 7/12/2022.
21. The applicant states that they were never served with the NTSC. I have come across the said NTSC. It is dated 5/10/2022 and addressed to Mugoye & Associates Advocates (via email), J.P.Makhokha & Co. Advocates Busia and Onchweri Ngamate & Co. Advocates requiring their attendance on 7/11/2022. This must be the NTSC that the court pointed to was not served hereinabove. The record does not bear any other notice requiring parties to appear on the said 7/12/2022.
22. In view of the absence of the NTSC then this court can confidently state there must have been an oversight on the part of the court as the court had specifically ordered that the plaintiff be served as they had filed a notice of intention to act in person since the year 2019. On this basis of non service of the NTSC alone I would allow the application. Even the scales of justice would tilt in allowing this application for the party was not served and therefore missed the opportunity to defend his cause. This in my view is sufficient cause.
23. In the case of **Njororo v Kinuthia & another**
(Commercial Appeal E092 of 2021)
[2024] KEHC 3148 (KLR) (Commercial and Tax)

(22 March 2024) (Ruling), Lady Justice Njoki Mwangi had this to say; -

‘But when I place on scale the concerns by the Defendant against those of the Plaintiff, I am inclined to reinstating the suit rather than interring its remains upon a permanent legal death. A legal resurrection of the suit as enabled by equity is in order. Accordingly, I set aside the order of dismissal made by the court on 13th December, 2011 and reinstate the suit for hearing and disposal expeditiously. To strike an almost symmetrical balance between the rights of parties herein, the reinstatement will not be without conditions. The Plaintiff shall comply with all pre-trial requirements and set the matter down for hearing within the next 60 days’

24. Having made the above finding, it then paves way for the consideration of the prayer for restraining orders against the respondents from evicting the applicant. I have noted the provisions under which the application has been brought and I can only state that only the provisions on the inherent powers of the court will apply. I will look away at technicalities and proceed to determine the application on its merits.

25. The applicants state that they are faced with eviction. The applicants state that the process of eviction will cause unnecessary blood shed incase of resistance. I must state that threats of blood shed must never be used as a ground for the grant of restraining orders. Applicants must desist from this moving forward as I have noted it is becoming a trend. Infact anyone causing blood shed must face the arms of the criminal justice system.
26. The above notwithstanding the court has perused the entire proceedings in this matter. It is not in dispute that there are several subdivisions arising from what used to be the mother title being plot No.LR North Ugenya/Sega/563 which the applicants claim was their ancestral land but which was fraudulently subdivided by the defendant. I have seen a photograph annexed of one house and the suit property which seems to be open.
27. Noting the above it appears to me the occupation is not extensive and I see no prejudice to the other parties were the court to order the status quo to preserve the suit property. It is only after hearing both parties that the court can make an informed determination and decision as to the ownership of the suit property. In proposing this approach the court is guided by the following decisions; -
28. The court in the case of **Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR** gave a distinction on the

nature of status quo orders vis a vis injunctive orders, it was stated as follows: -

“Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows:“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.””

29. In **Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Odunga J.** stated,

*"When a court of law orders or a statute ordains that the **status quo** be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining **status quo** is meant to preserve existing state of affairs...**Status quo** must therefore be interpreted with respect to existing factual scenario..."*

30. In the case of **Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR**, the purpose of a status quo order was explained as follows: -

*"... **By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.**"*

31. Further, in the case of **Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others**

[2015] eKLR, Onguto J stated that an order of status quo can be given by the court exercising its general jurisdiction and that the order need not necessarily be prayed by the parties and in fact, can be originated by the court.

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs.

32. Apart from preserving the substratum of the subject matter, the court is keen on granting status quo orders as a case management strategy. This is an old matter that requires to be expedited and therefore the need to prevent interlocutory applications which I note also caused delays in the substantive prosecution of the case.

33. The following orders therefore issue to dispose of the application dated 3/02/2025; -

1) The suit be and is hereby reinstated on condition that the plaintiff shall comply with the provisions of order 11 within 45 days to enable setting down the matter for hearing.

2) An order of status issues to the effect that there shall be no eviction of the applicants and their families from the parcel No.LR North Ugenya/Sega/563 and or any of its subdivisions in occupation by the applicants and their families

3) The said status quo orders to remain in force pending the hearing and determination of this suit.

4) The costs of this application shall abide the outcome of the main suit.

34. In the meantime, the applicant shall serve all the parties in this suit within 14 days the orders herein and who shall respond to the Originating Summons within 30 days.

35. The suit is fixed for pretrial directions before the Deputy Registrar ELC on 18/02/2026.

Orders accordingly

**HON. JUSTICE A. E. DENA
JUDGE**

11/12/2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Odera for the Applicant

No Appearance for the rest of the Parties

Court assistant: Ishmael Orwa

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