



**Ooko v Oloo & 2 others (Environment & Land Case 437 of 2015)  
[2024] KEELC 816 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 816 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 437 OF 2015**

**E ASATI, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**GEORGE OPONDO OOKO ..... PLAINTIFF**

**AND**

**PIUS OLOO ..... 1<sup>ST</sup> DEFENDANT**

**SYLVESTER WANJALA ..... 2<sup>ND</sup> DEFENDANT**

**SUSAN ADOYO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before court for determination is the Notice of Motion dated 16<sup>th</sup> May, 2023 filed by the Defendants. It seeks for orders that;
  - a. The Honourable court be pleased to set aside the proceedings of the court of 26<sup>th</sup> January, 2022 and the Judgement delivered on 23<sup>rd</sup> March, 2022.
  - b. The court be pleased to order the proceedings to start de novo.
  - c. The court be pleased to order the Plaintiffs/Respondents to pay the auctioneer's and/court bailiff's costs of the eviction of the applicants from the suit premises, if any
  - d. The costs of this application be awarded to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.
2. The grounds upon which the application was brought are that the hearing in the matter proceeded ex parte on 26<sup>th</sup> January, 2022 and judgement delivered in favour of the Plaintiff on 23<sup>rd</sup> March, 2022 declaring the plaintiff the legal registered owner of the suit property and awarding him Kshs.14,000/- per month from the month April, 2020 as mesne profits among other awards. That the Plaintiff subsequently filed an application dated 28<sup>th</sup> November, 2022 seeking to evict the applicant from the suit land which application was allowed vide the court's ruling delivered on 9<sup>th</sup> March, 2023. That the



Plaintiff executed the eviction orders on 12<sup>th</sup> May, 2023. That the eviction orders were not served upon the applicant or their advocates. The application was supported by the averment in the Supporting Affidavit of Pius Oloo sworn on 16<sup>th</sup> May, 2023.

3. The application was opposed vide the contents of the Replying Affidavit sworn by George Opondo Ouko on 3<sup>rd</sup> August, 2023 and the annexures thereto. It is the Respondent's case, as can be gathered from the Replying Affidavit, that the applicants filed their Memorandum of Appearance and defence through the firm of S.O. Madialo & Company Advocates.
4. That the suit was first filed in the year 2010 as Kisumu HCCC No.62/2010 before it was transferred to Environment and Land Court to be registered as KSM ELC No.437 of 2015. That both parties were represented on 23<sup>rd</sup> August, 2021 before the Deputy Registrar when the hearing date of 26<sup>th</sup> January, 2022 was taken. That the Defendant was later notified of what transpired on 26<sup>th</sup> January, 2022. That the judgement was sent to both parties electronically through their email addresses. That the Defendants were served with Notice of entry of judgement. That the Defendants were served with the Plaintiff's party and party bill of costs. That the applicants were served with the application for eviction dated 28<sup>th</sup> November, 2022. That the applicants have been evicted from the suit land and that the Plaintiff has taken possession hence the application has been overtaken by events.
5. No submissions were filed on behalf of the applicants.
6. It was submitted on behalf of the Plaintiff that the matter proceeded *ex parte* because the applicants and their advocates failed to attend court after they were duly served. That there has been inordinate delay in bringing the application. That the application has been overtaken by events as execution of the decree has taken place. That the current firm of Advocates appearing for the applicants have not complied with the provisions of Order 9 Rule 9 of the [Civil Procedure Rules 2012](#).
7. The substantive prayer sought is for an order setting aside of the judgement herein. The other prayers sought will flow from the decision made on the substantive prayer. The grounds for setting aside *ex parte* judgement include explanation for non-attendance, demonstration that the applicant has a good defence that raises triable issues and that prejudice will not be occasioned to the Respondent. The court has discretion under the provisions of Order 12 Rule 7 of the [Civil Procedure Rules](#) to set aside *ex parte* judgement on such terms as are just.
8. In the case of [Esther Wamaittha Njibia & two others vs. Safaricom Ltd](#) (2014)eKLR the court citing relevant cases on the issue held *inter alia* that:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd.*) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs. Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali*. It also goes without saying that the reason for failure to attend should be considered."

9. The explanation for non-attendance as contained in paragraphs 13 and 14 of the Supporting Affidavit is that the applicants were never served with Summons to Enter Appearance and other suit papers in the



matter and that they never instructed the law firm M/s Madialo & Company Advocates to represent them in the matter and hence were not aware of the proceedings.

10. Perusal of the court file shows that the applicants were served with Summons to Enter Appearance and plaint. The record further shows that the firm of Madialo & Company Advocates subsequently filed a Memorandum of Appearance dated 24<sup>th</sup> May, 2010 and Defendants' Written Statement of Defence on 17<sup>th</sup> September, 2010. The same firm later amended the Statement of Defence and replaced it with 1<sup>st</sup> and 2<sup>nd</sup> defendants' amended written Statements of Defence. The law firm also filed Defendants' witness statements dated 3<sup>rd</sup> March, 2012 and Replying Affidavit sworn by the 2<sup>nd</sup> Defendant on 17<sup>th</sup> September 2010 in reply to an application by the Plaintiff. The proceedings further show that the said law firm actively participated in the proceedings up to and including 23<sup>rd</sup> May, 2021 when the hearing date was taken before the Deputy Registrar when one Mirembe appeared on behalf of the Defendants.
11. The annexures to the Replying Affidavit show that the firm of Madialo & Company Advocates was served and notified of all processes. One of the annexures to the Replying Affidavit is a letter dated 29<sup>th</sup> January, 2022 from the Plaintiff's Advocates to the firm of Madialo & Company Advocates informing the said law firm of what transpired on 29<sup>th</sup> January, 2022. The letter was received in the firm of Madialo & Company Advocate on 31<sup>st</sup> January, 2022. The contents of the letter were;

“ Kindly note that this matter came up for hearing on 26<sup>th</sup> January, 2022 before Justice A.O. Ombwayo when the Plaintiff's case was heard and closed. The defence case was also closed. The Judge then directed that parties do file their written submissions within 14 days from the date of the hearing and that the court will deliver judgement on notice. Therefore, proceed and file your written submissions”.
12. Although the applicants have claimed that they never instructed the firm of Madialo & Company Advocates this cannot be confirmed and there is no explanation why Counsel would take up a case where he has no instructions and make all the efforts seen in the proceedings. There is no evidence that the applicants have taken any step against the said law firm for acting in a matter where they had no instructions to the detriment of the applicants.
13. There is also no evidence that the applicants had taken any legal steps against the 2<sup>nd</sup> Defendant who swore the Affidavits which are on record and particularly the Replying Affidavit sworn on 17<sup>th</sup> September, 2010 on behalf of the 1<sup>st</sup> applicant.
14. From all the material placed before court, I am convinced that the applicants were all along represented by Counsel and were aware of the suit and the progress thereof but failed to attend court to prosecute their defence and to respond to court processes. The explanation given for non-attendance is not supported by the proceedings and court record generally and hence unbelievable.
15. It has not been demonstrated that the applicants have a good defence to the plaintiff's case that raises triable issues. In any event, execution of the judgement has already taken place and this is not disputed. The Defendants have been evicted from the suit land and the Plaintiff taken possession thereof. To undo the whole process will no doubt occasion loss and prejudice to the plaintiff.
16. The application was filed on behalf of the applicants by the firm of Otieno Ochieng & Co. Advocates. It has not been demonstrated that the said firm of Advocates complied with the mandatory provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) on Change of Advocates or Notice to act in person after judgement. Failure to comply with the said provision of law renders the pleadings and all documents filed by the non-compliant firm of advocates incompetent.



17. In the case of *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR while striking out an application filed by counsel post judgment in contravention of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, the court held that

“Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”

The court then proceeded to strike out the pleadings filed by the advocate who had not complied with Order 9 Rule 9 *Civil Procedure Rules*.

18. On the basis of the foregoing reasons the court finds that the application is not only incompetent for having been filed without compliance with Order 9 Rule 9 but also lacking in merit. The application is dismissed. Costs to the plaintiff.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU AND READ VIRTUALLY THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen - Court Assistant.

Ken Omollo for the Plaintiff/Respondent

No appearance for the Defendants/Applicants

