



Oyieko v Henry & 4 others (Environment & Land Case 48 of 2019) [2024] KEELC 4509 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 48 OF 2019**

LA OMOLLO, J

JUNE 6, 2024

BETWEEN

CAROLINE ACHIENG OYIEKO PLAINTIFF

AND

FRANKLINE NJERU HENRY 1ST DEFENDANT

HENRY KIPLAGAT MAIYO 2ND DEFENDANT

NIMO KORANE MOHAMED 3RD DEFENDANT

BENSON KABUGI GICHUKI 4TH DEFENDANT

MICHAEL ELIJAH KABIRU 5TH DEFENDANT

RULING

Introduction

1. This ruling is in respect to the Plaintiff/Applicant’s Notice of Motion application dated 7th November, 2023. The said application is expressed to be brought under Order 9 Rule 9 of the Civil Procedure Rules, Order 12 Rule 7 of the Civil Procedure Rules, Section 1, 1A, 3A and 7 of the Civil Procedure Act and Article 159 (d) of the Constitution.
2. The application is filed under Certificate of Urgency and seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to grant leave to the firm of Sheth And Wathigo Advocates to come on record for the Applicant in place of the firm of Geoffrey Otieno & Company Advocates or otherwise from Osero & Company Advocates.
 - c. Spent



- d. That this Honourable court be pleased to set aside its orders delivered on 28th July, 2022 dismissing the Plaintiff's suit for non-attendance and/or want of prosecution and the consequent ex parte proceedings on the counterclaim.
 - e. That this Honourable Court be pleased to re-instate the Plaintiff's suit and remit the counterclaim for merit and inter partes hearing and determination.
 - f. That the costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit of the applicant, one Caroline Achieng Oyieko. The Supporting affidavit is sworn on 8th November, 2023.

Factual Background.

4. This suit came up for hearing on 20th November, 2023 and counsel for the Plaintiff/Applicant informed the court that he had filed an application dated 7th November, 2023 to stay the proceedings. He submitted that the application be heard before a judgment date is taken.
5. Counsel for the 2nd and 3rd Defendants/Respondents informed the court that the application had not been served upon them and termed the actions of the Plaintiff/Applicant as mischievous. The court directed that the application shall be heard on 14th November, 2023.
6. On 14th November, 2023, counsels for the Plaintiff/Applicant and counsel for the 1st and 4th Defendants/Respondent informed the court that they have filed their submissions to the application.
7. The 2nd and 3rd Defendant/Respondent's counsel informed the court that they have filed their response and prayed that the be granted 14 days to file submissions, which prayer the court acceded to.
8. The Plaintiff/Applicant was also granted leave to file supplementary submissions.
9. The matter came before the court on 21st February, 2024 and all parties confirmed filing submissions. The court then issued the parties with a ruling date.

Applicant's Contention.

10. The Applicant deposes that she has now appointed the firm of Sheth And Wathigo Advocates as the advocates to take over the conduct of this matter on her behalf, seek its revival and to defend the counter-claim.
11. She deposes that because the proposed change of representation comes after the dismissal of her suit, leave of court is necessary.
12. It is her deposition that she is the legal owner of the suit parcels of land known as Nakuru/municipality BLOCK 3/226, 229, 230, 233, 234 and 237 having acquired them by way of donation from Mr. Kanji Valji Patel and had taken possession and aggressive use thereof in 2004. She deposes that Mr. Kanji Valji Patel allowed her to run a children's home known as Lagca Children Home Centre on the parcels all of which adjoin to form the entire parcel they occupy.
13. It is her further deposition that having been aggrieved by the actions of the Defendants interfering with her parcels of land known as Nakuru Municipality Block 3/226, 229, 230, 233, 234 and 237 sometimes in the year 2017, she sought for redress from the National Land Commission which prompted the Commission to write to the 4th Defendant.



14. She deposes that after establishing that the National Land Commission was not the appropriate forum to seek redress from for her grievances, she was advised to and resorted to institute the suit against the Defendants.
15. It is her deposition that together with her husband who is a foreigner, they sought and instructed an advocate from Nairobi after having been advised that Nakuru lacked competent, meticulous and honest advocates who could not be compromised by land cartels that operated within the town like the Defendants.
16. She deposes that her advocates on record then, Osero & Company Advocates Capital House, 2Nd Floor, Suite 21, Moi Avenue, P.o Box 990-00100, Nairobi commenced the said suit by a Plaint dated 23rd May, 2019 seeking an injunction to restrain the Defendants herein and/or their agents from trespassing on and/or interfering with her properties known as Nakuru Municipality Block 3/226, 229, 230, 233, 234 and 237 and evicting her from the same.
17. It is her deposition that due to the vagaries occasioned by COVID-19 upon the normal operations of this Honourable court and her reliance on misleading advice from the firm of Osero & Company Advocates, her suit was left unprosecuted.
18. She deposes that the suit was fixed for hearing on 28th July, 2022 when it was listed before this Honourable Court. She deposes that on 28th July, 2022, her then counsel on record, Osero & Company Advocates failed to attend Court and prosecute the matter and because she had also not been informed that the matter was fixed for hearing, she never attended. She deposes that consequently and sadly, the suit was dismissed for non-attendance and/or want of prosecution.
19. It is her deposition that she immediately changed advocates to the firm of Geoffrey Otieno & Company Advocates vide a notice of change of advocates dated 1st September, 2022 and the new advocates on record then made an application dated 1st September, 2022 to this Honourable Court to reinstate the suit.
20. She deposes that the 1st Defendant's advocate filed a notice of preliminary objection dated 10th October, 2022 under Order 9 Rule 9 of the Civil Procedure rules contending that the firm of Geoffrey Otieno & Company Advocates was improperly and irregularly on record.
21. She deposes that the matter came to Court for hearing of the application dated 1st September, 2022 and the Court was of the opinion that the same be withdrawn and that the firm of Geoffrey Otieno & Company Advocates follow the procedure to properly come on record.
22. It is her deposition that vide a consent dated 25th October, 2022, the parties herein agreed that the firm of Geoffrey Otieno & Company Advocates take over the conduct of the suit in place of Osero & Co. Advocates.
23. She deposes that the firm of Geoffrey Otieno & Company Advocates filed a Notice of Withdrawal dated 2nd November, 2022 that the first application to reinstate the suit vide a Notice of Motion dated 1st September, 2022 be withdrawn.
24. It is her deposition that the firm of Geoffrey Otieno & Company Advocates made a second application to this Honourable court vide a Notice of Motion dated 2nd November, 2022 to reinstate the suit.
25. She deposes that the 1st Defendant's advocates filed a Notice of Preliminary Objection that the Notice of Motion dated 2nd November, 2022 be struck out as the firm of Geoffrey Otieno & Company Advocates was again unprocedurally on record and that the Supporting Affidavit in support of the



- Notice of Motion dated 2nd November, 2022 was hers instead of that of Geoffrey Otieno as stated in the same Notice of Motion.
26. It is her deposition that on 24th November, 2022, the application dated 2nd November, 2022 came before this Honourable Court for hearing court addressed the Preliminary Objection dated 16th November, 2022 and established that indeed there was improper change of advocates.
 27. She deposes that on 11th January, 2023, the firm of Geoffrey Otieno & Company Advocates. They also filed a Notice of change of advocates. She deposes that the firm then filed a Notice of Withdrawal of the Notice of Motion dated 2nd November, 2022 and a third application to reinstate suit vide a Notice of Motion dated 11th January, 2023.
 28. It is also her deposition that the 2nd and 3rd Defendants/Respondents filed a Replying Affidavit dated 3rd January, 2023 in opposition of the third application to reinstate the suit dated 11th January, 2023. She deposes that the 2nd and 3rd Defendants blamed her for lack of keenness, diligence and negligence in prosecuting the suit. It is her deposition that the 2nd and 3rd Defendants were hell- bent on absolving the previous counsel and placing all the blame upon her.
 29. It is her deposition that on 7th March, 2023, the 4th Defendant/Respondent filed a Notice of Appointment of Advocates and filed grounds of opposition to the application dated 11th January, 2023 under Order 5 Rule 1 (6) of the Civil Procedure Rules 2010. She deposes that the 4th Defendant alleged that since the institution of the Applicant's suit on 24th May, 2019, they are yet to be served with summons to enter appearance.
 30. It is her deposition that the application was set for hearing on 13th March, 2023 where the Court directed that the application be disposed by way of written submissions and issued a mention date on 17th April,2023 to confirm filing of the same.
 31. She further deposes that on 17th April, 2023, the matter came to court for mention to confirm filing of submissions and unfortunately, the firm of Geoffrey Otieno & Company Advocates had not filed submissions and this Honourable court dismissed the application dated 11th January, 2023 for want of prosecution and set a mention date for the 2nd and 3rd Defendants' counterclaim.
 32. She deposes that her previous advocates omitted to carry out their duties in advancement of her case. She deposes that being a lay person, she is not conversant with litigation processes and has no skills or knowledge to follow legal procedures requisite to enter and serve summons, change advocates and draft submissions.
 33. She deposes that as a result of their repeat missteps, her suit was dismissed and although immediate attempts were made to correct the situation, such attempts were beset with small needless technical mistakes that now put her at risk of losing property that the law vests in her.
 34. It is her deposition that in respect of the third application dated 11th January, 2023, she had no skill set to address the failures of the firm of Geoffrey Otieno & Company Advocates to follow the rules guiding change of advocates.
 35. She deposes that she should not be blamed for the failure of the firm of Geoffrey Otieno & Company Advocates to file submissions to canvass the third application before the mention date on 17th April, 2023. It is her deposition that the sins and or omissions of her previous advocates on record should not be visited upon her as she is an innocent litigant and this Honourable court ought to consider her predicament with broad understanding.



36. She deposes that it has been confirmed to her that she indeed has a solid and good case based on the claim of adverse possession of the suit parcels of land and the suit has formidable defense of limitation of time and adverse possession sufficient to address any counterclaims arising from the same.
37. It is her deposition that even to the plain eye, the documents filed by the defendants are forgeries being perpetrated by individuals who perhaps went to the land office and learnt of the absence of the original owner and backdated their title documents to oust them from the premises.
38. She deposes that her belief is backed by the glaring omission on their part to file transactional documents if indeed they acquired the parcels for value of consideration as alleged. She deposes that even assuming that they indeed acquired the titles as their documents suggest, she is advised that the same would have been extinguished by adverse possession on her part, a fact that she can and would easily demonstrate.
39. It is her deposition that her beneficiaries (homeless children) who benefit from her work of philanthropy under her foundation, Lagca Children Home Foundation, which sits on one of the suit land stand to be greatly prejudiced should the suit herein not be reinstated.
40. It is her deposition that it is in the interest of justice and fairness that this Honourable Court should exercise its discretion in her favour, grant leave for the firm of Sheth And Wathigo Advocates to come on record for her in place of the firm of Geoffrey Otieno & Company Advocates, set aside the order dismissing this suit and reinstate the same for determination on merit.
41. She deposes that it is also fair that the counter-claim that proceeded ex parte be set aside to allow fair and just determination of the matter. She deposes that she is willing to pay whatever costs is adjudged to be fair to compensate the defendants for the inconvenience that may be occasioned if the orders sought herein are granted.
42. She deposes that the application is made in good faith, promptly and without undue delay.

The 2Nd And 3Rd Defendant's Response.

43. The 2nd and 3rd Defendants/Respondents filed a replying affidavit on 13th December, 2023 sworn by Henry Kiplagat Maiyo, the 2nd Defendant/Respondent.
44. He contends that no justifiable reason or ground has been advanced by the Applicant to warrant the grant of the orders sought. He contends that whereas it is true that COVID-19 affected court operations, the Plaintiff/Applicant cannot cite this as an excuse since the pandemic was long contained and normal court operations have been ongoing for the last three years.
45. He further contends that an action for adverse possession can only be commenced by way of originating summons as required under section 38 of the *Limitation of Actions Act* while the present action was commenced by way of Plaint hence the Plaintiff/Applicant's claim for adverse possession is not tenable. He contends that a party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. He contends that the two orders cannot be made in the same suit and for one to sustain a claim for adverse possession, there must be a title, to which the party claims possession that is adverse to that of the title holder.
46. The 2nd Defendant/Respondent contends that the Plaintiff/Applicant has been indolent and shown no interest at all in prosecuting her case since the filing of her Plaint together with the application seeking injunctive orders both dated 23rd May, 2019.



47. He contends that the Plaintiff's/Applicant's disinterest was so apparent that the 2nd and 3rd Defendants/Respondents took up the responsibility of ensuring the case is given a mention date for the purposes of seeking directions on how the matter was to proceed.

Issues For Determination.

48. The Applicant filed submissions on 8th December, 2023 and she identified the following issue for determination:
- a. Whether or not the application dated 7th November, 2023 has merit and should be allowed?
49. She submits that her application dated 7th November, 2023 has merit and should be allowed on the following grounds: a) The application is brought in good faith and without delay b) The Applicant's dismissed suit was meritorious and competent, c) The Applicant's suit was dismissed as a result of mistake of previous counsel.
50. She submits that the subject application is brought in good faith with the sole intention of reviving the Applicant's suit. She submits that the application is brought within reasonable time considering the Applicant had to change advocates and generally the circumstances of the entire case.
51. She submits that the applicant having been aggrieved by the Respondent's actions interrupting her quiet possession and use of the suit parcels of land known as Nakuru Municipality Block 3/226,229, 230, 233, 234 and 237, she filed the dismissed suit seeking redress.
52. The Applicant submits that she brings the subject application on the grounds of Article 50 of *the Constitution* of Kenya 2010 on the right to fair hearing. The Applicant pleads with this Honourable court that her suit is heard and determined on merit.
53. It is the Applicant's submission that since her suit was dismissed on 28th July, 2022, she undertook the odious task of changing advocates. She further submits that on 1st September, 2022 just a month and three days after the suit was dismissed, the Applicant through a Notice of Change of Advocates appointed the firm of Geoffrey Otieno & Company Advocates with instruction that they revive her dismissed suit.
54. She submits that after, relentless effort to revive her suit, which effort was thwarted by sheer lack of zeal and mistakes of the counsel on record, the Applicant sought for a second change of advocates vide the Notice of Appointment dated 17th October, 2023.
55. The Applicant submits that thereafter, she filed the subject application on 7th November, 2023 and from the aforementioned flow of events, she submits that never at any point in time after her suit was dismissed was she indolent to make an application to revive the same.
56. The Applicant submits that her dismissed suit was competent and aptly before this Honourable court. She submits that the said suit was brought under the cause of action of adverse possession well-grounded in the *Land Registration Act*, No 3 of 2012 Laws of Kenya and *Limitation of Actions Act*, Cap 22 Laws of Kenya, Section 28 of the *Land Registration Act*, No 3 of 2012 Laws of Kenya which recognizes adverse possession as an overriding interest to land.
57. She submits that the *Limitation of Actions Act*, Cap 22 Laws of Kenya elaborates more on adverse possession. She submits that the construction of Section 7, 13 and 38 (1) of the Statute of Limitation demonstrate that in adverse possession, a person acquires a proprietary right to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period (12 years).



58. The Applicant submits that our judicial fabric also recognizes this form of ownership and therefore the Plaintiff's suit was inspired by judicial precedence and the pursuit to secure her accrued interest in the suit parcels of land. She relies on the judicial decisions of *Rose Akello Otieno v Joseph Odote & another* [2022] eKLR and *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau* (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR.
59. It is the Applicant's submission that she indeed satisfied the requisite threshold for ownership rights over the suit parcels of land as per the Doctrine of Adverse Possession as pleaded in the dismissed suit. The Applicant submits that in the dismissed suit, she satisfied that she was in non-consensual (with respect to the Defendants), actual open, notorious, exclusive and adverse use/occupation of the suit land in question for an uninterrupted period of 12 years.
60. The Applicant further submits that the dismissed suit had a formidable cause of action and a bearing in law and she prays that this Honourable court allows the application dated 7th November, 2023 so that the Applicant's dismissed suit be revived.
61. It is her submission that this application is brought in an effort to cure deficiencies or mistakes of previous counsel on record on behalf of the Applicant that resulted in the dismissal of the Applicant's suit.
62. She also submits that in an effort to avoid mistakes occasioned by non-zealous advocates, she and her husband (who is a foreigner) sought and instructed an advocate from Nairobi after having been advised that Nakuru lacked competent, meticulous and honest advocates who could not be compromised by land cartels that operated within the town like the Defendants herein.
63. The Applicant submits that the advocates on record for her, Osero & Company Advocates, misadvised and later on stopped communicating with her after instituting the dismissed suit. She further submits that the said counsel failed to attend court on 28th July, 2022 and she was unaware that the matter was scheduled for hearing on that date to show cause why the suit should not be dismissed for want of prosecutions.
64. It is the Applicant's submission that she appointed a second firm of advocates, Geoffrey Otieno & Company Advocates, in a bid to revive her suit. She submits that however, two of her applications to revive the suit were dismissed as there was improper change of advocates and the third application was dismissed on 17th April, 2023 for want of prosecution as the advocates failed to file submissions as per this Honourable Court's direction.
65. The Applicant further submits that the mistakes of her previous counsel on record should not be visited upon her as an innocent litigant. She further submits that when the suit was dismissed, she was genuinely unaware that the same was in court on the material date for her to show cause as to why the same should not be dismissed.
66. She submits that that she is a lay person as far as the legal profession is concerned and as such lacks command of knowledge and skills requisite to maneuver through the complexities of legal practice. She submits that failure by the second advocates on record to file submissions in time should not be revisited upon her too.
67. The Applicant submits that Article 159 (2) (d) of *the Constitution* of Kenya 2010 and Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya provide for the overriding principles which Courts should consider to meet the ends of justice. The Applicant submits that in the spirit of fairness and



justice, the mistakes of previous counsel on record for the Applicant should be construed as procedural technicalities that ought not to occasion injustice upon her.

68. The Applicant relies on the judicial decisions of *Gold Lida Limited v Nic Bank Limited & 2 others* [2018] eKLR. The Applicant further relies on Article 50 of *the Constitution* of Kenya and submits that if her application is not allowed, then there is imminent danger that she would be denied audience of this Honourable court which she desperately needs. The Applicant prays that the application dated 7th November, 2023 be allowed and the suit be reinstated.
69. The 1st and 4th Defendants/Respondents filed submissions on 13th December, 2023. They submit that the Applicant filed her suit in 2019 and subsequently failed to prosecute. They submit that the court in 2022 considered that it was over three years since the case was filed and no action had been taken by the Plaintiff/Applicant towards fixing the case for hearing or withdrawing the case.
70. The 1st and 4th Respondents submit that the court then proceeded to issue a Notice to Show Cause why the suit should not be dismissed for want of prosecution on 27th May, 2022. They submit that the Plaintiff/Respondent attended court on 28th July, 2022 and failed to give her reasons why the suit should not be dismissed. They submit that the court ended up dismissing the suit with costs to the Defendants/Respondents and the Honourable court issued a decree/order.
71. The 1st and 4th Defendants submit that the Plaintiff/Applicant now seeks through her application dated 7th November, 2023 to set aside the orders that were delivered on 28th July, 2022 and that the suit be reinstated on grounds that the suit was dismissed due to mistakes of her previous counsel. The rely on the judicial decision of *Pius Mulwa Masai (Suing as legal representative of the Estate of Masai Kabolelya) v Nzembi Musili & 5 others* [2021] eKLR.
72. The 1st and 4th Respondents submit that no just reason has been offered to convince this Honourable court to exercise its discretionary powers and set aside the orders delivered on 28th July, 2022 and the Plaintiff/Applicant has all the rights to pursue redress against the previous counsel for negligence and professional misconduct but should not inconvenience the Defendants/Respondents herein due to the mistake of her counsel. They rely on the judicial decision of *Geoffrey Omboko Awuor v Kenya Power & Lightning* [2021] eKLR.
73. They submit that it is evident that the Plaintiff/Applicant drove herself out of the seat of justice by refusing to prosecute her suit and nothing can salvage the situation at present dismissal. In support of this point, they rely on the judicial decisions of *Gilbert K Kabage vs Richard M Mutungi*, Nakuru High Court No 114 of 2016 (O.S) and *Utalii Transport Co Ltd and 3 others vs N.I.C Bank and another* [2014] eKLR.
74. They submit that from the above case, it is clear that the Plaintiff/Applicant is guilty of inordinate delay in bringing the present application and the allegations contained in the supporting affidavit are not viable grounds for reinstating the suit and the application be dismissed with costs.
75. The 2nd and 3rd Defendants/Respondents filed submissions on 21st February, 2024. They identify the following issues for determination:
 - a. Whether the application dated 7th November, 2023 merits the setting aside of the orders delivered on 28th July, 2022?
 - b. Whether the Applicant can simultaneously plead adverse possession and cancellation of the same title by way of fraud?
 - c. Whether the claim for adverse possession was properly instituted?



- d. Who bears the cost of this suit?
76. They submit that dismissal of a suit for want of prosecution is as good as a judgment by the court. They rely on the judicial decisions of Peter Ngome vs Plantex Company Limited (1983) eKLR and Martin L. Barasa vs Giza Systems Smart Solutions Limited (2022) eKLR.
77. The 2nd and 3rd Respondents submit that the Plaintiff/Applicant cannot purport to transfer blame for non-attendance to her Advocates on record. They submit that she claims in her supporting affidavit that despite the non-attendance by her advocates on record, she was present on the date of dismissal but did not participate in the events leading to the dismissal.
78. The 2nd and 3rd Respondents submit that if the Plaintiff/Applicant herein was diligent and vigilant to prosecute her case before the court, she would have taken the initiative to inform the Honourable Court of her presence on that very day. They rely on the judicial decisions of Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No 397 of 2002 and Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR.
79. They submit that the conduct of the Plaintiff/Applicant in this matter is one of a litigant not interested in prosecuting her case before the court. They submit that the Applicant further failed to prosecute the application dated 11th January, 2023 which this Honourable Court dismissed for want of prosecution. They submit that the current application seeks similar orders against the same parties which is an abuse of the court process.
80. The 2nd and 3rd Respondents submit that they have been diligent in proceeding with their matters in court despite the inexcusable indolence of the Plaintiff/Applicant. The 2nd and 3rd Respondents also submit that they are the registered owners of land parcel number: Nakuru Municipality/ Block 3/230 and they jointly possess a valid certificate of lease. They submit that nevertheless, the Applicant contests the title in their names on the ground that it was acquired through fraud.
81. It is their submission that the Applicant has not filed any document in support of her claim that the previous owner Kanji Valji Patel donated the suit property to her and there are no instruments of transfer to support her claim. They rely on Section 26 of the [Land Registration Act](#).
82. They further submit that a party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud in the same suit. They submit that the Applicant on one hand disputes the validity of the same title and seeks its cancellation and on the other hand seeks to benefit from it under adverse possession.
83. They submit that the Applicant cannot approbate and reprobate so as to acquire the suit property. The 2nd and 3rd Respondents rely on the judicial decisions of Wellington Lusweti Barasa & 75 others vs Lands Limited & another [2014] eKLR, Peter Lavatsa Kabwoya vs Nicholas G. Karira & another [2021] eKLR and Silvester K.Kaitany vs Nyayo Tea Zones Development Corporation & another: National Land Commission & another (Interested Parties) [2021].
84. The 2nd and 3rd Respondents submit that the applicant is merely casting aspersions on the legitimacy of the title without neither particularizing or proving the allegations of fraud while advancing the argument that she acquired the suit property through adverse possession. In support of this submission, they rely on the judicial decisions of Vijay Morjaria vs Nansigh Madhusingh Darbar & Another (2000) eKLR (Civil Appeal No 106 of 2000) and Wasui vs Musumba (2002) KLR 396.



85. They submit that the Applicant's attempts to benefit from their legal title on account of adverse possession while simultaneously challenging their title of the suit property on grounds of fraud is a mutually self-destructive contradiction warranting no relief in law.
86. They urge this Honourable court to dismiss the application since it is frivolous, vexatious, and an abuse of the court process.
87. The 2nd and 3rd Defendants/Respondents submit that it is an established legal tenet that a person claiming land by adverse possession must establish exclusive, open, peaceful, continuous, and uninterrupted possession of the land. They submit that in the present case, the Applicant has not demonstrated by clear and unequivocal evidence that her possession of the suit was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property. They rely on the judicial decision of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR.
88. They submit that the Applicant has not established when she came into possession of the property and whether the inaction or default of the true owners allowed her to enjoy at least 12 years of quiet possession and they rely on the judicial decision of *Maweu vs Liu Ranching and Farming Cooperative Society* [1985] KLR 430.
89. The 2nd and 3rd Respondents submit that the Applicant has not stated when she came into occupation of the land and when her claim of adverse possession should have commenced while also challenging the validity of the title. They submit that there is no documentary evidence showing the Applicant's interest on the land against the registered owner.
90. The 2nd and 3rd Respondents submit that in the unlikely event that her suit is reinstated, the Applicant has not satisfied all the elements to sustain a claim in the nature of adverse possession and therefore this application is unmerited and should be dismissed.
91. It is their submission that the Applicant's substantive suit was instituted by way of Plaint and her claim for adverse possession offends statutory provisions and particularly Order 37 rule 7 of the Civil Procedure Rules, 2010.
92. The 2nd and 3rd Respondents submit that the Plaintiff's claim for adverse possession is fatally defective and cannot be maintained as against the Defendants/Respondents. Reliance is placed on the judicial decision of *Njuguna Ndatho vs Masai Ituma & 2 others* Civil Appeal No 23 of 1999.
93. They submit that some of the reliefs sought by the Plaintiff/Applicant necessitate instituting the claim via way of originating summons and this is not a mere procedural technicality that can be cured by Article 159 (2) (a) but touches on procedural substance (sic).
94. The 2nd and 3rd Respondents further submit that the Plaintiff/Applicant's Plaint and the claim for adverse possession did not comply with procedural requirements and therefore cannot be maintained. They submit that the Applicant is guilty of laches. They also submit that the Applicant filed her Plaint on 22nd November, 2019 and the parties attended court several times and ultimately the Plaintiff's suit was dismissed for non-attendance and/or want of prosecution on 28th July, 2022.
95. They submit that the 2nd and 3rd Respondents counterclaim was certified ready for hearing whereupon the hearing proceeded in open court. They submit that the 2nd Respondent has already testified on his behalf and the 3rd Defendant/Respondent closed their testimony.
96. They submit that they have already filed their written submissions which the Honourable Court confirmed on 18th October, 2023 to be in the Court file and all of a sudden, the Plaintiff's Advocates served them on the eve of the mention with the current application before court.



97. The 2nd and 3rd Respondents submit further that the Applicant has offered no and/or insufficient reasons for presenting this Application far too late in time. They submit that it was incumbent upon the Plaintiff/Applicant to explain the delay which she has not done so in this matter. They rely on the judicial decisions of Joseph Ochieng T/A Aquiline Agencies vs First National Bank of Chicago, Kassam vs Bank of Baroda [2002] 1KLR 294, Lawrence Owino Omondi vs Kenneth Inea Muyera (2017) eKLR and John Mulwa Kanga'atu vs Pan African Insurance Co. Ltd [2015] eKLR.
98. The 2nd and 3rd Respondents submit that the application before this court is vexatious and without merit. They submit that the Applicant has previously sought similar orders to no avail; this being the second attempt to revive the suit which was dismissed due to want of prosecution and failure to comply with various mandatory statutory provisions.
99. The 2nd and 3rd Respondents rely on Section 27 of the *Civil Procedure Act* and the judicial decision of Stanley Kaunga Nkarichia vs Meru Teachers College & another [2016] eKLR. They submit that they have been unduly burdened defending the numerous applications after diligently attending court to defend the main suit and the first application both of which were dismissed due to non-attendance and/or want of prosecution.
100. The 2nd and 3rd Respondents submit that the Plaintiff/Applicant cannot purport to transfer blame for non-attendance to her advocates on record to escape blame for failing to prosecute her case for more than 4 years while the 2nd and 3rd Respondents have faced hardship due to laxity, indifference and/or negligence of the Plaintiff/Applicant.
101. The 2nd and 3rd Respondents pray to this Honourable court to find them deserving of costs to compensate them for the expenses incurred in defending this suit.
102. The Plaintiff/Applicant filed supplementary submissions on 17th January, 2024 and identified the following issue for determination: whether the challenge raised by the 2nd and 3rd Defendants/Respondent as to the viability of the plaint as alternative vehicle for seeking redress before the court by the Plaintiff/Applicant is valid and tenable.
103. The Plaintiff/Applicant submits that the challenge raised by the 2nd and 3rd Defendants/Respondents as to the viability of the plaint as an alternative vehicle (alternative to Originating Summons) for seeking redress before this Honourable Court is untenable and is a vacuous ploy by the former to subvert the course of justice. They submit that the 2nd and 3rd Defendants/Respondents seek to rely on a non-existent procedural technicality in order to distract the court and the Plaintiff/Applicant from the course of justice. Reliance is placed on the judicial decision of Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & another [2020] eKLR.
104. The Plaintiff/Applicant submits that the use of a plaint in the instant case in advancing her claim for adverse possession is not perilous as the same does not offend any provisions of law and the challenge raised by the 2nd and 3rd Defendants in their Replying Affidavit is only meant to subvert the course of justice.
105. They submit that it is apparent that that the 2nd and 3rd Defendants/Respondents statements of defence and submissions dated 13th March, 2020 and 13th October, 2023 respectively did not allude to any objection to the primary mode of initiating the suit by the Plaintiff/Applicant. They submit that no other plausible explanation exists as to why the 2nd and 3rd Defendants seek to cast aspersions regarding the said mode of approaching the court now even after judgment in the cause was long entered.
106. The Plaintiff/Applicant submits that the 2nd and 3rd Defendants/Respondents ought her to have her day in court and ventilate her property rights over the suit property and in the unlikely event that the



court finds her claim unjustifiable; nothing would stop it from asserting the 2nd and 3rd Defendants' legal rights over the suit property. They submit that such vile and weak attempts by the 2nd and 3rd Defendants/Respondent to prevent the Plaintiff/Applicant from having her day in court demonstrate that the 2nd and 3rd Defendants/Respondents do not believe in the strength of their case and their only recourse is to prevent the former from getting the court's audience. The Plaintiff/Applicant relies on Article 159 (2) of *the Constitution* of Kenya and submits that she deserves to have her day in court to ventilate her property rights.

ANALYSIS AND DETERMINATION.

107. I have considered the Application, the Replying affidavit and the rival submissions filed. In my opinion, the issues that arise for determination are as follows:

- a. Whether the Court should grant leave to the firm of SHETH AND WATHIGO ADVOCATES to come on record for the Applicant in place of the firm of GEOFFREY OTIENO & COMPANY ADVOCATES or otherwise from OSERO & COMPANY ADVOCATES?
- b. Whether the court should set aside its orders delivered on 28th July, 2022 dismissing the Plaintiff's suit for non-attendance and/or want of prosecution and the consequent ex parte proceedings on the counterclaim?

A. Whether the Court should grant leave to the firm of Sheth And Wathigo Advocates To Come On Record For The Applicant In Place Of The Firm Of Geoffrey Otieno & Company Advocates Or Otherwise From Osero & Company Advocates?

108. There is a consent order on the record filed by counsel for the Plaintiff on 21st November, 2023. It is worded as follows:

“That the firm of Sheth & Wathigo Advocates be and is granted leave to come on record the matter (sic) in place of Geoffrey Otieno & Co Advocates for the Plaintiff”

109. My reading of this consent is that its intention is to communicate the fact that the firm previously on record for the Plaintiff i.e. Geoffrey Otieno & Co. Advocates has no objection to leave being granted to the firm of Sheth & Wathigo coming on record in their place. Ultimately, it is the court that grants leave and no amount of consenting can take this discretion and/or authority from the court.

110. As I embark on my analysis and determination, I note that the following facts remain undisputed:

- a. That the Plaintiff's suit was dismissed for want of prosecution with costs on 28th July, 2022.
- b. That the 2nd and 3rd Defendant's filed a counterclaim to the Plaintiff's suit.
- c. The counterclaim was heard on 23rd September, 2023 in the absence of the Plaintiff/Applicant and is pending submissions and judgement.

111. None of the parties have objected to the question of leave being granted to the Applicant's counsel and I have no basis for disallowing the same. Further the right to representation is enshrined in *the constitution*. It is in the interest of justice to grant leave to the Applicant's counsel to come on record for her.



B. Whether the court should set aside its orders delivered on 28th July, 2022 dismissing the Plaintiff's suit for non-attendance and/or want of prosecution and the consequent ex-parte proceedings on the counterclaim?

112. The court record shows that the Plaintiff/Applicant's suit was dismissed for want of prosecution on 28th July, 2022 and the 2nd and 3rd Defendants counterclaim proceeded for hearing on 23rd September, 2023 in the absence of the. The circumstances surrounding this dismissal are as follows:
- a. This court served a notice to show why the suit should not be dismissed under order 17 Rule 2 of the Civil Procedure Rules 2020. The notice was served upon both counsel for the Plaintiff (Osero & Company Advocate) and the 1st Defendant's Advocate (Karanja Mbugua & Company Advocate) and the 2nd and 3rd Defendant's advocate (Kipkenda & Company Advocates)
 - b. On the date scheduled for hearing of the notice to show cause, the Plaintiff's counsel was absent. The 1st Defendant's counsel and the 2nd and 3rd Defendant's counsel were present.
 - c. Subsequent to the dismissal for want of prosecution, the firm of Geoffrey Otieno & Company filed a notice of change of advocates on 6th September, 2022 and an application dated 1/9/2022 to set aside the orders of dismissal. This was about five weeks after the dismissal.
 - d. This application was withdrawn on 8th November, 2022 after it became apparent to counsel for the Plaintiff that they had not sought leave to come on record for the Plaintiff, the suit having been dismissed.
 - e. The Plaintiff's counsel filed another application dated 2nd November, 2022 but made the same error; did not seek leave to come on record. This application was mentioned severally for hearing and particularly to confirm service upon the 4th and 5th defendant. Eventually service was effected upon the 4th and 5th Defendant and directions taken for hearing which included filing of submissions.
 - f. On 17th April, 2023, the application was for mention to confirm filing of submissions and to take a ruling date. Counsel for the Plaintiff/Applicant was absent and had not filed submissions as directed which meant that other parties could not have responded to their submissions. Inevitably, the application was dismissed for want of attendance and prosecution.
 - g. Subsequent to dismissal of this application dated 2nd November, 2023, a date was taken for hearing of the counterclaim of the 2nd and 3rd Defendant.
 - h. On the date appointed for hearing of the counterclaim, counsel for the 2nd and 3rd Defendant confirmed having served the plaintiff/ Applicant's counsel with the hearing notice. The affidavit of service is sworn on 25th April, 2023 and filed on 5th May, 2023. The court ordered that the counterclaim proceeds but the hearing did not proceed as counsel was under the mistaken belief that the hearing would proceed virtually.
 - i. The counter claim was adjourned to 26th September, 2023 for hearing. On the said date, counsel for the 2nd and 3rd Defendant confirmed having served the Plaintiff/Applicant's counsel with the hearing notice. The affidavit of service is sworn by one Simon Velela on 12th July, 2023 and filed on 13th July, 2023. On this date, the Plaintiff appeared in court without her counsel and sought more time to put in her defence. The Judge's hand-written notes are as follows;



“This matter is for hearing of the 2nd & 3rd Defendant’s counterclaim the suit having been dismissed on 28th July, 2022.

Subsequently an application to reinstate the suit was filed. the same application is dated 2nd November, 2023. It was dismissed on 17th April, 2023 for want of prosecution.

As things remain, there is counsel on record appearing for the Plaintiff. Counsel has been served and is aware of today’s hearing date. It is for that reason that counsel has sent his client the Plaintiff to court but has chosen not to attend the hearing of the counterclaim. I order that the counterclaim proceeds to hearing. Justice must be done and must be seen to be done to all parties to a suit.”

- j. The counterclaim proceeded to hearing and directions taken for filing submissions. Before a judgment date was issued, the Applicant filed the instant application, which application seeks orders similar to those sought in previous applications. They are summarised as follows:
 - i. That the firm of Sheth & Wathigo be granted leave to come on record for the Plaintiff/Applicant.
 - ii. That the orders of dismissal of 28th July, 2022 be set aside.
 - iii. That the counterclaim be heard on merit.
113. The Applicant/Plaintiff submits that the instant application has been brought in good faith and within reasonable time considering that she had to change advocates. The Applicant submitted that on 1st September, 2022 just a month and three days after the suit was dismissed, the Applicant through a Notice of Change of Advocates appointed the firm of Geoffrey Otieno & Company Advocates with instruction that they revive her dismissed suit. She submits that after relentless effort to revive her suit, which effort was thwarted by sheer lack of zeal and mistakes of the counsel on record, the Applicant sought for a second change of advocates vide the Notice of Appointment dated 17th October, 2023.
114. The Applicant submits that thereafter, she filed the subject application on 7th November, 2023 and from the aforementioned flow of events, she submits that never at any point in time after her suit was dismissed was she indolent to make an application to revive the same.
115. The 1st and 4th Respondents submit that the Plaintiff Applicant filed her suit in 2019 and subsequently failed to prosecute her case. They submit that the court in 2022 considered that it was over three years since the case was filed and no action had been taken by the Plaintiff/Applicant towards fixing the case for hearing or withdrawing the case.
116. The 2nd and 3rd Respondents submit that the Plaintiff/Applicant cannot purport to transfer blame for non-attendance to her Advocates on record.
117. The Applicant has approached this court under provisions of Order 12 Rule 7 of the Civil Procedure Rules. It provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
118. The courts discretion is key in determining whether to set aside a judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff. This discretion has to be exercised judiciously, as was stated



the judicial decision of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the judicial decision of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR, where that court held thus:

“.....this 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.” (Emphasis mine)

119. In the judicial decision of *Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998 the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicants were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend.

Clearly the Applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the Applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

120. This court has given the Plaintiff/Applicant several opportunities to prosecute her claim and the Plaintiff/Applicant has refused to take up the opportunities.

121. In *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR the learned Judge cited with approval the decision in “*Investment Limited –Versus - G4s Security Services Limited* (2015) eKLR where court held;

“ This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of *the Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of *the Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.

122. The court notes that the Plaintiff filed this suit on 24th May, 2019. I am faced with what I would term as one of the worst cases of “mistake of counsel” that I have encountered. How did the Plaintiff/Applicant get so unlucky with her choice of representation?

123. It is not just that the Plaintiff dragged the Defendants to court and has kept this suit looming over their heads since the year 2019. While it is true that mistake of counsel should not be visited on the client, I am also aware that suits belong to the parties and not to counsels who are instructed to represent them.



There is no amount of blaming counsel for mistake that will be good enough to exonerate a litigant from the duty of ensuring that suits instituted on his/her instruction are dealt to conclusion.

124. The Applicant has also sought to set aside the ex-parte proceedings in respect of the counterclaim filed by the 2nd and 3rd Defendant. As outlined in preceding paragraphs, directions on filing submissions in the counterclaim have been taken after one witness testified in support of the 2nd and 3rd Defendants and their case closed.
125. In the interest of justice, I am constrained to exercise my discretion in favour of the Plaintiff/Applicant in respect of the counterclaim by the 2nd and 3rd Defendant. I shall set out the manner of proceeding with it in the disposal paragraph.
126. As regards the Plaintiff/Applicant's claim as against the other Defendants/Respondents, I decline to set aside the order of 28th July, 2022 dismissing the suit against them for want of prosecution.

Disposition.

127. Consequently, the Plaintiff/Applicant's application dated 7th November, 2023 is allowed in the following terms:
 - a. Leave is hereby granted to the firm of Sheth and Wathigo Advocates to come on record for the Plaintiff in place of the firm of Geoffrey Otieno & Company Advocates and/or Osero & Company Advocates.
 - b. The Plaintiff shall within 14 days of the date hereof file a response to the counterclaim, list of documents and witness statements.
 - c. The 2nd and 3rd Defendant's case is hereby re-opened for purposes of cross-examination by the Plaintiff. The 2nd and 3rd Defendant are hereby granted leave to call additional witnesses and file additional documents if necessary.
 - d. The Plaintiff shall pay to the 2nd and 3rd Defendant thrown away costs of Kshs. 100,000 within 14 days of the date hereof.
 - e. The order of 28th July, 2022 dismissing the Plaintiff's suit for non-attendance and/or want of prosecution stands.
 - f. The cost of this application shall abide the outcome of the counterclaim.
128. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6th DAY OF JUNE, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Osumba for Samora for the 2nd and 3rd Defendant/ Respondent.

No appearance for the Plaintiff/Applicant.

No appearance for the 1st and 4th Defendant/Respondent.

No appearance for the 5th Defendant/ Respondent.

Court Assistant; Mr. Joseph Makori.

