



**Oloo v Okuna & 4 others (Environment and Land Case Civil Suit
E033 of 2021) [2024] KEELC 4784 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E033 OF 2021
SO OKONG'O, J
MARCH 20, 2024**

BETWEEN

CAREN OCHIENG OLOO PLAINTIFF

AND

SOLOMON ONYANGO OKUNA 1ST DEFENDANT

FRED OKOTH NANDWA 2ND DEFENDANT

THE LAND REGISTRAR, KISUMU 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The Plaintiff brought this suit against the Defendants on 24th May 2021. The Plaintiff averred that she was at all material times the registered proprietor of all that parcel of land known as Title No. Kisumu/Chiga/318 (hereinafter referred to as “the suit property”). The Plaintiff averred that she acquired the suit property from the 1st Defendant at a consideration of Kshs. 1,900,000/- after carrying out due diligence and confirming that the same was registered in the name of the 1st Defendant. The Plaintiff averred that she was issued with a title deed for the suit property by the 2nd Defendant on 14th September 2012. The Plaintiff averred that after being issued with a title deed, she was informed by the 3rd Defendant that the suit property did not belong to the 1st Defendant and that it was all along registered in the name of one, Manuel Cyril Rattos. The Plaintiff averred that the 3rd Defendant claimed that she had acquired title to the suit property fraudulently. The Plaintiff averred that this allegation was made by the 3rd Defendant even though all the searches she carried out confirmed that the property was registered in the name of the 1st Defendant. The Plaintiff averred that if indeed the suit property belonged to Manuel Cyril Rattos, then the actions of the 1st, 2nd, 3rd and 4th Defendants



- in purporting to process the transfer and registration of the property in her name amounted to fraud, breach of contract, trust and statutory duty.
2. The Plaintiff sought judgment against the Defendants jointly and severally for; a declaration that the Plaintiff is the lawful registered owner of the suit property, a declaration that the 3rd and 4th Defendants and/or their designated officers had no statutory powers to cancel the title issued to the Plaintiff in respect of the suit property, in the alternative, a refund of Kshs. 1,900,000/-and incidental expenses, general damages for breach of contract, trust and statutory duty, exemplary and aggravated damages, and costs of the suit.
 3. The 1st Defendant appointed a firm of advocates to act for him in the suit but neither entered an appearance nor filed a defence. The 2nd Defendant neither entered appearance nor filed a defence. The 3rd, 4th and 5th Defendants filed what they referred to as a “holding defense” on 20th September 2021. The 3rd, 4th and 5th Defendants denied the Plaintiff’s claim in its entirety and urged the court to dismiss the same with costs.
 4. On 5th May 2022, the suit was fixed for hearing on 17th October 2022 in the presence of the advocates for Plaintiff and the 1st Defendant. When the matter came up for hearing on 17th October 2022, only the advocate for the 1st Defendant turned up in court. The Plaintiff and her advocates were absent the same as the 3rd, 4th and 5th Defendants and their advocates. Since there was no explanation for the Plaintiff’s absence, the suit was dismissed with costs for non-attendance.
 5. What is now before the court is the Plaintiff’s Notice of Motion application dated 19th September 2023 brought under Sections 3 and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Article 159(2) of the Constitution and all enabling powers of the court. In the application, the Defendant has sought the setting aside of the order made on 17th October 2022 and the reinstatement of the suit. The application is supported by the affidavit of the Plaintiff sworn on 19th September 2023. The application was brought on the grounds that the Plaintiff was not informed by her previous advocate that the suit had been fixed for hearing on 17th October 2022. The Plaintiff averred that the said advocate did not keep her informed of the progress of her suit. The Plaintiff averred that she was desirous of prosecuting the suit and that the mistake of her advocate should not be visited upon her.
 6. In her affidavit, the Plaintiff stated that she kept following up on the status of the suit and was all the time being informed by her previous advocate that the same was progressing well. The Plaintiff averred that she was told at one point that her advocate was involved in a road traffic accident. The Plaintiff averred that thereafter she did not receive much information from the said advocate on the progress of the suit. The Plaintiff averred that after a long wait without any information on the progress of the suit, she decided to visit the court registry in August 2023 to find out for herself the status of the suit. The Plaintiff averred that it was on this visit to the registry that she learnt that the suit had been dismissed on 17th October 2022 for non-attendance. The Plaintiff averred that she was not informed of the hearing date of 17th October 2022. The Plaintiff urged the court to set aside the orders dismissing the suit so that the suit could be heard on merit. The Plaintiff averred that she spent about Kshs. 2,000,000/- on the suit property that she stood the risk of losing if the suit was not reinstated. The Plaintiff annexed to her affidavit the WhatsApp communication that she had with her previous advocate.
 7. The application was opposed by the 1st, 3rd, 4th and 5th Defendants. The 1st Defendant opposed the application through grounds of opposition dated 18th March 2024. The 1st Defendant averred that the Plaintiff’s application was brought after a long unexplained delay and that sufficient reason had not been given for the Plaintiff and her previous advocate’s failure to attend court for the hearing of



the suit on 17th October 2022. The 1st Defendant averred that the Plaintiff's claim that her advocate was involved in a road traffic accident and was incapacitated was not supported by any evidence. The 1st Defendant averred further that the Plaintiff's current advocates did not obtain leave of the court to come on record for the Plaintiff in place of the Plaintiff's previous advocates who were on record when the suit was dismissed. The 1st Defendant averred that the application was in the circumstances an abuse of the court process.

8. The 3rd, 4th and 5th Defendants opposed the application through grounds of opposition dated 18th October 2023. The 3rd, 4th and 5th Defendants averred that the application was brought after unreasonable delay which was a sign of laxity on the part of the Plaintiff and lack of interest in the prosecution of the suit. The 3rd, 4th and 5th Defendants averred that the Plaintiff had a duty to ensure that the suit was prosecuted efficiently and expeditiously. The 3rd, 4th and 5th Defendants averred that the Plaintiff had been indolent and as such was not deserving an equitable relief. The 3rd, 4th and 5th Defendants averred that the application was misconceived, incompetent and an abuse of the process of the court.

Analysis and determination

9. When the application came up for hearing on 19th March 2024, the advocate appearing for the Plaintiff relied entirely on the Plaintiff's affidavit in support of the application and urged the court to allow the application. The advocate for the 1st Defendant also relied on the 1st Defendant's grounds of opposition. The 1st Defendant's advocate added that the Plaintiff's current advocates were irregularly on record as they had not obtained leave of the court to come on record for the Plaintiff in place of the Plaintiff's previous advocates. The advocate for the 3rd, 4th and 5th Defendants relied entirely on the 3rd, 4th and 5th Defendants' grounds of opposition.
10. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed in opposition to the application. The application was brought principally under Order 12 Rule 7 of the [Civil Procedure Rules](#). Order 12 Rule 7 of the [Civil Procedure Rules](#) gives the court discretionary power to set aside or vary an order of dismissal of a suit for non-attendance made under Order 12 Rule 3 of the [Civil Procedure Rules](#). In [Patriotic Guards Ltd. v. James Kipchirchir Sambu](#) [2018] eKLR the court stated that:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

11. The principles applied by the court in applications to set aside *ex parte* judgments and orders were set out in [Shah v. Mbogo](#) [1967] E.A 116 as follows:

“...the court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

12. The burden was upon the Plaintiff to establish sufficient cause to warrant the setting aside of this court's order made on 17th October 2022. The WhatsApp communication between the Plaintiff and



her former advocate, Lesley Odhiambo shows a picture of a litigant who was interested in and keen on following the progress of her case. It is not clear from the material on record as to when the Plaintiff's former advocate was involved in a road traffic accident referred to in the Plaintiff's affidavit and the communication aforesaid and whether it contributed to the said advocate's failure to attend court on 17th October 2022 and to inform the Plaintiff of the hearing date. Whatever the case, it is my finding that the Plaintiff was not to blame for her failure to attend court on 17th October 2022. The Defendants did not file an affidavit to rebut the averments in the Plaintiff's affidavit that her advocate never notified her of the hearing date and that it was until August 2023 through her initiative that she came to learn that the suit had been dismissed for non-attendance. I agree that there was an unreasonable delay in the filing of the application. I am however satisfied with the explanation given by the Plaintiff for the delay. The 1st Defendant had also objected to the application on the ground that the Plaintiff's current advocates who filed the application are not properly on record in that they came on record without leave of the court contrary to Order 9 Rule 9 of the *Civil Procedure Rules*. I agree with the Plaintiff's advocate's submission that Order 9 Rule 9 of the *Civil Procedure Rules* applies only where there has been an entry of judgment. A dismissal of a suit for non-attendance in my view does not amount to a judgment for the purposes of Order 9 Rule 9 of the *Civil Procedure Rules*. I have said enough to show that the application before me has merit. I wish to add however that I have also considered the unique nature of the dispute between the parties, the possible prejudice to the Plaintiff if the orders sought are not granted and the fact that when the suit was dismissed, it was the first time it had come up for hearing. I have further taken note of the fact that any prejudice to the Defendants can be compensated in costs. In *Richard Nchapi Leiyangu v. IEBC & 2 others*, Civil Appeal No. 18 of 2013, the court stated that:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

13. For the foregoing reasons, I allow the Plaintiff's Notice of Motion application dated 19th September 2023 in terms of prayer (b) thereof with costs to the 1st, 3rd, 4th and 5th Defendants.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF MARCH 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. P.D. Onyango for the Plaintiff

Mr. Jeji for the 1st Defendant

Ms. Moraa h/b for Ms. Essendi for the 3rd, 4th and 5th Defendants

Ms. J. Omondi-Court Assistant

