REPUBLIC OF KENYA

IN T H E ENVIROMRNT AND LAND COURT AT MIGORI

MSC. APPL. NO E031. OF 2025

PROF. JOSIAH OUMA OMOLO (Suing as Legal Representative of the Estate of CHARLES OMOLO ONYANGO)
……APPLICANT

VERSUS

TIMON OLOO ODIRA……RESPONDENT

RULING

On whether the respondent's suit should be dismissed for want of prosecution)

The Application

1. The applicant filed a notice of motion application dated 23rd September 2025 under certificate of urgency. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 17(2) as well as Order 51 of the Civil Procedure Rules, 2010.

2. The applicant seeks ORDERS that:

a) …Spent

b) The respondent's application by way of Originating Summons (Land Case No. 71 of 2016 filed at Kisii

High Court (later transferred to Migori and first consolidated as ELC 228 of 2017 but later di-consolidated to stand alone) be dismissed for want of prosecution and proceed to order for the eviction of the respondent from land parcels L.R. KAMAGAMBO/KANYAJUOK/ 476 and LR. KAMAGAMBO/KANYAJUOK/ 480.

c) in the alternative, the respondent herein, TIMON OLOO ODIRA, be ordered to immediately take steps within a time to be specified by this Honourable Court, to prosecute the said application.

d) Any other orders that meet the ends of justice.

3. The application is anchored on the grounds outlined on the face of the application as well as the grounds contained in the affidavit sworn by Prof. Josiah Omolo and annexed to the application.

4. The applicant maintains that there has been unjustified and prolonged delay in prosecuting the matter, which delay has precluded the applicant as well as the heirs of the estate of Charles Omolo Onyango.

5. The applicant averred that in May 2025 the court ordered that the suit he heard as a stand-alone suit. He also stated that it is now four months since the court, in its Judgment in ELC 228 of 2017, directed the respondent to take steps to prosecute his case, yet the respondent has not made any steps whatsoever to have the matter heard and determined. He added that respondent continues to trespass on the applicant's family land, being, LR. KAMAGAMBO/KANYAJUOK/ 476 and LR. KAMAGAMBO/KANYAJUOK/ 480 in the pretext of a suit pending determination between the parties herein under the guise that there is a suit between myself and him pending determination.:

6. Further to the above the applicant averred that the respondent continues to put up structures, destroy indigenous trees of great aesthetic value to the applicant and generally subject the said property to wastage. He concluded that it is in the interest of justice that application be heard and the orders sought granted.

7. The applicant in his Supporting Affidavit deponed that the respondent filed a suit against him in 2016 at the Kisii High Court. in these suits, the respondent was laying claim to two

parcels of land being LR. KAMAGAMBO/KANYAJUOK/ 476 and LR. KAMAGAMBO/KANYAJUOK/480. These suits were later consolidated with a suit the applicant had filed against the respondent's relatives, and transferred to the ELC at Migori as Migori as ELC NO.228 of 2017.

8. The applicant further deponed that Migori ELC 228 of 2017 was determined on the on 22nd May 2025 and the court found that the aforesaid two parcels of land belong to the estate of his deceased father.

9. The applicant averred that in Migori ELC Case no. 228 of 2017, the court restricted itself to the question of title and that the respondent, despite having filed his statement of defence, did not participate in the proceedings, since his interest in the property was adverse possession. As a consequence, the court directed that the respondent's application be given a new case number and be heard separately. He annexed a copy of the judgment of the court as annexure marked JOO1.

10. In addition to the foregoing, the applicant deponed that, since the court ordered that the respondent's application be heard separately, the respondent has not taken any steps to

have the same prosecuted. On the contrary, the applicant maintained that the respondent has been trespassing into the above stated two parcels of land that the court found to be part of his father's estate.

11. The applicant deponed that his efforts to have the matter prosecuted, including writing a letter to the Deputy Registrar on 27th June 2025, have borne no fruit. He annexed a copy of the said letter as annexure marked JOO2.

12. The applicant maintained that the respondent's continued trespass into the aforesaid two parcels of land has prejudiced his family members by causing economic and financial loss besides robbing them of their rightful inheritance. Moreover, the applicant deponed that he is unable to render an account of the dealings of the estate of his late father, which in turn risks the cancellation of the grant of representation issued to his by the court.

13. The applicant further deponed that a party who files a suit has the responsibility of ensuring that the same is prosecuted. He maintained that the respondent continues to utilize the above stated parcels of land despite the same having been

found to belong to his father's estate. He added that the respondent's suit should be dismissed and the applicant he issued with an eviction order against the respondent on account of the latter having lost interest in the prosecution of his matter.

14. Alternatively, the applicant prayed that the respondent be ordered to take immediate measures to prosecute his case within a specified timeline.

15. The Respondent filed a Replying Affidavit delayed 27th October 2025. He averred that the application is incompetent and that the same violates the law. He deponed that the jurisdiction of this court had not been properly invoked considering that the applicant seeks to dismiss another suit that has its own merits on account of this application.

16. He contended that the application was premature and maintained that the application should have been made in the suit whose dismissal the applicant seeks. The respondent further deposed that the applicant misunderstood the directions of the court as the court did not impose a timeline within which he (the respondent) was expected to prosecute

the matter. Moreover, the respondent averred that there were several administrative actions which needed to take place before the suit could be set down for hearing, and the said steps have not yet materialized.

17. It was the respondent's further averment that he does not have the authority to direct the office of the Deputy Registrar to act. He added that the directives of the court were never directed at the deputy registrar hence the difficulties in complying with the order of the court. Equally, the respondent maintained that he had the prerogative of determining whether or not to institute a suit against the applicant. In his own words, in the Affidavit sworn by him on 27th October 2025, he deposed at paragraph 11 thus, "***… in any event, prosecution of the suit remains a reserve of the Respondent who is at liberty to even institute fresh proceedings in compliance with the directions of this court thus the applicant should sit back and await service of summons if any***."

18. Finally, the respondent deponed that the application is premature legally untenable and contended that this court lacks the jurisdiction to hear and determined the same.

The applicant's Further Affidavit

19. The applicant filed a further affidavit sworn on 21st November 2025. He deponed that, since the respondent's claim on adverse possession did not have a file number, it was only prudent that the instant application be made under a miscellaneous file. He also deponed that the court is faced with a unique situation that entails a suit pending before the court, but without a file number, which action he maintained, required urgent intervention.

20. The applicant further deponed that parties who file suits should ensure the same are prosecuted in a timely manner. He contended that the respondent's application had ben in court for ten years, having been filed in the year 2016.

21. The applicant also deponed that it was not necessary for the court to make any order to the registrar. Rather, the court ordered/directed the respondent to file another cause of action, the latter having informed the court that he had a claim on adverse possession. He also acknowledged that, while the discretion to prosecute the matter remains with the respondent, the same suit cannot remain pending in court

forever. In any event, the pendency of the said is injurious to the applicant and his family.

The parties' Submissions

22. The application was canvassed via written submissions. The applicant filed his submissions dated 22nd October 2025. He framed a single issue for determination, being whether or not the application should be allowed. He relied on the overriding objectives provided under sections 1A, 1B and 3A of the Civil Procedure Act to argue that courts and parties should ensure the expeditious disposal of suits. He submitted that both the respondent and his advocate participated in the hearing and determination of ELC 228 of 2017, wherein the court made orders that required the respondent to take steps to prosecute his case. He submitted that the respondent had not taken any action in the matter despite his knowledge of the directions of the court. he maintained that the matter has been in court for too long and reiterated that the respondent had not taken any steps to have the same prosecuted.

23. The applicant filed further written submissions dated 21st November 2025. He submitted that the respondent had not

been forthright to state that the applicant had made his application in a separate file and maintained that the court did de-consolidate and removed the respondent's application for adverse possession from being part of ELC 228 of 2017. As a consequence, the application for adverse possession does not have a file number. In the circumstance, the applicant submitted that the it was only proper that any application touching on adverse possession be made under a miscellaneous file.

24. The applicant further submitted on this court’s duty to ensure justice is accorded to all the parties herein and maintained that parties should never be allowed to use the court process to frustrate their adversaries. To this end, he submitted that the respondent should not be allowed to use the court process o continue farming and staying on the suit property while doing nothing to have his matter prosecuted. He further submitted that the respondent had not demonstrated to the court the steps he had taken since May 2025 when the judgement was delivered to have his case prosecuted. He submitted the respondent was not keen on prosecuting the

matter and urged the court to either strike out the suit or order the respondent to take steps to prosecute the same.

25. The respondent filed his submission dated 21st November 2025. He framed the following issues for determination: whether the Application is properly before this Court; whether this Court has jurisdiction to dismiss another separate suit through a miscellaneous application; whether the Application is premature and legally tenable in light of the applicable law on dismissal for want of prosecution; whether any delay has occurred, and if so, whether it is attributable to the Respondent and what appropriate orders should be granted by the court.

26. On whether the application is properly before this Court, the respondent submitted that invokes the Court's jurisdiction through miscellaneous proceedings to seek orders that can only be sought within the primary suit he wishes to terminate. He relied on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd |1989| KLR 1** to highlight to centrality of jurisdiction in litigation. to this end, the respondent submitted that a miscellaneous application cannot be used to extinguish another substantive suit as each suit is has its own

set of pleadings. He contended that the approach adopted by the applicant is a shortcut and amounts to abuse of the court process.

27. On whether the court had the jurisdiction to entertain the instant application, the respondent submitted that the application improperly invited the court to dismiss a suit that was not before the court. This act, the respondent argued, violates the fundamental principles of civil procedures. He cited **Kobil Petroleum Ltd v Unyx Service Station Ltd |2015| eKLR** where it was held that a court cannot issue final orders affecting rights in a separate matter that is not properly before it. He concluded that the application invoked the wrong procedure thus depriving the court of jurisdiction.

28. On whether the application was premature and legally tenable, the respondent submitted that a suit can only be dismissed for want of prosecution under order 17 rule 2 of the civil procedure rules if the matter had not been prosecuted for a period of one year. He relied on **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat & Others [2016] eKLR** and **Ivita v Kyumbu (1984) KLR 441**

to buttress this position. He argued that the one-year period had not lapsed and added that the steps to be taken to have the matter set for hearing are administrative in nature and not attributable to himself.

29. As to whether the respondent is to blame for the allege delay, the respondent submitted that he has no supervisory powers over the deputy registrar; that he has made follow-ups in the ELC registry and that the court did no direct that he prosecutes his matter within a specified timeframe. He relied on **Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another (2014] eKLR** where the court held that the right to fair hearing under Article 50 is violated where dismissal is premised on administrative delays beyond a party's control. On these bases, the respondent maintained that the alleged delay cannot be attributable to him.

30. The respondent also submitted that despite the court's determination that the title to the suit properties revert to the applicant's deceased father, the same are still registered in the names of third parties. He maintained that his claim for adverse possession is over the said two parcels of land and

added that the fact of the that the said parcels are still registered in the third parties confirms that his suit is not frivolous, that the dispute is still live, and that the applicant has not executed the judgment hence he suffers no prejudice by waiting for the matter to be properly filed and served.

31. The respondent submitted that grating the orders ought would violate his constitutional right to access justice, amount to judicial overreach into another suit and undermine the proper administration of justice.

32. The respondent concluded that the application is misconceived, premature, legally incompetent, filed in the wrong forum, lacking in jurisdictional foundation. He urged the court to dismiss the same and the costs thereof be awarded to him.

Issues, Analysis and Determination

33. The court has carefully analyzed the application, the response thereto and the submissions of the parties. The issues for determination in the application are whether the it satisfies the condition for dismissal of a suit for want of prosecution, as

provided under Order 17 Rule 2 of the Civil Procedure Rules; and, who to bear the costs of the application.

34. The applicant seeks this court's intervention in fast tracking the resolution of the Respondent's claim of adverse possession over two parcels of land which this court determined to be part of his deceased father's estate. Notably, the court rendered its decision in case number Migori ELC 228 of 2017 on 22nd May 2025. In the decision it directed that, the issue of adverse possession, which the respondent had raised and which forms the subject of the suit sought to be dismissed be filed and determined in a separate matter.

35. It is this 'latter' suit that the applicant prays that it be dismissed under order 17 Rule 2 of the Civil Procedure Rules on account of the respondent having taken too long to prosecute the same hence occasioning the estate of his deceased father financial and other forms of loss.

36. **Order 17 Rule 2** of the **Civil Procedure Rules** provides as follows concerning dismissal of suits for want of prosecution:

> *(1) In any suit in which no application has been made or step taken by either party for one year, the court*

may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

37. In my humble view, whereas the applicant prayed that the respondent's suit be dismissed for want of prosecution, this court finds that the application is in incompetent and premature. This finding is supported by the fact that the applicant filed a Miscellaneous Application seeking to dismiss a main suit that is yet to be assigned a new number as ordered by the court. I say so because in the Judgment dated 22nd May 2025 in Migori ELC No. 228 of 2017, the learned judge directed that the Counterclaim be given a new number and be prosecuted. The wisdom of the court was that suit No. 228 of 2017 having been determined and settled the question of ownership of title, the outstanding issue to go for trial could not be handled in the same suit number. He thus, directed the issuance of a new number. It, in my view meant that the court was required to use the pleadings filed by the Respondent

herein but in that suit the court determined to file the matter for determination.

38. The applicant depones that he wrote to the Deputy Registrar on 27th June 2025 to issue a new number for the matter as directed by the court. He annexed and marked JOO2 a copy of a letter dated the same date, to evidence that. However, he did not annex any evidence to the effect that such a letter was ever dispatched to or delivered at the intended office. The court is left to guess and imagine that the said letter was delivered but not acted upon. Moreover, he applicant did no confirm that a new number has been issued by the Deputy Registrar as ordered. Even if the new number would have been issued, if there was a delay in prosecution of the same, an application of this nature could only be made in the said main suit or parent file and not filed as a miscellaneous application.

39. In **Ouma v Maina & another (Miscellaneous Application E496 of 2021) [2022] KEHC 3358 (KLR) (Civ) (31 May 2022) (Ruling), the court held that:**

> *‘‘12. On the second and third prayers, the applicant seeks to have orders of injunction issued against the*

respondents. These are interlocutory orders which are normally sought before the court hears and determines the issues in contention. The contentious issue in this case is defamation which is yet to be determined in the main suit, Civil Case 291 of 2021. This raises the issue of sub judice which was pointed out by the respondents in their grounds of opposition....

13.It is not contended that the parties in the main suit are the same. Additionally, the orders sought are substantive in nature. The miscellaneous application will not offer this opportunity as it is a suit filed out of the main suit. The court cannot make orders on the prayers sought as they are already under determination in the main suit.

14.Furthermore, had the issues not been sub judice, the applicant ought to have moved the court properly. Order 3 rule 1 provides that suits may be instituted by way of a plaint, petition or through originating summons. This position is confirmed in the case

of Nairobi West Hospital Limited v Joseph Kariha & another [2018] eKLR the court held that:

> *8.A perusal of Order 3 rule 1 of the Civil Procedure Rules will reveal that suits may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be a metrophyic lateral scleroses and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed....''*

40. Similarly, in **Ongera v Shah & another (Environment and Land Miscellaneous Application E130 of 2023) [2023] KEELC 17820 (KLR) (6 June 2023) (Ruling),** the court held that:

> *''17. Notably, the Applicant herein is confirming that there is in existence a primary/substantive suit, wherein Judgment was rendered and/or delivered. Instructively,*

counsel for the Applicant has even ventured to exhibit a copy of the impugned Judgment, which is sought to be reviewed.

18.Consequently and in view of the foregoing, the question that does arise and which requires to be addressed is whether an applicant who has hitherto filed a substantive suit, pertaining to and concerning the same subject matter, can now file a Miscellaneous Application seeking to review a Judgment entered/delivered in the substantive suit.

19.To my mind, where a litigant is aggrieved by a Judgment and/or decree issued in a substantive suit, it behooves the aggrieved litigant to take out and file an application for review in the same/substantive suit, wherein Judgment was rendered/delivered. In this respect, it is important to recall and take cognizance of Section 34 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

20.Furthermore, it is not acceptable for a litigant to file a Miscellaneous application, which is a completely different suit with a view to impugning the decision of a court made

in a separate cause/suit. Clearly, the filing of a Miscellaneous application in such application, constitutes a misconception of the elementary principles of the law, regulating and guiding the Filing of Suits.''

41. Even if the application were competent, this court is of the humble view that the same would still be premature. This is because Order 17 Rule 2 of the Civil Procedure Rules prescribes a one-year time frame lapse or period of inaction on the part of a party in order for such an application to be made by a party, as provided for under Order 17 Rule 2(3), or for the court to issue a Notice to Show Cause why the matter cannot be dismissed for want of prosecution, in terms of Order 17 Rule 2(1). Thus, the one-year period prescribed in has not lapsed. As the record bears, the court delivered judgment on 22nd May 2025 by which it issued directions on the next step in regard to the remaining limb of the suit in ELC No. 228 of 2017. Further,

the instant application was filed on 23rd September 2025. That was barely four months after the delivery of the judgment. While the court is alive to the legal requirement of delivery of justice in an efficient, timely and expeditious manner, it wonders aloud why the applicant would be hasty in applying to dismiss the said suit instead of fixing it for hearing since one year period had not lapsed.

42. The above finding notwithstanding, the court appreciates the need for the expeditious disposal of suits as mandated by Article 159 of the Constitution as well as the overriding objectives outlined in the Civil Procedure Act. The applicant maintains that the estate of his father is incurring losses on account of the continued occupation of the said land by the respondent. The respondent on the other hand is alleged to be utilizing the suit properties, which have been found to belong to the estate of the applicant's father save for the determination of the Respondent's claim for adverse possession claim. He argued that he has the sole prerogative of deciding whether or not to file pursue the adverse possession claim.

43. In my very considered opinion, the response by the Respondent, particularly his deposition that he has the sole prerogative of deciding whether or not to pursue the claim of adverse possession bespeaks nothing short of shear arrogance and impunity, which this court cannot condone. The proper step should be, either the Respondent prosecutes his counterclaim expeditiously or he vacates the suit land forthwith. He cannot have his cake and eat it.

44. Given the above, this Court directs the Respondent to move the Court by ensuring that the new number is given within two months and that suit is fixed for hearing, or he files a fresh suit, as he depones, still within the two months, in default of which the Court will take appropriate steps suo motto, regarding the judgment in issue.

45. The upshot is that the court declines the invitation by the applicant to dismiss the suit as prayed because not only is the prayer made in a separate unrelate but also the suit sought to be dismissed has not been ‘filed’ afresh, that is to say, issued with a new number as ordered by the court. The application herein was premature.

46. But, given the stakes herein, and in the spirit of ensuring a just and expeditious disposal of the matter, and for the reason that the Respondent has demonstrated arrogance and pride and an intent to delay the determination of the Counterclaim for as long as he many wish, this Court hereby directs that he follows up the issuance of the new number for the suit as directed by the Court on 22nd May 2025 in thirty (30) days and expressly demonstrates to this court the pragmatic steps he makes in that regard, in default of which the Applicant herein is at liberty to move the Court in the ELC No. 228 of 2017 for issuance of the new number, and moving the Court appropriately under Oder 11 of the Civil Procedure Rules for non compliance of the same.

47. Further, the Deputy Registrar is directed to ensure the new number is given to the said claim by the 4th Defendant and parties notified forthwith. This Ruling be served by the Court Assistant on the Deputy Registrar, immediately.

48. On costs, they will be in the main cause/ suit because the Respondent, though he 'succeeded' in this application had the

obligation to move the court for his suit to be heard but he has not, and seems to be happy that it is lying unattended.

49. Orders accordingly.

RULING Dated, signed and Delivered virtually via the Teams Platform this 16th day of February 2026.

HON. DR. IUR NYAGAKA

JUDGE

From 1:17 PM, i**n the presence of,**

Ms. Atieno holding brief for Orondo Advocate for the Applicant

Ms. Kibet holding brief for Owino for the Proposed Interested