



Odero & 2 others v Bodo (Sue as the Administrator of the Estate of the Late Reuben Bodo Othuon) & 8 others (Environmental and Land Originating Summons E018 of 2022) [2025] KEELC 18478 (KLR) (18 December 2025) (Ruling)

Neutral citation: [2025] KEELC 18478 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E018 OF 2022
E ASATI, J
DECEMBER 18, 2025

BETWEEN

REV LUKIO OTIENO ODERO 1ST APPLICANT
ABRAHAM OWEN GUMBA OTIENO 2ND APPLICANT
ONESMUS NYAOKE OTIENO 3RD APPLICANT

AND

CHURCHIL OMOLO BODO (SUE AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE REUBEN BODO OTHUON) 1ST DEFENDANT
CHURCHIL OMOLO BODO (SUED AS THE ADMINISTRATOR OF THE LATE AWELU MAJIWA RAKWACH) 2ND DEFENDANT
CHURCHIL OMOLO BODO 3RD DEFENDANT
PETER YONGO OMORO 4TH DEFENDANT
GRACE AKOTH NDORO 5TH DEFENDANT
LINCOLIN MUNYENDO 6TH DEFENDANT
MARTIN OUMA OKUMU 7TH DEFENDANT
PAULINE ATIENO OWINO 8TH DEFENDANT
THE KISUMU COUNTY LANDS REGISTRAR 9TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated 27th June, 2025 filed by the 8th Defendant and the Notice of Motion application dated 27th August, 2025 filed by the Plaintiffs.



Directions were given on 23rd September, 2025 that the applications be heard together by way of written submissions and one ruling be given.

2. The application dated 27th June, 2025 was expressed to be brought pursuant to provisions of section 1A, 1B, 3A, 7 and 63(c) of the *Civil Procedure Act*, Order 10 Rule 11, order 2 Rule 4, Order 22 Rule 22 and Order 51 Rules 1 & 3 of the Civil Procedure Rules Cap 21 Laws of Kenya. The application seeks for orders that:-
 1. That this application be certified as urgent and the same be heard ex parte in the first instance and such interim orders and/or directions as the Honourable court may deem fit be granted pending inter parties hearing.
 2. That all ex parte orders/interlocutory judgement (if any) and any consequential orders entered against the 7th and 8th Defendants/Respondents herein be forthwith set aside.
 3. That the court be pleased to grant leave to the 7th and 8th Defendants/Respondents to file and serve her replying affidavit and any other appropriate responses out of time and the same be deemed duly filed and served upon payment of requisite fees.
 4. That the court be pleased to stay any further proceedings and/or execution in this suit, pending the hearing and determination of this application and/or suit.
 5. That this honourable court be pleased to direct that the hearing of his suit and all interim applications proceed with full involvement and participation of the 7th and 8th Defendant/Respondent and all parties.
 6. That all services of process and pleadings upon the 7th and 8th Defendant/Respondent by the Applicants/Plaintiffs was irregular, defective and a nullity and any proceedings or orders founded thereon be set aside.
 7. That cost of this application be provided for.
3. The grounds upon which the application was brought were that the 8th Defendant was never properly served and only became aware of these proceedings upon receiving mention notice for submissions and judgement date. That the Applicants obtained orders for substituted service through questionable averments, despite knowing the 8th Defendant's whereabouts and fully failed to attempt electronic or direct service. That the suit property was the subject of previous litigation in ELC Civil Suit No.47 of 2006 and Civil Appeal No.76 of 2008, facts not disclosed by the Applicant rendering the suit res judicata, an abuse of process and a vehicle for re-litigation. That one of the named Defendants, Mr. Martin Owino is deceased and service by newspaper posthumously is irregular and fatally defective. That the statutory period for adverse possession has not lapsed as alleged. That no prejudice will be suffered by the Applicants if this application is allowed and the 7th and 8th Defendant is granted the opportunity to defend the suit on its merits. That this Honourable court has inherent powers to grant the orders sought in the interest of justice and due process.
4. The application was supported by the averment in the Supporting Affidavit sworn by the 8th Defendant on 27th June, 2025 and the annexures thereto.
5. The application was opposed vide the contents of the Replying Affidavit sworn by Abraham Oweno Gumba Otieno sworn on 27th August, 2025. The Plaintiff's case is that the 8th Defendant/Applicant was served by way of substituted service. That the 8th Defendant/Applicant has not demonstrated that she has triable issues worth of being adjudicated upon by the court as there is no draft defence or reply



- annexed to the application. That as the suit has progressed to advanced stage of finalization setting aside the proceedings would occasion great prejudice upon the Plaintiffs who have invested in the same.
6. In support of the application, the Applicant/8th Defendant averred that she was never accorded the opportunity to participate in the proceedings and only became aware of the matter when it was about to be fixed for mention for purposes of submissions and a date for judgement.
 7. That the current matter was previously litigated between the same parties in ELC Civil Suit No.47 of 2006 and Civil Appeal No.76 of 2008 making the suit res judicata and an abuse of court process.
 8. That she has a clear and bona fide defence because she is in occupation of the property and occupation by the Plaintiffs, if any, begun in the year 2021 hence the 12 years have not elapsed and that she collects rent from the property. That unless the orders sought are granted, she will suffer prejudice.
 9. On behalf of the Plaintiff, it was submitted in respect of the 8th Defendant's applications that service by way of substituted service upon the 8th Defendant was pursuant to leave granted by the court under the provisions of Order 17 Rule 1 Civil Procedure Rules. That the Applicant did not dispute that service was effected.
 10. Counsel relied on the case of Shah -vs- Mbogo & Another [1967] EA 116 where it was held that the discretion to set aside ex parte judgement is intended to avoid injustice or hardship but not to assist a party who has deliberately sought to obstruct justice.
 11. On whether the Applicant has a defence to the claim that raises triable issues, Counsel submitted that the 8th Defendant/Applicant has not annexed any draft defence hence there is no way of ascertaining whether there are triable issues.
 12. Counsel submitted further that the 8th Defendant/Applicant has not made out a case for stay of proceedings.
 13. I have considered the application. Though the Applicant claims that she was not served, Affidavit of Service filed shows that the Applicant was served by way of substituted service pursuant to a court order.
 14. Further, there is on the court file (on the CTS platform) a Memorandum of Appearance dated 17th October, 2022 filed by P.D. Onyango Advocates on behalf of the Applicant, the 1st, 2nd and 3rd Defendants. This rules out the claim of not having been served. There is also a Replying Affidavit by the 1st Defendant sworn on his behalf and on behalf of the 4th and 8th Defendants. It was filed in court on 18th October, 2022.
 15. I have read the application and the Supporting Affidavit. The Applicant raises the issue of res judicata and cites cases which she claims determined the dispute herein. A plea of res judicata is a triable issue. A triable issue can be demonstrated by exhibiting a copy of the intended defence/reply to the claim or by explaining in the Affidavit in support of the application.
 16. Taking all the circumstances of the case into account, I find that the application dated 27th June, 2025 has merit.
 17. The second application is the Notice of Motion application dated 27th August, 2025 filed on behalf of the Plaintiffs. The application was expressed to have been brought pursuant to the provisions of sections 1A, 1B, 3, 3A, 63(e) of the [Civil Procedure Act](#), Section 5 of the [Judicature Act](#) and Order 51 of the [Civil Procedure Act](#).
 18. The application seeks for orders that;



1. Leave does issue to cite the contemnor for contempt of court order.
2. Upon prayer 1 being allowed, the contemnor herein be committed to Civil jail for a period not exceeding six (6) months and/or be imposed a fine as this honourable court may in its discretion decide for disobedience of a court order given on 18th November, 2022.
3. Costs of the application be borne by the contemnor.
19. The grounds upon which the application was brought are that the court issued an order of temporary injunction on 18th November, 2022, that the orders were duly served upon all the Respondents and particularly the 8th Respondent and their agents being Pauline Atieno Owino. That despite being served with the order, the said Pauline Atieno Owino went ahead to issue the Plaintiffs/Applicants' tenant with a notice to vacate dated 16th June, 2025 and subsequently evicted them. That it is in the interest of justice that the contemnor be punished by the honourable court for her to respect due process of the law and obey court orders so as to deter lawlessness.
20. The application was supported by the contents of the Supporting Affidavit of Abraham Owen Gumba Otieno, the 2nd Applicant and the annexures thereto and the statement dated 27th August, 2025.
21. The application was opposed vide the contents of the Replying Affidavit sworn by Pauline Atieno Owino on 3rd October, 2025. Her case is that the application is vague and fails to disclose with specificity the identity of the alleged contemnor among the 9 Defendants. That the 7th Respondent was deceased. She denied knowledge of the letter dated 16th July, 2025.
22. She stated that she had never been served with the court order and that the Affidavit of Service does not show that she was served.
23. It was submitted on behalf of the Plaintiffs/Applicants that it was not in dispute that the court issued temporary order of injunction dated 18th October, 2022.
24. Replying on the case the Basil Criticos -vs- Attorney General & 8 Others (2012)eKLR where it was held that knowledge supersedes personal service – that where a party acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary, Counsel submitted that the Applicant extracted the order and consequently served the Respondents. That the 8th Defendant's act of contempt was when she illegally wrote to the Plaintiffs'/Applicants' tenants asking them to vacate the suit parcel vide letter dated 16th June, 2025. That the acts of the 8th Defendant amount to clear affront and challenge to the authority of the court.
25. Written submissions dated 27th November, 2025 were filed on behalf of the 1st Defendant by Clerkson & Associates Company Advocates.
26. Counsel submitted that the suit was res judicata as the matter had been litigated up to the Court of Appeal in KISUMU CIVIL APPEAL NO.195 OF 2019 and in KISUMU ELC NO.21 OF 2012 where there was a consent judgement.
27. That an order arising from an incompetent suit cannot be sustained.
28. Counsel urged the court to dismiss the application dated 27th August, 2025.
29. I have considered the application and the grounds of opposition thereto. The standard of prove for contempt proceedings is higher than proof on a balance of probabilities. In Mutitika vs Baharini Farm Limited [1985] KLR 227, it was held that “contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily...It must be higher than proof on a balance



of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge...”

30. The 8th Defendant denied that she authored the letter dated 16th June, 2025 which according to the plaintiffs, constitutes the act of contempt of the court order. The Applicant ought to have availed evidence that it is the respondent who authored the letter. There is no evidence the letter was dispatched to the addressees. None of the addressees swore Affidavit that they received the letter or that they were subsequently evicted. There is no evidence of eviction of the tenants.
31. I find that the material placed before court does not meet the standard of proof required in cases of contempt of court.
32. While court orders are not made in vain and while courts will act swiftly to ensure that court orders are adhered to and that the authority of the court and the rule of law is upheld, such claims of contempt must be proved to the required standard.
33. I find that the application dated 27th August, 2025 lacks merit.
34. In conclusion;
 - (1) the application dated 27th June, 2025 is hereby allowed in the following terms;
 - a. The case is hereby re-opened.
 - b. The 8th Defendant is hereby granted leave to file reply to the Originating Summons, witness statements and bundle of documents, if any, within 14 days hereof.
 - c. The Plaintiffs are granted leave to file further document, if any, within 14 days of service.
 - d. PW1 to be recalled for further evidence and the matter to proceed to hearing inter parties.
 - e. Thrown away costs of Kshs.15,000/- are awarded to the Plaintiffs.
 - (2) the application dated 27th August, 2025 is dismissed. No orders as to costs.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 18TH DECEMBER, 2025.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Omondi T. for the Applicant

Kisaka for the 1st – 4th Respondents.

