



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiteme v Dhuri, Baya and Dhuri (As the Administrators to the Estate of Karisa Dhuri Kombe alias Charo Dhuri Kombe) & 20 others; Jansen & 6 others (Interested Parties) (Environment & Land Case E017 of 2024) [2025] KEELC 3727 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3727 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND CASE E017 OF 2024**

**FM NJOROGE, J**

**APRIL 30, 2025**

**BETWEEN**

**JUSTUS KADENGE KITEME ..... PLAINTIFF**

**AND**

**DAMA CHARO DHURI, DAMA TLIOYA BAYA AND KATANA CHARO DHURI (AS THE ADMINISTRATORS TO THE ESTATE OF KARISA DHURI KOMBE ALIAS CHARO DHURI KOMBE) ..... 1<sup>ST</sup> DEFENDANT**  
**MAYUNGU LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**ANTONIO PEZZINO ..... 3<sup>RD</sup> DEFENDANT**  
**ALBERTINI EMILIANO ..... 4<sup>TH</sup> DEFENDANT**  
**MAYUNGU PARADISE GARDEN LTD ..... 5<sup>TH</sup> DEFENDANT**  
**EZIO COTROZI AND GIANA ACUNZO ..... 6<sup>TH</sup> DEFENDANT**  
**ZAGO GIUSEPPE ..... 7<sup>TH</sup> DEFENDANT**  
**FERNANDA VIGO ..... 8<sup>TH</sup> DEFENDANT**  
**IRALDO LIVIO AND ELSA LODESANI ..... 9<sup>TH</sup> DEFENDANT**  
**BONATO GIOVANNI ..... 10<sup>TH</sup> DEFENDANT**  
**DAL MASO RENATO AND MARTA SEGATINI ..... 11<sup>TH</sup> DEFENDANT**  
**ZAGO GIUSEPPE AND MAINATE ESTER ..... 12<sup>TH</sup> DEFENDANT**  
**ANTONIO PEZZINO AND RESSION MULVA ..... 13<sup>TH</sup> DEFENDANT**  
**MAGNO LUIGI ..... 14<sup>TH</sup> DEFENDANT**  
**FRANCESCO SANNA ..... 15<sup>TH</sup> DEFENDANT**



ANTONIO PEZZINO AND JANSEN MARIA ..... 16<sup>TH</sup> DEFENDANT  
THE LAND REGISTRAR, KILIFI ..... 17<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 18<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 19<sup>TH</sup> DEFENDANT  
JOSEPH RUHARI KUNGU ..... 20<sup>TH</sup> DEFENDANT  
MELISSA ANN BAKER ..... 21<sup>ST</sup> DEFENDANT

**AND**

MARIA JANSEN ..... INTERESTED PARTY  
ADRIANO PERISE ..... INTERESTED PARTY  
ARINADO MADINELLI ..... INTERESTED PARTY  
GRAZIANO PELLACHIMI AND SONIA PICCINELL ..... INTERESTED PARTY  
CHRISTINA STANGELLINI ..... INTERESTED PARTY  
MICHAEL OMARE MUSA ..... INTERESTED PARTY  
LINDA IKENYE ..... INTERESTED PARTY

**RULING**

1. There are two applications for determination dated 30/10/2024 and 14/11/2024, filed by the 10<sup>th</sup> and 5<sup>th</sup> Defendants respectively. In the former application, which was by way of Chamber Summons, the 10<sup>th</sup> Defendant sought the following reliefs: -
  1. That the default judgment entered herein on the 28<sup>th</sup> May 2024 against the 10<sup>th</sup> Defendant/Applicant be set aside and the 10<sup>th</sup> Defendant/Applicant be granted leave to enter appearance and file its defence unconditionally;
  2. That this honourable court be pleased to extend and fix time within which the 10<sup>th</sup> Defendant to file his defence;
  3. That the costs of this application be in the cause.
2. The application was premised on the grounds listed thereon and supported by an affidavit sworn on 29/10/2024 by the 10<sup>th</sup> Defendant. The 10<sup>th</sup> Defendant deposed that he was away in Italy on 25/3/2024 when his employee was served with the Summons to enter appearance in this matter; that he immediately instructed Mr. Ole Kina of the firm of Muli & Ole Kina Advocates to take up the matter but they failed to file any document; that on 9/4/2024, Mr. Ole Kina advised him, which he did, to instruct Mr. Kamunde of Kinyua Muyaa & Company Advocates. Similarly, Mr. Kamunde failed to enter appearance. On 15/10/2024, he instructed the firm of Chepkwony & Associates Advocates who in turn informed him on 16/10/2024, that interlocutory judgment had been entered against him on 28/5/2024. He stated that he has a good and meritorious defence and counterclaim which ought to be heard. He apportioned blame on the previously instructed advocates for failure to file a defence in time. He added that if the application is disallowed, he stands to suffer irreparable harm.



3. The 5<sup>th</sup> Defendant's application is a Notice of Motion and the orders sought are similar to those sought by the 10<sup>th</sup> Defendant above. They are tailored as follows: -
  1. That this honourable court be pleased to set aside the interlocutory judgment entered against the 5<sup>th</sup> Defendant/applicant on 9<sup>th</sup> April 2024 and leave be granted to the 5<sup>th</sup> Defendant/applicant to defend the suit;
  2. That consequent to prayer 1 above, the 5<sup>th</sup> Defendant/applicant's annexed statement of defence be admitted as duly filed upon the payment of the requisite filing fees and the statement of defense dated 17<sup>th</sup> September 2024 and filed without the leave of this court be struck off the record;
  3. That the costs of this application be in the cause.
4. The grounds in support were listed in the application and the supporting affidavit sworn on 14/11/2024 by Rolf Krusi who is said to be the 5<sup>th</sup> Defendant's managing director and majority shareholder. He stated that the 5<sup>th</sup> Defendant is the registered owner of a property known as Chembe/Kibabamshe/749, a resultant subdivision of Chembe/Kibabamshe/313 (the suit property) to which the Plaintiff lays a claim over in its entirety; that the 5<sup>th</sup> Defendant's claim over Chembe/Kibabamshe/749 is by virtue of a sale and purchase agreement dated 3/12/2022, between itself and the 6<sup>th</sup> Defendant; that upon service of the summons, the 5<sup>th</sup> Defendant instructed the firm of Kiarie Kariuki, Atieno Obura & Partners Advocates LLP to take conduct of the matter on its behalf, which they did by entering appearance and attended virtual court session on 5/3/2024; that however, the said advocates failed to file a defense in time despite constantly assuring the 5<sup>th</sup> Defendant that the same would be filed. Seeing no action from them, the 5<sup>th</sup> Defendant instructed their current advocates, F.M. Muteti & Co Advocates who filed a notice of change of advocates on 10/6/2024; that unknown to them, the Plaintiff had long applied for interlocutory judgment on 2/4/2024 which had been endorsed on 9/4/2024. The deponent stated that he was never served or made aware of the notice of entry of judgment, and he blamed his former advocates for the mishaps. He added that the orders endorsing the request for interlocutory judgment were neither extracted nor uploaded on the CTS until 31/10/2024; and that their current advocates only became aware of the existence of the interlocutory judgment when the matter was raised in court by counsel for the Plaintiff on 19/9/2024. The deponent added that the 5<sup>th</sup> Defendant has a prima facie defense that raises triable issues and that the application has been brought timeously. To him, the Plaintiff will not suffer any prejudice if the orders sought are granted, since there is in place an order to maintain status quo. He was apprehensive that should the 5<sup>th</sup> Defendant not be allowed to defend the suit, it would be dispossessed of its rightful property without being heard.
5. In response to the applications, the Plaintiff filed affidavits which he swore on 18/11/2024 and 13/1/2025 respectively. The Plaintiff deposed that the supporting affidavit sworn in support of the application dated 30/10/2024 is fatally defective and should thus be expunged from the record, for reasons that the mode of address and attestation offend the provisions of the Oaths & Statutory Declaration Act. The Plaintiff stated that the application has been made after a period of over 5 months which he averred was too late. He added that the 10<sup>th</sup> Defendant is guilty of laches and is not entitled to any remedy in equity. To him, the application is a waste of judicial time and it should be dismissed.
6. In his affidavit dated 13/1/2025, the Plaintiff stated that the 5<sup>th</sup> Defendant has failed to raise any triable issue in the draft defence but has resorted to vexatious claims in the hopes of misleading the court to grant orders that serve to indulge an illegality.



7. Both applications were canvassed by way of written submissions which I have carefully considered.
8. The issues that arise for determination are: -
  - i. Whether the default judgment entered herein on the 28th May 2024 against the 10<sup>th</sup> Defendant/Applicant ought to be set aside and the 10<sup>th</sup> Defendant/Applicant be granted leave to enter appearance and file its defence;
  - ii. Whether the interlocutory judgment entered against the 5<sup>th</sup> Defendant on 9<sup>th</sup> April 2024 ought to be set aside and leave be granted to the 5<sup>th</sup> Defendant to defend the suit;
9. The Court of Appeal in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193 held that:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so 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 course of justice.”

10. The Court added that:

“A judge had to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for Porter J.”

11. The court of appeal in *Yooshin Engineering Corporation v Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment) further stated: -

“27. However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.”

12. In the present case, there is no doubt that both the 5<sup>th</sup> and 10<sup>th</sup> Defendants were served with the Summons to Enter Appearance. They state as much in their respective affidavits. In fact, the 5<sup>th</sup> Defendant deposed that his former counsel entered appearance but failed to file a defense on time. There is therefore no issue of service and this means that the impugned judgments were regular in nature as explained by the Court of Appeal in the above case.



13. The 10<sup>th</sup> Defendant stated that he was served with the Summons to Enter Appearance on 25/3/2024 when he instructed Mr. Ole Kina to represent him in the suit. He exhibited an email of even date containing the said instructions to Mr. Ole Kina, and another dated 9/4/2024 to Mr. Kamunde. The contents of the latter email reveal that the 10<sup>th</sup> Defendant had been informed by Mr. Ole Kina that his case was being handled by Mr. Kamunde. It is however clear that neither Mr. Ole Kina or Mr. Kamunde agreed to represent the 10<sup>th</sup> Defendant, rather, there is no response to the said emails from either counsel. It is therefore worrisome that the 10<sup>th</sup> Defendant had to wait for about 7 months to instruct his current advocate to act on his behalf. No plausible explanation has been given for that delay. Defendants with such a lackadaisical approach to litigation ought to be warned not to conduct themselves in a manner as to delay court proceedings. Be that as it may, I have keenly perused the draft defence, I find that it raises triable issues which should be heard on merit.
14. On his part, the 5<sup>th</sup> Defendant's counsel entered appearance but neglected to file a defense on time, and interlocutory judgment was issued against it on 9/4/2024. The 5<sup>th</sup> Defendant averred that the failure was occasioned by his former counsel. Notably, the 5<sup>th</sup> Defendant's present counsel entered appearance on 10/6/2024 and filed a statement of defense, albeit out of time, 3 months down the line, on 18/9/2024. No reason has been presented for that laxity leading to the filing the defense on time. I will however exercise discretion in favour of the 5<sup>th</sup> Defendant considering that the failure was first occasioned by its former advocate. Seeing that the draft defense raises triable issues, and by dint of the order of status quo previously issued by this court, I think it fair that the interlocutory judgment against the 5<sup>th</sup> Defendant ought to be set aside.
15. The outcome is that the application dated 30/10/2024 is allowed in terms of prayer nos 1 and 2 and the application dated 14/11/2024 is allowed in terms of prayer 1 (fully) and partially in terms of prayer no 2. The 5<sup>th</sup> and 10<sup>th</sup> defendants' respective defences shall be filed and served on all parties within 14 days from the date of this order. The orders setting aside judgment and allowing filing of defence by the 5<sup>th</sup> and 10<sup>th</sup> defendants herein are granted condition that the said each of the said defendants shall pay throw away costs of Kshs. 60,000/- to the Plaintiff within 14 days of this order. In default of compliance with any of the conditions issued herein, the orders of setting aside and granting leave shall stand automatically vacated.
16. This matter shall be mentioned on 28<sup>th</sup> May 2025 for further directions.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

