



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nganga v Gitara & 23 others (Environment & Land Case  
45A of 2019) [2023] KEELC 18040 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18040 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 45A OF 2019**

**LA OMOLLO, J  
JUNE 19, 2023**

**BETWEEN**

**CHARLES NJIHIA NGANGA ..... PLAINTIFF**

**AND**

**JOSEPH KIMANI GITARA/PETER NJONJO GATHONI ..... 1<sup>ST</sup> DEFENDANT**  
**BETH WANGARI KAHURIA ..... 2<sup>ND</sup> DEFENDANT**  
**NJENGA MUNIU/MAMA PETER ..... 3<sup>RD</sup> DEFENDANT**  
**HEZEKIAH NJUGUNA IRAYA ..... 4<sup>TH</sup> DEFENDANT**  
**JECINTA WAITHIRA KAMAU/MR.WAIRUBI ..... 5<sup>TH</sup> DEFENDANT**  
**EMILLY NYAMBURA KAIRU/MR NG'ANG'A ..... 6<sup>TH</sup> DEFENDANT**  
**JOSEPH LUKA MBUGUA KAMAMA ..... 7<sup>TH</sup> DEFENDANT**  
**MACHARIA HIRAM MWANGI ..... 8<sup>TH</sup> DEFENDANT**  
**NGANGA MATU/JOHN GICHURU MWANGI ..... 9<sup>TH</sup> DEFENDANT**  
**SAMMY NJIRI GITOGO ..... 10<sup>TH</sup> DEFENDANT**  
**ALICE MIHIOKO KIMANI ..... 11<sup>TH</sup> DEFENDANT**  
**WILFRED NGANGA KAMAU/MS. NJERI ..... 12<sup>TH</sup> DEFENDANT**  
**REUBEN KARIUKI WANJIRU ..... 13<sup>TH</sup> DEFENDANT**  
**GATUNA KUNGU ..... 14<sup>TH</sup> DEFENDANT**  
**JOHN RUIRU MUCHIRI ..... 15<sup>TH</sup> DEFENDANT**  
**TABITHA NJERI MICHORE/MR. WAIRUBI ..... 16<sup>TH</sup> DEFENDANT**  
**ANDREW GICHUKI CHEGE/BABA NJERI ..... 17<sup>TH</sup> DEFENDANT**



JOHN MWANGI KAHUNGURA/MR. KAMAU .....	18 <sup>TH</sup> DEFENDANT
KIMANI NDIRANGU/MR. NGANGA .....	19 <sup>TH</sup> DEFENDANT
DAVID KAMWEA NGANGA/MR. WAMWEA .....	20 <sup>TH</sup> DEFENDANT
PERPETUAH TUTA KAMAU .....	21 <sup>ST</sup> DEFENDANT
DAVID N. KARURU/ MR. ISOE .....	22 <sup>ND</sup> DEFENDANT
LAND REGISTRAR NAKURU .....	23 <sup>RD</sup> DEFENDANT
TAYARI FARMERS COMPANY LIMITED .....	24 <sup>TH</sup> DEFENDANT

## RULING

### Introduction

1. This ruling is in respect of the 24<sup>th</sup> Defendant/Applicant's Notice of Motion application dated 31<sup>st</sup> October, 2022. The said application is expressed to be brought under Section 1A and 3A of the Civil Procedure Act, Order 37 Rule 6, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The application is filed under Certificate of Urgency seeking the following orders;
  - a. Spent
  - b. That this honourable court be pleased to set aside the *ex parte* judgement entered in default of appearance and defence, and all consequential orders arising therefrom, restore the suit for hearing and final determination on merits and grant leave to the 24<sup>th</sup> Defendant to file and serve its Statement of defence out of time and or in the alternative the 24<sup>th</sup> defendant statement of defence filed on 12<sup>th</sup> July, 2022 and dated 20<sup>th</sup> May, 2022 be deemed as properly on record upon payment of the requisite filing fees.
  - c. That the honourable court be pleased to grant leave to the applicant to file its statement of defence against the plaintiff/respondent's suit out of time.
  - d. That costs of this application be provided for.
3. The Application is based on the grounds on its face and supported by the affidavit of Milton Kamau Mbugua. The supporting affidavit is sworn on 31<sup>st</sup> October, 2022.

### Factual Background.

4. The Plaintiff filed his Amended Plaintiff dated 21<sup>st</sup> April, 2021 seeking the following orders;
  - a. An order declaring that all the undermentioned 26 plots are superimposed on my shamba no 623 as per the Olweny & Associates surveyors Map and are hereby cancelled;
    - a. Mau Summit/ Molo, Block 7/1529
    - b. Mau Summit/ Molo, Block 7/1530
    - c. Mau Summit/ Molo, Block 7/1531
    - d. Mau Summit/ Molo, Block 7/1532



- e. Mau Summit/ Molo, Block 7/1533
  - f. Mau Summit/ Molo, Block 7/1534
  - g. Mau Summit/ Molo, Block 7/1535
  - h. Mau Summit/ Molo, Block 7/1536
  - i. Mau Summit/ Molo, Block 7/1537
  - j. Mau Summit/ Molo, Block 7/1538
  - k. Mau Summit/ Molo, Block 7/1539
  - l. Mau Summit/ Molo, Block 7/1540
  - m. Mau Summit/ Molo, Block 7/1541
  - n. Mau Summit/ Molo, Block 7/1542
  - o. Mau Summit/ Molo, Block 7/1543
  - p. Mau Summit/ Molo, Block 7/1544
  - q. Mau Summit/ Molo, Block 7/1545
  - r. Mau Summit/ Molo, Block 7/1546
  - s. Mau Summit/ Molo, Block 7/1547
  - t. Mau Summit/ Molo, Block 7/1548
  - u. Mau Summit/ Molo, Block 7/1549
  - v. Mau Summit/ Molo, Block 7/1550
  - w. Mau Summit/ Molo, Block 7/1551
  - x. Mau Summit/ Molo, Block 7/1552
  - y. Mau Summit/ Molo, Block 7/1553
  - z. Mau Summit/ Molo, Block 7/1554.
- b. An order declaring the Plaintiff as the rightful owner of Shamba no 623 measuring 1.5 acres and plot no 153 measuring 50 \* 100 feet as per the Olweny & Associates Map.
- c. An order cancelling the registration of the 10<sup>th</sup> – 22<sup>nd</sup> Defendant by the 23<sup>rd</sup> and 24<sup>th</sup> Defendants as the owners of; -
- I. Mau Summit/ Molo, Block 7/1529 (Tayari)- Sammy Njiri Gitogo
  - II. Mau Summit/ Molo, Block 7/1533 (Tayari)- Alice Mihioko Kimani
  - III. Mau Summit/ Molo, Block 7/1535 (Tayari)- Wilfred Nganga Kamau
  - IV. Mau Summit/ Molo, Block 7/1536 (Tayari)- Reuben Kariuki Wanjiru.
  - V. Mau Summit/ Molo, Block 7/1537 (Tayari)- Gatuna Kungu
  - VI. Mau Summit/ Molo, Block 7/1538 (Tayari)- John Ruiru Muchiri



- VII. Mau Summit/ Molo, Block 7/1541 (Tayari)- Tabitha Njeri Michore
  - VIII. Mau Summit/ Molo, Block 7/1544 (Tayari)- Andrew Gichuki Chege
  - IX. Mau Summit/ Molo, Block 7/1547 (Tayari)- John Mwangi Kahungura
  - X. Mau Summit/ Molo, Block 7/1549 (Tayari)- Kimani Ndirangu
  - XI. Mau Summit/ Molo, Block 7/1550 (Tayari)-David Kamwea Nganga
  - XII. Mau Summit/ Molo, Block 7/1551 (Tayari)- Perpetuah Tuta Kamau
  - XIII. Mau Summit/ Molo, Block 7/1554 (Tayari)- David N. Karuru
- d. An order cancelling Title No's;-
- a. Mau Summit/Molo Block 7/1530 (Tayari) – Sammy Njiri Gitogo
  - b. Mau Summit/Molo Block 7/1531 (Tayari) – Joseph Kimani Gitara
  - c. Mau Summit/Molo Block 7/1532 (Tayari) – Beth Wangari Kahuria
  - d. Mau Summit/Molo Block 7/1534 (Tayari) – Njenga Muniu
  - e. Mau Summit/Molo Block 7/1539 (Tayari)– Hezekiah Njuguna Iraya.
  - f. Mau Summit/Molo Block 7/1540 (Tayari)–Jecinta Waithira Kamau.
  - g. Mau Summit/Molo Block 7/1543 (Tayari) – Emilly Nyambura Kairu
  - h. Mau Summit/Molo Block 7/1545 (Tayari)–Joseph Luka Mbugua Kamama
  - i. Mau Summit/Molo Block 7/1548 (Tayari)– Joseph Luka Mbugua Kamama
  - j. Mau Summit/Molo Block 7/1552 (Tayari) – Macharia Hiram Mwangi
  - k. Mau Summit/Molo Block 7/1553 (Tayari)–Nganga Matu/John Gichuru Mwangi
- e. An order for eviction of the defendants or their agents or servants from the suit property and removal of their structures.
- f. A permanent injunction restraining the defendants from selling, alienating or in any other manner interfering with the plaintiff's peaceful possession, occupation, ownership and enjoyment of his Plot no 623.
- g. Compensation for the non-use of the shamba from January 2018 up to the time of determination of this suit at a rate of ksh 100,000 per year
- h. Costs and interests.
5. The 2<sup>nd</sup> Defendant filed his statement of defence on 12<sup>th</sup> July, 2022 and denies the averments of the amended plaint and seeks that the suit be dismissed with costs to him.
6. The other Defendants filed a joint statement of defence on 12<sup>th</sup> May, 2022 wherein they deny the averments in the plaint and state that they lawfully acquired the suit property and seek that the Plaintiff's case be dismissed with costs.
7. The application under consideration first came up for hearing on 9<sup>th</sup> November, 2022 when the court directed that it be served upon the other parties.



8. The 23<sup>rd</sup> Defendant stated that they would not be opposing the Application.
9. The 1<sup>st</sup>- 22<sup>nd</sup> Defendant have not filed a response to the Application.
10. On 7<sup>th</sup> December, 2022 the Court directed that the application be heard by way of written submissions and on 2<sup>nd</sup> February, 2023 the matter was reserved for ruling.

**The 24<sup>th</sup> Defendant/Applicant's Contention.**

11. The 24<sup>th</sup> Defendant/Applicant through its chairman Milton Kamau Mbugua contends that it has never been served with summons to enter appearance and only became aware of the present matter upon being informed by one John Mwangi.
12. It is its contention that the Plaintiff/Respondent, the 1<sup>st</sup> to 23<sup>rd</sup> Defendants/Respondents cases have been closed without its input and it is apprehensive that judgement maybe delivered without its evidence.
13. It also contends that the Plaintiff/Respondent's interlocutory judgment that is in place is irregular for lack of service of summons or any other pleadings in the present matter.
14. the 24<sup>th</sup> Defendant/Applicant contends that it has a defence with triable issues and prays that it be allowed to ventilate its case.
15. the 24<sup>th</sup> Defendant/Applicant further contends that it has come to court with clean hands and has a genuine reason for failure to put in a defence on time.
16. It is its contention that it is in the interest of justice that it be given a chance to defend its case.
17. The 24<sup>th</sup> Defendant/Applicant ends its deposition by stating that it does not intend to cross examine the Plaintiff/Respondent and the other Defendants/Respondents but seeks leave to ventilate its case through oral evidence and to allow the other parties to cross examine it on any issues they may deem fit.

**The Plaintiff/Respondent's Response.**

18. In response to the application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 21<sup>st</sup> November, 2022 and filed on 22<sup>nd</sup> November, 2022.
19. The Plaintiff/Respondent admits that the suit has always proceeded without the input of the 24<sup>th</sup> Defendant/Applicant.
20. It is his contention that the 24<sup>th</sup> Defendant/Applicant was served eight times through its chairman.
21. It is also his contention that the 24<sup>th</sup> Defendant/Applicant was served with both the original and amended plaints as per the affidavit of one Manuel Sakayo Market dated 19<sup>th</sup> May, 2021.
22. It is further his contention that the 24<sup>th</sup> Defendant/Applicant was served with a mention notice as per the affidavit of one Nyaramba Mariera dated 22<sup>nd</sup> October, 2021.
23. It is his contention that the 24<sup>th</sup> Defendant/Applicant was also served with hearing notices as per the affidavits of one Mary Ngugi dated 5<sup>th</sup> November, 2021, 25<sup>th</sup> November, 2021, 10<sup>th</sup> January, 2022 and 25<sup>th</sup> March, 2022.
24. The Plaintiff/Respondent contends that the 24<sup>th</sup> Defendant/Applicant was served with a mention notice as per the affidavit of one Nyaramba Mariera dated 4<sup>th</sup> May, 2022.



25. The Plaintiff/Respondent also contends that the 24<sup>th</sup> Defendant/Applicant was served with a hearing notice as per the affidavit of one Nyaramba Mariera dated 20<sup>th</sup> May, 2022.
26. The Plaintiff/Respondent further contends that he opposes ground 3 of the application as it is clear from the affidavits that the failure to enter appearance and file statement of defence by the 24<sup>th</sup> Defendant/Applicant was intentional and as explained in the affidavits, the chairman Milton Kamau refused to acknowledge receipt of most of the documents.
27. The Plaintiff/Respondent ends his deposition by stating that he opposes ground 4 of the application that states that the 24<sup>th</sup> Respondent/Applicant has come to court with unclean hands.

### **Issues for Determination.**

28. The 24<sup>th</sup> Defendant/Applicant filed his submissions on 30<sup>th</sup> January, 2023 while the Plaintiff/Respondent did not file any submissions.
29. The 24<sup>th</sup> Defendant/Applicant identified the following issues for determination;
  - a. Whether there was proper service of summons to enter appearance upon the applicant.
  - b. Whether the applicant's prayer for setting aside the *ex parte* judgement is merited.
  - c. Whether the applicant should be granted leave to defend the suit.
30. On the first issue, the 24<sup>th</sup> Defendant/Applicant submits that the affidavits of service relied upon by the Plaintiff/Respondent do not indicate the time the service was effected.
31. The 24<sup>th</sup> Defendant/Applicant relies on Order 5 Rule 15 of the [Civil Procedure Rules](#) and submits that the affidavits of service have inconsistencies and so they fail to meet the requirements of the law.
32. The 24<sup>th</sup> Defendant/Applicant relies on the judicial decision in [Delphis Bank Limited v Wheatland Motors & 2 Others](#) [2015] and submits that the process servers alleged to have served it did not comply with the requirements of the law.
33. The 24<sup>th</sup> Defendant/Applicant also relies on the judicial decision in [Kenga Mwaduna Mwambira & another v National Bank of Kenya Limited](#) [2006] eKLR, [Kenya Orient Insurance Limited v Cargo Stars Limited and 2 Others](#) [2017] eKLR in support of its arguments.
34. On the second issue, the 24<sup>th</sup> Defendant/Applicant relies on Order 10 Rule 11 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#) and submits that it has given a sufficient reason why it did not enter appearance and seeks that the court exercises its discretion in its favour.
35. The 24<sup>th</sup> Defendant/applicant cites the decisions in [CMC Holdings Limited v James Mumo Nzioka](#) [2004] eKLR and [Transafrica Assurance Co. Ltd v Lincoln Mujuni](#) (no citation given) in support of its arguments.
36. On the third issue, the 24<sup>th</sup> Defendant/Applicant submits that its draft defence annexed to its application raises triable issues and it is therefore in the interest of justice that its application be allowed as prayed.
37. The 24<sup>th</sup> Defendant/Applicant relies on the case of [Multiscope Consulting Engineers v University of Nairobi & another](#) [2014] eKLR in support of this argument.



## **Analysis and Determination.**

38. After considering the application, replying affidavit and submissions, the issues that arise for determination are as follows;
- a. Whether the court should set aside the *ex-parte* judgment entered in default of appearance and filing of statement of defence.
  - b. Whether the 24<sup>th</sup> Defendant/Applicant should be granted leave to file its statement of defence out of time.
  - c. Who should bear the costs of the application?

### **A. Whether the court should set aside the ex-parte judgment entered in default of appearance and filing of statement of defence.**

39. The 24<sup>th</sup> Defendant/Applicant is seeking orders that the court sets aside the *ex parte* judgement entered in default of entering appearance and filing its Statement of Defence. This is on the grounds that it has never been served with the pleadings in this matter and was not aware of the existence of this suit.
40. The Plaintiff/Respondent is opposing the said application and states that the 24<sup>th</sup> Defendant/Applicant has always been served with the pleadings in this matter and was aware of the present proceedings.
41. A perusal of the court record shows that no *ex-parte* judgement in default of appearance was entered against the 24<sup>th</sup> Defendant/Applicant and therefore, there are no orders to set aside.

### **B. Whether the 24th Defendant/Applicant should be granted leave to file its statement of Defence out of time.**

42. The Plaintiff/Respondent amended his plaint on 21<sup>st</sup> April, 2021 to include the 24<sup>th</sup> Defendant/Applicant.
43. The 24<sup>th</sup> Defendant/Applicant contends that it has never been served with the pleadings in this matter and that is why it did not file its Statement of Defence within time. The Plaintiff/Respondent, on the other hand, alleges that it has always ensured service upon the 24<sup>th</sup> Defendant/Applicant.
44. The Plaintiff/Respondent has in response to the 24<sup>th</sup> Defendant/Applicant's application annexed various copies of affidavits of service intended to demonstrate that process servers have been trying to serve the chairman of the 24<sup>th</sup> Defendant/Applicant at his home but he has always declined to accept service.
45. The 24<sup>th</sup> Defendant/Respondent argues that the said affidavits of service are not in compliance with the provisions of the law as they lack necessary details.
46. A perusal of the court record confirms that there are affidavits of services that show that there were attempts to serve the 24<sup>th</sup> Defendant/Applicant's chairman with various hearing and mention notices. This demonstrates that the 24<sup>th</sup> Defendant/Applicant has always been aware of the pleadings and proceedings in this matter.
47. The 24<sup>th</sup> Defendant/Applicant entered appearance on 20<sup>th</sup> May, 2022 and also filed its Statement of Defence on the same date.



48. My view is that the 24<sup>th</sup> Defendant/Applicant is an important party to this suit whose presence and evidence will help the court in determining the dispute. This is because both the Plaintiff/Respondent and the 1<sup>st</sup> to 23<sup>rd</sup> Defendants/Respondents claim to have been allocated the suit parcels by the 24<sup>th</sup> Defendant/Applicant. Importantly, there is nothing to suggest that the Respondents would suffer any prejudice if this application were to be allowed.
49. However, I must state that it is highly regrettable that the 24<sup>th</sup> defendant is just now waking up from slumber and causing great inconvenience to this Court and other parties. This matter has proceeded substantially. The plaintiff and his 5 witnesses have testified and plaintiff's case closed. The case of the 23<sup>rd</sup> defendant has been heard partially and is coming up for further hearing. The 1<sup>st</sup> -22<sup>nd</sup> Defendant's case is yet to be heard. I have also noted that counsel appearing for the 1<sup>st</sup> -22<sup>nd</sup> Defendants is also appearing for the 24<sup>th</sup> Defendant.
50. The 24<sup>th</sup> Defendant/Applicant acknowledges that this application is a set back on the progress made towards hearing and determination of this suit. It has expressly stated that it does not intend to cross-examine the Plaintiff/Respondent and the other Defendants/Respondents but seeks leave to ventilate its case through oral evidence and to allow the other parties to cross examine it on any issues they may deem fit.

### **Disposition.**

51. In the result, the application dated 24/10/2022 is hereby allowed in the following terms:
- a. Leave is hereby granted to the 24<sup>th</sup> Defendant/applicant to file its statement of defence out of time.
  - b. The 24<sup>th</sup> Defendant/Applicant's Statement of Defence filed on 12<sup>th</sup> July, 2022 is hereby deemed as duly filed.
  - c. The 24<sup>th</sup> Defendant/Applicant shall serve the Statement of Defence upon the Respondents within 7 days of the date hereof.
  - d. The Respondents shall file their Reply to Defence within 14 days upon service.
  - e. The hearing of the suit (defence hearing) shall proceed as earlier scheduled.
  - f. The costs of this application shall abide the outcome of this suit.
52. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19<sup>TH</sup> DAY OF JUNE 2023.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Charles Njihia Nganga for the Plaintiff/Respondent.**

**No appearance for the 1<sup>st</sup> -22<sup>nd</sup> Defendant/Respondent.**

**No appearance for 23<sup>rd</sup> Defendant/Respondent.**

**No appearance for the 24<sup>th</sup> Defendant/Applicant.**

**Court Assistant; Ms. Monica Wanjohi.**

