



**Ogosi v Gworo (Environment & Land Case 5 of 2022)
[2023] KEELC 15823 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 5 OF 2022
GMA ONGONDO, J
FEBRUARY 28, 2023**

BETWEEN

JOSEPH ONYANGO OGOSI PLAINTIFF

AND

CORNEL AKACHA GWORO DEFENDANT

RULING

1. In an application by way of a notice of motion dated March 7, 2022 and duly filed in court on March 9, 2022 under, inter alia, order 10 rule 11 and order 12 rule 11 of the [Civil Procedure Rules, 2010](#), the plaintiff/applicant through the firm of SM Sagwe and Company Advocates, is seeking the following orders;
 - a. Spent
 - b. That the hon court be pleased to set aside orders of dismissal made on December 17, 2018 and reinstate the suit for hearing on merit.
 - c. That upon granting prayer (b) above the suit be fixed for hearing on merit.
2. The application is premised on seven grounds set out on the face of the same alongside the applicant's affidavit of ten paragraphs sworn on even date. In a nutshell, the applicant's complaint is that the suit was dismissed on March 17, 2018 in the absence of his counsel and himself as revealed in the court proceedings (J OO 2). That during the time, his counsel was sick with a swollen leg as demonstrated in the treatment chits and photograph (JOO 1a and b) herein. That he came to learn about the dismissal order when the respondent intended to sell the suit land and that the orders sought in the application are not prejudicial to the respondent.



3. The respondent was served with the application as discerned in EMS Kenya World Wide Courier shipment waybill number xxxx of February 22, 2022, among others. He had the option to appear and respond to the application and failed to do so; see also *Ogada v Mollin [2009] KLR 620*.
4. On March 9, 2022, the court directed that the application be heard by written submissions.
5. Consequently, the applicant's counsel filed submissions dated October 21, 2022 making reference to the prayers in the application and implored the court to grant the same. It was submitted that SM Sagwe, learned counsel for the applicant was indisposed as per the photograph attached to the submissions thus, his absence from court which led to the dismissal of the suit. Counsel relied on *Kihuyu Ndirangu v Reuben Kinyanjui [2003] eKLR* and *Trade Circles Ltd v Family Bank Ltd and another [2021] eKLR*, to buttress the submissions.
6. The respondent's counsel failed to file submissions in the application.
7. I have carefully considered the entire application and the submissions on record herein. Therefore, is the application meritorious?
8. The instant suit was dismissed under order 17 rule 2 (1) of the Civil Procedure Rules, 2010 on December 17, 2018.
9. It is trite law that the right to be heard before an adverse decision is made against a party is fundamental and permeates the entire justice system; see *James Kanyiita Nderitu and another v Marios Philotas Gbikas [2016] eKLR*.
10. Furthermore, the applicant has the right of access to justice and unlimited right to fair hearing of the suit as provided for under articles 48, 50 (1) and 25 (c) of the *Constitution* of Kenya, 2010. This court has the discretion to reinstate suit under order 17 rule 2 (2) of the Civil Procedure Rules, 2010. The same calls for hearing on merits.
11. This court has the discretion to reinstate suit under order 17 rule 2 (2) of the Civil Procedure Rules, 2010. The applicant cannot be condemned at the alter of his counsel's indisposition. The suit calls for hearing on merits.
12. Sections 1A, 1B, 3 and 3A of the Civil Procedure Rules, 2010 govern overriding objective, inherent jurisdiction and special powers of the court.
13. So, I find the application unopposed, cogent and merited.
14. Wherefore, the application is hereby allowed in terms of orders sought therein as stated in paragraph 1 (b) and (c) hereinabove.
15. Costs of the application be in the cause.
16. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 28TH DAY OF FEBRUARY 2023.

G.M. A ONGONDO

JUDGE

PRESENT

a. Defendant in person

b. Mutiva, Court Assistant.

