



Adipo v Obonyo & 8 others; Othuon & 3 others (Applicant) (Environment and Land Case Civil Suit 444 of 2015) [2024] KEELC 13955 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 444 OF 2015
SO OKONG'O, J
DECEMBER 19, 2024**

BETWEEN

NAUM OTHUON ADIPO PLAINTIFF

AND

SILVANUS OBONYO & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS DEFENDANT

AND

STEPHEN OCHIENG OTHUON APPLICANT

VITALIS OMONDI OTHUON APPLICANT

FREDRICK OTIENO OTHUON APPLICANT

OUMA CHARLES OTHUON APPLICANT

(FORMERLY ELC SUIT NO. 89 OF 2010)

RULING

1. The plaintiff brought this suit against the defendants on 11th June 2010 seeking several reliefs relating to all that parcel of land known as Uholo/Ugunja/265 (hereinafter referred to as “the suit property”). The plaintiff averred that he was the administrator of the estate of Zacharia Usodho Mungala and Batholomayo Adipo both deceased (hereinafter referred to as “the deceased”). The plaintiff averred that the deceased were registered as the proprietors of the suit property as tenants in common in equal shares. The plaintiff averred that one, John Onyango Adipo illegally and fraudulently caused the suit property to be transferred to his name after which he subdivided the same and transferred portions to several parties, some of whom were not the beneficiaries of the deceased’s estate. The deceased sought the cancellation of all the transactions relating to the suit property and the reversion of the ownership of the property to the name of the deceased.



2. The 1st to 6th defendants entered appearance and filed statements of defence denying the plaintiff's claim. The 7th, 8th and 9th defendants neither entered appearance nor filed statements of defence. The plaintiff took no action to prosecute the suit after the same was filed. On 9th May 2016 after a lapse of almost 6 years from the time the suit was filed, the suit was dismissed for want of prosecution.
3. What is now before the court is an application brought by Stephen Ochieng Othuon, Vitalis Omondi Othuon, Fredrick Otieno Othuon And Ouma Charles Othuon (hereinafter referred to as "the applicants") on 19th February 2024; 14 years after the suit was filed and almost 8 years after the suit was dismissed for want of prosecution. In the application, the applicants have sought the following orders;
 1. That the firm of B.M.Ouma & Company Advocates be allowed to come on record for the applicants.
 2. That the court be pleased to set aside the orders made on 9th May 2016 dismissing the suit for want of prosecution.
 3. That the plaintiff, Naum Othuon Adipo, deceased be substituted in the suit with the applicants.
 4. That the costs of the suit be in the cause.
4. The application that was supported by the affidavit of the 4th applicant was brought on several grounds. The applicants averred that the deceased plaintiff (hereinafter referred to only as "the plaintiff") died on 18th December 2014 before the suit was dismissed on 9th May 2016. The applicants averred that after the dismissal of the suit, their previous advocate misadvised them to file a fresh suit which they did namely, Kisumu ELC No. 36 of 2016(O.S) (hereinafter referred to as "the new suit"). The applicants averred that the delay in bringing the present application was caused by the wrong advice that was given by their previous advocates who advised them to file a new suit instead of applying to reinstate the present suit. The applicant averred that the mistake of an advocate should not be visited against his client and that the dispute between the parties was still subsisting. The applicants averred that it was in the interest of justice that the orders sought be granted.
5. In their supporting affidavit, the applicants averred that they were the legal representatives of the deceased and that when the suit was dismissed for want of prosecution, it was not brought to the attention of the court that the plaintiff was deceased. The applicants averred further that the dismissal of a suit is a draconian act and that the doors of justice should not be closed to a litigant because of a mistake of his advocate.
6. The applicants' application was opposed by the 1st to 6th defendants through grounds of opposition dated 16th April 2024. The defendants contended that the application was fatally defective and that the delay in bringing the application was inordinate. The defendants averred that in any event, the suit had abated.
7. The application was argued on 30th April 2024. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the 1st to 6th defendants in opposition to the application. The applicants' application has two limbs. The first limb of the application is seeking the setting aside of the order made on 9th May 2016 dismissing the suit for want of prosecution and the second limb is seeking the substitution of the deceased plaintiff with the applicants.
8. The plaintiffs' suit was dismissed under Order 17 Rule 2 of the *Civil Procedure Rules* in the absence of the plaintiff who did not appear in court to show cause why the suit should not be dismissed for



want of prosecution. Although Order 17 Rule 2 of the [Civil Procedure Rules](#) does not provide for the setting aside of the orders of dismissal of suits for want of prosecution, I am of the view that since the order was made in the absence of the plaintiff, the plaintiff could move the court to set it aside under Order 51 Rule 15 of the Civil Procedure Rules which provides as follows:

15. The court may set aside an order made ex parte.”

9. The power of the court to set aside an ex-parte order is discretionary. The burden was upon the applicants’ who were the legal representatives of the plaintiff to establish that they deserved the exercise of the court’s discretion. The applicants had a duty to demonstrate that there existed sufficient grounds to warrant the setting aside of the order of this court made on 9th May 2016. The court’s discretion must be exercised judiciously. The rationale behind the judicious exercise of discretionary powers was explained in [Patriotic Guards Ltd. v James Kipchirchir Sambu](#) [2018] eKLR where the court stated as follows:

“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.”

10. In [Shah v. Mbogo](#) [1967] EA 116 where the court was dealing with an application to set aside an ex parte judgment, the court stated that:

“...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.”

11. 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”.

12. Applying the said principles to this case, I am not inclined to exercise my discretion in favour of the applicants. As I mentioned earlier in the ruling, by the time this suit was dismissed on 9th May 2016, no action had been taken to prosecute the suit for almost 6 years. The applicants have not explained this long period of inactivity. The plaintiff died on 18th December 2014. By the time of his death, the case had remained dormant for 4 years. The death of the plaintiff could not therefore be the reason for non-prosecution of this suit. In the absence of any explanation for the non-prosecution of the suit, the suit was properly dismissed for want of prosecution. I wish to add that since the plaintiff died on 18th December 2014, the suit had abated by the time it was dismissed by the court on 9th May 2016. The suit has not been revived to date and that is not one of the orders sought by the applicants. The suit having abated, it ceased to exist unless it was revived under Order 24 Rule 7(2) of the [Civil Procedure Rules](#) and it was not even necessary for the court to strike it out. For the foregoing reasons, I find no merit in the limb of the application seeking the setting aside of the order made on 9th May 2016.



13. With regard to the second limb of the application, I am of the view that there is no suit in which the applicants can be substituted as plaintiffs. I have made a finding that this suit was properly dismissed for want of prosecution and that there is no reason given to warrant the setting aside of the dismissal order. The suit therefore remains dismissed. In any event, the suit abated on 18th December 2015 and has not been revived. The applicants cannot be substituted as plaintiffs in an abated suit.
14. For the foregoing reasons, I find no merit in the Notice of Motion application dated 19th February 2024. The application is dismissed with costs to the 1st to 6th defendants.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

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

Mr. Ouma for the Applicants

Mr. Odeny for the Defendants

Ms. J.Omondi-Court Assistant

