



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN BUSIA**  
**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 14 OF 2015**

**PAUSTINA AUMA OJWANG.....APPLICANT**

**VERSUS**

**JOHN ONYANGO OWANGI.....1<sup>ST</sup> RESPONDENT**

**JAMES ODHIAMBO OWANGI.....2<sup>ND</sup> RESPONDENT**

**JOSEPH OMONDI ONYANGO.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. The application before me is a Notice of Motion dated 17/8/2017 filed in court on the same date. It was brought by the Applicant – **PAUSTINA AUMA OJWANG** – whose suit, an Originating Summons filed on 24/2/2015, was dismissed on 9/2/2016 but later reinstated by consent on 15/3/2016. One of the conditions for reinstatement to hearing was that the Applicant had to pay 10,000/= as thrown away costs within 30 days from the date of reinstatement, failing which the suit would again stand dismissed.
2. The Applicant only managed to pay 5,000/= within the period, leaving a balance of 5,000/= unpaid. That balance remains unpaid to date and this is despite a reminder dated 3/10/2016 informing the Applicant that the balance is still owing. The Applicant now wants the suit reinstated and that is the main prayer in her application, the other being a prayer on costs.
3. In the application, the Applicant talks of unfair dismissal of her suit as neither she nor her advocate then on record was aware of the date of hearing. The dismissal was on the basis of non-attendance during hearing and she feels that her side should not be blamed for it.
4. The Respondents responded vide a replying affidavit filed on 27/9/2017. Much of what is contained in that response has already been stated at the beginning of this ruling. The Respondents – **JOHN ONYANGO OWANGI, JAMES ODHIAMBO OWANGI and JOSPEH OMONDI ONYANGO** – believe that the application herein is false and misleading and should therefore be dismissed with costs.
5. The court heard the application interparties on 23/10/2017. The Applicant reiterated that she and her advocate were not aware of the hearing date when the case was first dismissed. She then referred to the consent entered into later and the 10,000/= she was required to pay. She said she paid 5,000/= but failed to raise the remaining balance of 5,000/= as she is poor.
6. The land in dispute is a one-acre portion in LR. No. **SOUTH TESO/ANGOROMO/9755/9754**. The

Applicant claims to own it by adverse possession. The Respondents deny the claim.

7. During hearing, the Respondents responded by reiterating what is already contained in their written response to the application.

8. I have considered the application, the response made, and the arguments proffered by both sides during hearing. What I am being asked to do involve the use of discretion. I am constrained to observe that the Applicant's application would be one for dismissal on the basis of merits. And this is because the application seems to address issues to do with the first dismissal. That dismissal was occasioned by non-attendance but was set aside by consent. What is at play now is the second dismissal which was occasioned by non-payment of the full amount agreed upon in the consent that reinstated the matter. The application is not addressing this dismissal. Infact, there is no mention of non-payment of any monies in the Applicant's application. That issue only came up during hearing and it only arose because the Respondents had raised it.

9. But in an application like this, I feel impelled to go beyond considerations of merit. At the time of first dismissal, the Applicant had a counsel. In this application itself, the Applicant has no counsel. Her averment that she is poor may not be an idle assertion. I saw her during the hearing of the application. She impressed me as a rustic rural woman of humble circumstances. If the court fails to heed her cry, I do not know who else will. I also consider that land is a unique resource and matters surrounding it are normally emotive. The overriding concern of the court is, or should be, to try a matter and give a judgement on the merits. This is the approach that should guide the court here.

10. But the court realizes that the Applicant has put the Respondents to uncalled-for expenses. And though the court has stated that she might be poor, it has to be realized that she has not sued here as a pauper. Given that her application is not strong on merits, it need to be appreciated that the Respondents may have legitimate cost concerns. Given this scenario, I allow the Applicant's application but order that she pays the 5,000/= that she has not paid from the earlier consent herein. Additionally, I order her to pay another 5,000/= as costs of this application. The whole amount totals to 10,000/= and should be paid within 60 days after the delivery of this ruling. If this again is not done, this suit will automatically stand dismissed after the expiry of the period.

**Dated, signed and delivered at Busia this 6<sup>th</sup> day of December, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: .....

1<sup>st</sup> Respondent: .....

2<sup>nd</sup> Respondent: .....

3<sup>rd</sup> Respondent: .....

Counsel of Applicant: .....

Counsel of Respondents: .....