



**Osolo ((Suing as an Administrator of the Estate of the Late Gerorge William Khamala Osolo alias George Wilson Khamala Osolo) v Ochola & 7 others (Environment & Land Case 67 of 2018) [2024] KEELC 350 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 350 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 67 OF 2018  
BN OLAO, J  
JANUARY 30, 2024**

**BETWEEN**

**PROF. AGOLA AUMA OSOLO ..... PLAINTIFF  
(SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE GERORGE  
WILLIAM KHAMALA OSOLO ALIAS GEORGE WILSON KHAMALA OSOLO**

**AND**

**JOHN OJIAMBO OCHOLA ..... 1<sup>ST</sup> DEFENDANT  
NICHOLAS OCHOLA ..... 2<sup>ND</sup> DEFENDANT  
ADONGO OCHOLA ..... 3<sup>RD</sup> DEFENDANT  
ASOSO BARASA ..... 4<sup>TH</sup> DEFENDANT  
ROBERT WANYAMA ..... 5<sup>TH</sup> DEFENDANT  
OBIRO OCHOLA ..... 6<sup>TH</sup> DEFENDANT  
PAMELA MUGENI ..... 7<sup>TH</sup> DEFENDANT  
SUSAN MAKOKHA ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. Professor Agola Auma Osolo (the Plaintiff herein and suing as the Administrator of the Estate of the late George William Khamala Osolo Alias George Wilson Khamala Osolo) approached this Court vide his plaint filed on 17<sup>th</sup> July 2018 seeking against John Ojiambo Ochola, Stephen Makokha Ochola and Anthony Tebino Ochola (as the Defendants) the main orders that the Defendants be permanently enjoined from burying the remains of the late Morris Barasa Ochola on the land parcel No Samia/Bujwanga/1080. Alternatively, that a decree be issued in terms of the award of the Minister for Lands



and Settlement in the and Appeal No 41 of 1974 during the Land Adjudication process. The plaint was later amended on 28<sup>th</sup> February 2021 adding other Defendants and seeking the eviction of the Defendants, their children and dependants from the suit land as well as an injunction permanently restraining them from trespassing thereon.

2. The Defendants filed their amended defence and counter-claim. The basis of the parties respective cases is not relevant for purposes of this ruling. What is relevant is that for five years, the Plaintiff has not prosecuted his case for one reason or another. On 6<sup>th</sup> March 2023 when the suit came up for hearing, the Plaintiff was not in Court and his case was dismissed for non-appearance after the application for adjournment by his counsel Mr Jumba was objected to by Mr Ombete counsel for the Defendants. The objection was up held by the Court.
3. I now have for my determination the Plaintiffs Notice of Motion dated 3<sup>rd</sup> March 2023 and premised under the provisions of Order 17 Rule 2, Order 12 Rule 7 and Order Rule 17 and 52 of the [Civil Procedure Rules](#) as well as Section 3A of the [Civil Procedure Act](#). He seeks the following orders:
  1. That this Honourable Court be pleased to set aside the order of dismissal made on 6<sup>th</sup> March 2023.
  2. That the costs of this application be in the cause.
4. The gravamen of the application is that the Plaintiff who has been unwell for a long period is now ready to settle previous costs and abide by any conditions set by this Court. In his supporting affidavit, the Plaintiff confirms that this suit was initiated in 2018 but has been adjourned on several occasion for various reasons. That when it came up for hearing on 7<sup>th</sup> November 2022, Mr Ombete insisted on the Plaintiff being present to prosecute his case although he is suffering from age related ailments. When it next came up for hearing on 6<sup>th</sup> March 2023, the Plaintiff was indisposed and the Defendants counsel objected to a further adjournment and his suit was dismissed. The Plaintiff is now ready and willing to settle the outstanding assessed costs and this suit should be reinstated and set down for hearing.
5. The following documents are annexed to the application:
  1. Bill from Aga Khan Hospital Kisumu.
  2. Discharge Summaries from Aga Khan Hospital.
  3. Deposit Receipts.
  4. Invoices.
6. The application is opposed and the Defendants' counsel Mr Livingstone M. Ombete has filed a replying affidavit dated 6<sup>th</sup> October 2023 in which he has deposed, inter alia, that this suit was filed in 2018 some five (5) years ago and although the Plaintiff made futile attempts to have the suit heard, it could not proceed because he had not complied with the provisions of Order 11 of the [Civil Procedure Rules](#). On 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> March 2022, it could not proceed because the Plaintiff wanted someone else to testify on his behalf. On 14<sup>th</sup> July 2022, it could not proceed because the Plaintiff was unwell and similarly, on 3<sup>rd</sup> November 2022, it was adjourned because the Plaintiff was bereaved. Then on 6<sup>th</sup> March 2023, the Plaintiff was reported to be un-well but no document was produced to prove the same and even the documents annexed to the application do not show that he was un-well on that day. That all the documents annexed to the application are for the year 2022.



7. The suit having been dismissed on 6<sup>th</sup> March 2023, it has taken the Plaintiff upto 4<sup>th</sup> July 2023 to file this application. Further, the Plaintiff has not paid the costs assessed at Kshs.22,000 which he was ordered to pay on 14<sup>th</sup> July 2022. He is therefore in contempt and cannot be heard until he purges the same.
8. That notwithstanding, if this Court is inclined to set aside the dismissal order dated 6<sup>th</sup> March 2023, the Plaintiff should be ordered to first pay the costs assessed at Kshs.22,000 on 14<sup>th</sup> July 2022 as well as throw away costs of Kshs.50,000 and the Defendant’s travelling expenses for 6<sup>th</sup> March 2023.
9. The application has been canvassed by way of written submissions. These have been filed both by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Plaintiff and by Mr Ombete instructed by the firm of L. M. Ombete & Company Advocates for the Defendants.
10. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
11. It is not in dispute that on 6<sup>th</sup> March 2023 this Court dismissed non-attendance. Order 12 Rule 3 of the *Civil Procedure Rules* empowers this Court to dismiss the Plaintiff’s suit due to non-attendance. However Rule 7 of the same order allows the Court to reinstate a dismissed suit. It reads:

“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.”

Reinstatement of a dismissed suit is therefore left to the discretion of the Court. Such discretion must of course be exercised judiciously on sound grounds. It is not available to a party as a matter of course because the dismissal of a suit must have been for good reasons. It is therefore the duty of the party seeking the reinstatement of a dismissed suit to demonstrate good reasons why the same should be reinstated. And in exercising that discretion, the Court will no doubt consider all the relevant surrounding circumstances of each individual case.

The Court will no doubt also consider Articles 48 and 50 (1) of *the Constitution*. They provide that:

48: “The Court shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

50(1): “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

This Court will also be guided by the words of Chesoni J (as he then was) in the case of *Ivita v Kyumba* 1984 KLR 441 where he said the following on reinstatement of a suit:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the Court that it will be prejudiced by the delay or even the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged, if the Court is satisfied with the



Plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time."

I must also bear in mind, as was stated in the case of *Sebei District Administration v Gaysyali* 1968 E.A. 300, that to deny a party a hearing should be the last resort of a Court.

12. It is clear from the record that on 14<sup>th</sup> July 2022, Omollo J allowed the Plaintiff an adjournment on condition that he pays the Defendants and their counsel Kshs.22,800 (not Kshs.22,000 as stated by Mr Ombete in his replying affidavit) before the next hearing date. The next hearing date was 7<sup>th</sup> November 2022 and that money has not been paid and is still outstanding. That lapse alone, in my view, should disentitle the Plaintiff to the order of reinstatement of this suit. However, as there was no default clause, the Plaintiff would still have a window through which to plead his case for reinstatement.
13. Considering the circumstances in this case and exercising my discretion, it is not in dispute that this suit has been pending since 2018. It has also taken the Plaintiff four (4) months to file this application. The order dismissing his suit was made on 6<sup>th</sup> March 2023 in the presence of his counsel and so it is expected that he was made aware about the order. The Plaintiff has not explained why it took him four (4) months to file this application. He has also not explained why he has not paid the costs as directed on 14<sup>th</sup> July 2022. Those facts weigh heavily against reinstating the Plaintiff's suit.
14. On the flip side, I have not heard the Defendants allege that the reinstatement of the Plaintiff's suit will prejudice them in any way. I have not heard them, through their counsel's replying affidavit, complain that they will be unable to prosecute their case in view of the delay or that their witnesses and evidence is no longer available. If anything, the Defendants have shown through paragraph 27 of the replying affidavit of their counsel that they are not really averse to any order reinstating the Plaintiff's suit subject only to being paid thrown away costs which they have even quantified at Kshs.50,000. Mr Ombete has deposed in that paragraph as follows:  

27: "That notwithstanding the above grounds, which are valid, if the Court were, for whatever reasons, inclined to set aside the order given on 6<sup>th</sup> March 2023 dismissing the applicant's suit, I pray that the same be on terms that the applicant first pays a substantial throw away costs which we estimate at Kshs.50,000 plus the Kshs.22,000 which the applicant has not paid together with the Defendants' travelling expenses for 6<sup>th</sup> March 2023."

Whereas the above averment is not strictly speaking, a concession to the application, it is a demonstration that other than the prejudice of delay, and which the Defendants would be comfortable with an award of costs, they are still ready to proceed with the full hearing. If there was any other prejudice that would make it difficult for the Defendants to defend the Plaintiff's claim, they would certainly have said so in clear terms.
15. It is also clear from the medical documents annexed to the application that indeed the Plaintiff has had a long spell of illness during the course of this trial. And although no document was availed to show that indeed he was in hospital on March 6, 2023 when his suit was dismissed for non-appearance, what comes out from the medical documents is that for a good part of 2022 specifically between March and May 2022, he has been in and out of hospital. That of course does not explain his lack of enthusiasm in prosecuting his case from 2018. This Court nonetheless notes from the clinical report dated March 25, 2022 that the Plaintiff was aged 75 years as at the time of that report. I think that is also an important consideration in exercising my discretion in his matter. Let this old man have his day in Court.
16. Finally, the Defendants have their own counter-claim filed on September 14, 2020 in which they seek the main order that the land parcel No Samia/Bujwanga/1080 be registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They were therefore also obligated to have it prosecuted expeditiously. They have not



done so. Indeed even on March 6, 2023 when their counsel sought the dismissal of the Plaintiff's suit, no attempt was made to prosecute their counter-claim. Instead they sat back with the result that their counter-claim remains un-prosecuted. It may be argued and rightly so, that the Defendants' counter-claim should also suffer the same fate of dismissal under Order 17 Rule 2(5) of the Civil Procedure Rules which provides that:

“A suit stands dismissed after two years where no step has been undertaken.”

A counter-claim is a cross-suit. It can be treated as a separate claim independent of the Plaintiff's suit. Therefore, when the Plaintiff's suit is dismissed, the counter-claim can be prosecuted on its own. It is therefore similarly anchored under the provisions of Order 17 of the Civil Procedure Rules. However, that issue is not the subject of this ruling and ideally, the Defendants did not have to wait until March 6, 2023 to seek the dismissal of the Plaintiff's suit because even as they did so, their own counter-claim was being caught up by the provisions of Order 17 Rule 2 (5) of the Civil Procedure Rules. But as I have already stated above, nothing turns on that because it is not a matter for determination and this Court cannot now make any definitive findings on it. What is important however, for purposes of the application before me is that the reinstatement of the Plaintiff's suit will also serve the purpose of enabling the Defendants to prosecute their counter-claim which they appear to have forgotten even as they sought the dismissal of the Plaintiff's suit. Given all the above, the order for reinstatement of the suit is well merited and I allow it.

17. On the issue of costs, the record is clear that the Plaintiff has previously failed to pay costs as ordered by the Court. He has conceded that in paragraph 11 of his supporting affidavit. He must also pay through away costs which this Court will assess at Kshs.20,000.
18. Ultimately therefore and having considered the Notice of Motion dated 3<sup>rd</sup> July 2023, this Court makes the following disposal orders:
  1. The order issued on March 6, 2023 dismissing the Plaintiff's suit is set aside and with it, the decree issued on May 26, 2023.
  2. The Plaintiff shall, within 30 days of this ruling pay to the Defendants the following:
    - a. Kshs.22,400 as ordered on July 14, 2022.
    - b. Kshs.20,000 being throw away costs.
  3. The parties shall then take a date in the registry for the hearing of this suit.
  4. In default of (2) above, the order issued on March 6, 2023 shall revert automatically without any reference to this Court and the Defendants will be at liberty to take a date in the registry for hearing of their counter-claim.
  5. In the circumstances of this case, I find it proper that each party shall meet their costs.

**BOAZ N. OLAO**

**JUDGE**

**30<sup>TH</sup> JANUARY 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF JANUARY 2024 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 14<sup>TH</sup> NOVEMBER 2023.**

**BOAZ N. OLAO**



**JUDGE**

**30<sup>TH</sup> JANUARY 2024**

