



**Onani v Muhahala & 2 others (Environment & Land Case  
18 of 2021) [2024] KEELC 5554 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5554 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 18 OF 2021**

**BN OLAO, J  
JULY 30, 2024**

**BETWEEN**

**GABRIEL OUNDO ONANI ..... PLAINTIFF**

**AND**

**ODONGO MUHAHALA ..... 1<sup>ST</sup> DEFENDANT**

**OBWAYO ODONGO ..... 2<sup>ND</sup> DEFENDANT**

**MICHAEL ODWORI ODERO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Gabriel Oundo Onani (the Respondent for purposes of this ruling) was the Applicant in the Originating Summons filed herein on 28<sup>th</sup> October 2021. He sought against Odongo Muhahala, Obwayo Odongo and Michael Odero (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants for purposes of this ruling and who were the Respondents in the Originating Summons), the main orders that he had acquired by way of adverse possession the land parcel No Bunyala/bulemia/813 (the suit land) and further, that he be registered as proprietor thereof and that the Applicants be perpetually barred from using the said land.
2. The record shows that on 6<sup>th</sup> December 2021, the 3<sup>rd</sup> Applicant, on behalf of himself and the other Applicants, was served with the Originating Summons. However, although the firm of B. M. Ouma & Company Advocates entered appearance for them on 14<sup>th</sup> November 2022, no response was filed on their behalf.
3. Subsequently, on 20<sup>th</sup> March 2023 when the matter came up for hearing, neither the Applicants nor Mr Ouma their counsel was present in Court. An application by Mr Wambura holding brief for Mr Ouma seeking to have the suit adjourned was declined by the Court. The Respondent proceeded to testify in support of his case. By a reserved judgment delivered on 23<sup>rd</sup> March 2023, this Court entered judgment for the Respondent against the Applicants as prayed in the Originating Summons although



with regard to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, judgment was only in respect to one prayer. No appeal appears to have been filed against it.

4. The Applicants have approached this Court vide their Notice of Motion dated 23<sup>rd</sup> June 2023 premised under the provisions of Article 159 of *the Constitution* as well as Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*. They seek the following orders:
  - a. Spent.
  - b. That this Honourable Court be pleased to issue an order setting aside the proceedings of 20<sup>th</sup> March 2023 and the judgment delivered on 23<sup>rd</sup> March 2023 as well as all consequential orders.
  - c. That this Honourable Court be pleased to order a stay of execution of the judgment delivered on 23<sup>rd</sup> March 2023.
  - d. That the Applicants be allowed an opportunity to file their response to the Originating Summons and the draft Replying Affidavit be deemed as duly filed upon payment of the requisite Court fees.
  - e. That the costs of this application be provided for.
5. The application is supported by the affidavit of Odongo Muhahala the 1<sup>st</sup> Applicant and is also premised on the grounds set out therein.
6. The gravamen of the application is that the 3<sup>rd</sup> Applicant is the registered proprietor of the suit land and their advocate did not attend Court on the hearing date because he was engaged in Kisumu High Court P&a Case No 514 of 2007 which had been granted a last adjournment. That the hearing of the suit proceeded ex-parte after an application for adjournment by Mr Wambura who was holding brief for their advocate Mr Ouma was declined. That they have a meritorious defence to the Respondent's claim which they should be allowed to file so that they can be given an opportunity to be heard.
7. Annexed to the supporting affidavit are the following documents:
  1. A draft Replying affidavit in response to the Originating Summons.
  2. A copy of the Decree issued herein on 16<sup>th</sup> May 2023.
  3. Certificate of delivery of judgment by email.
  4. Copy of judgment delivered herein on 23<sup>rd</sup> March 2023.
8. The Respondent filed grounds of opposition dated 19<sup>th</sup> February 2024 raising the following grounds:
  1. That the Applicants were properly served with the Originating Summons.
  2. That the Applicants were also served with the mention and hearing notice and were therefore all aware of the suit.
  3. That the Applicants' advocate was also aware about the hearing date of 20<sup>th</sup> March 2023.
  4. That there is no valid reason to warrant a review or setting aside of the judgment.
  5. The application is therefore without merit and is scandalous, frivolous and otherwise an abuse of the process of this Court and should therefore be dismissed with costs.
9. The following documents are annexed thereto:
  1. Copy of Mention Notice addressed to B. M. Ouma Advocates dated 23<sup>rd</sup> October 2023.



2. Application for consent of the Land Control Board.
  3. Transfer of Interest in Land Form.
  4. Copy of Decree issued on 16<sup>th</sup> May 2023.
10. When the application was placed before me for direction on 10<sup>th</sup> July 2023, I directed that it be canvassed by way of written submissions. Those submissions were only filed by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Applicants. Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Respondent did not file any submissions.
  11. I have considered the application, the supporting affidavit and annexures, the grounds of opposition and the only submissions filed by counsel for the Applicants.
  12. There is not much divergence between the parties in this application. It is common ground that service of the Originating Summons on the Applicants is not in dispute. That they did not file any response to the Originating Summons although in their submissions, they blame an un-named advocate for letting them down by not filing their response to the Originating summons. This necessitated the engagement of their current counsel Mr Ouma who however did not turn up on the hearing date as he was engaged in another case in Kisumu where he had been granted the last adjournment. Indeed Mr Ouma sent Mr Wambura to hold his brief and seek an adjournment which this Court declined. I think other than failing to disclose the identity, if any, of their previous counsel whom they had instructed and who they claim did not file their pleadings, the Applicants have largely approached this Court with clean hands especially as there has been no attempt to deny service which is usually the fulcrum on which many applications seeking the setting aside of ex-parte judgments is hinged.
  13. However, no explanation has been proffered as to why their counsel Mr Ouma, having filed a memorandum of appearance on their behalf on 14<sup>th</sup> November 2022 had not filed any response to the Originating Summons four months down the line so that by the time the suit came up for hearing on 20<sup>th</sup> March 2023, the suit was not defended. Indeed that was one of the main reasons why the application for adjournment by Mr Wambura was declined. Most importantly, it is not clear why Mr Ouma, knowing very well that he had another matter in Kisumu Court where he had been granted a last adjournment, proceeded to fix this matter for hearing on 20<sup>th</sup> March 2023. That was a mistake by counsel and whereas litigation belongs to the parties, it is also now well settled that a party should not suffer the penalty of not having his case determined on its merits due to a lapse on the part of his counsel – Philip Chemwolo & Another -v- Augustine Kubende 1986 KLR 492 [1982 – 88 I KAR 1036].
  14. What the Applicants seek herein is the exercise of my discretion. The Respondent did not file any replying affidavit. Grounds of opposition cannot be sufficient to rebut a sworn affidavit because they basically address issues of law. There is therefore a presumption that what is averred in an affidavit as factual evidence has been admitted – [\*DANIEL KIBET MUTAI & OTHERS -V- AG C.A. CIVIL APPEAL NO 95 of 2016\*](#) [2019 eKLR]. Refer also to *Attorney General & Another -v- Mohamed Balala & 11 Others 2014* eKLR where the Court said:

“We do not think the grounds of opposition were sufficient to counter the complaints by the Respondents. They were neither a defence nor evidence that the High Court could have relied on to find favour with their arguments. The grounds, so to speak were a mere skeleton which required beefing up by way of evidence either through a replying affidavit or other means. Being a mere skeleton, the Judge could not really tell what the appellants case was or what they were upto. The grounds required to be elucidated, elaborated and expounded



upon by the appellants so that the High Court could appreciate the issues being ventilated by the appellants in answers to the Respondent's allegation."

15. The Court has a wide discretion in determining whether or not to set aside a judgment. I am also guided by the decision in the case of Sebei District Administration -v- Gasyali 1968 E.A. 300 where it was held thus:

"The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court." Emphasis mine.

Guided by all the above and taking into account the circumstances of this case, I am persuaded to allow the Notice of Motion dated 27<sup>th</sup> June 2023 but on terms.

16. I therefore make the following disposal orders:

1. The ex-parte judgment dated 23<sup>rd</sup> March 2023 and all consequential orders arising therefrom are hereby set aside.
2. The Applicants are granted 15 days from the date of this ruling to file and serve their responses to the Originating Summons together with all their necessary documentary evidence.
3. The Applicants will also within 30 days of the delivery of this ruling pay to the Respondent the sum of Kshs.20,000 being thrown away costs.
4. Thereafter, the matter be listed for pre-trial before the Deputy Registrar on 9<sup>th</sup> September 2024 to confirm compliance and fix a date for hearing.
5. In default of any of the above conditions, the ex-parte judgment dated 23<sup>rd</sup> March 2023 shall revert and the Respondent will be at liberty to execute the same.

**BOAZ N. OLAO**

**JUDGE**

**30TH JULY 2024**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF JULY 2024.**

**BOAZ N. OLAO**

**JUDGE**

**30TH JULY 2024**

