



**Otieno v Okwako (Environment & Land Case 365 of 2013)  
[2024] KEELC 3466 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3466 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 365 OF 2013  
DO OHUNGO, J  
APRIL 29, 2024**

**BETWEEN**

**GEORGE JOSEPH OTIENO ..... PLAINTIFF**

**AND**

**WAMALANDA OKWAKO ..... DEFENDANT**

**RULING**

1. By Notice of Motion dated 15<sup>th</sup> June 2023, the defendant seeks orders that the firm of Achero Mufuayia & Company Advocates be allowed to come on record for him in place of the firm of Anyona & Company Advocates and that the judgment delivered herein on 16<sup>th</sup> May 2023 be set aside.
2. The application is supported by an affidavit sworn by the defendant. He deposed that he failed to attend court at the defence hearing on account of his advanced age of 89 years and ill health due to old age. He annexed copies of his national identity card and treatment notes and further deposed that his advocates then on record failed to inform the court about his condition and to seek another convenient date for him to testify.
3. The plaintiff opposed the application through an affidavit sworn by Modrix Khakasa Wandallah, the advocate having conduct of the matter on his behalf. Mr Wandallah deposed that the defendant neither filed any witness statement nor attended court on the defence hearing date which had been fixed by consent. He further deposed that the defendant filed final written submissions without raising any issues as to his failure to attend the defence hearing.
4. The application was canvassed through written submissions. The defendant relied on the case of *Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014]* eKLR and urged the court to exercise discretion in his favour in view of the facts that he deposed in his supporting affidavit.
5. On his part, the plaintiff argued that the plaintiff participated in the proceedings all along and even filed final submissions. That despite filing a list of witnesses in the year 2014, the defendant did not



file any witness statement ten years later. Relying on the case of *Violet Wanjiru Kanyiri v Kuku Foods Limited [2022]* eKLR, the plaintiff argued that litigation must end and urged the court to dismiss the application.

6. I have considered the application, the affidavits, and the submissions. The issues for determination are whether the firm of Acheru Mufuayia & Company Advocates should be allowed to come on record the defendant in place of the firm of Anyona & Company Advocates and whether the judgment delivered on 16<sup>th</sup> May 2023 should be set aside.

7. Order 9 Rule 9 of the *Civil Procedure Rules, 2010* provides as follows regarding change of advocates after delivery of judgment:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.

8. Litigants have a right to be represented by an advocate of their choice and it is the duty of the court to facilitate that right by allowing change of representation post judgment when a meriting application is filed. Consequently, a court will be reluctant to dictate which advocate may or may not represent a litigant in a matter, unless where there is a real likelihood that prejudice would arise. In the case of *Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005]* eKLR the Court of Appeal stated:

The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness.

9. The position was affirmed earlier by the same court in *William Audi Odode & Another-vs- John Yier & Another* Court of Appeal Civil Application No. NAI 360 of 2004 (unreported) (O’Kubasu, JA) thus:

I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.

10. The record herein shows that the defendant has so far been represented by the firm of Anyona & Company Advocates. The said firm has not opposed the defendant’s plea for change of representation. I see no valid reason not to allow the prayer for change of representation. I will grant it.

11. The defendant is also seeking setting aside of the judgment delivered herein on 16<sup>th</sup> May 2023. When considering an application for setting aside, the court exercises discretion pursuant to the principles laid down in *Mbogoh & Another v. Shah [1968] EA 93* and reiterated in *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another [2016]* eKLR. The court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the order sought to be set aside was made, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The court’s discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.



12. The record herein shows that the plaintiff brought this suit through plaint filed on 16<sup>th</sup> December 2013 and that the defendant filed a statement of defence on 28<sup>th</sup> January 2014. No witness statement was filed with the defence, contrary to Order 7 Rule 5 of the Civil Procedure Rules, 2010.
13. After several adjournments, the hearing of the plaintiff's case started on 4<sup>th</sup> May 2022 in the presence of Mr Anyona for the defendant. On that occasion, Mr Anyona informed the court that he was ready to proceed. The plaintiff's case was heard and closed that day. Thereafter, the defendant sought and was granted an adjournment. The defendant was also granted thirty days to file and serve witness statement. Defence hearing was scheduled, by consent, for 11<sup>th</sup> October 2022.
14. Come the agreed date for defence hearing, neither the defendant nor his advocate attended court. The record also shows that the defendant neither filed nor served any witness statement as had been ordered. Upon an application by counsel for the plaintiff, defence case was closed and directions for filing and exchanging written submissions given. The plaintiff filed his submissions on 19<sup>th</sup> January 2023 while the defendant filed his final submissions on 23<sup>rd</sup> January 2023. Upon considered the parties' pleadings, evidence, and submissions, I delivered judgment on 16<sup>th</sup> May 2023.
15. While the defendant is keen to blame his previous advocates, he has not explained his failure to file any witness statement in the matter. A party who does not file a witness statement can hardly be said to be ready or willing to proceed with a hearing. Additionally, the defendant has sought to rely on age and alleged ill-health. I have perused the medical notes that the defendant has availed. As correctly pointed out by the plaintiff, the notes do not demonstrate that the defendant was unwell on 11<sup>th</sup> October 2022 and unable to attend court on that date.
16. More significant is the fact that the defendant willingly participated in the proceedings after 11<sup>th</sup> October 2022 without raising any complaint. He filed his final submissions on 23<sup>rd</sup> January 2023 and the court considered them prior to delivery judgment. He acquiesced in the entire process up to delivery of judgment and cannot now turn around to cite age and alleged ill-health. The reasons advanced by the defendant for his failure to attend court do not hold. In the circumstances of this case, there would be great prejudice to the plaintiff if he were to be made to start afresh over ten years after he filed his case. As is often restated, equity does not aid the indolent. The defendant is indolent, having failed to file a witness statement for over ten years. I see his application as an attempt to delay the cause of justice.
17. The defendant has not persuaded me that he is deserving of discretion. I find no merit in the prayer for setting aside and I therefore dismiss it. In the result, I make the following orders:
  - a. The firm of Acheru Mufuayia & Company Advocates is hereby allowed to come on record for the defendant in place of the firm of Anyona & Company Advocates.
  - b. The plaintiff shall have costs of Notice of Motion dated 15<sup>th</sup> June 2023.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF APRIL 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The plaintiff

Mr Acheru for the defendant

Court Assistant: M. Nguyayi

