



**Wamai v Muthoni (Environment and Land Case Civil Suit
E293 of 2022) [2025] KEELC 3730 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3730 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E293 OF 2022**

TW MURIGI, J

APRIL 30, 2025

BETWEEN

JOSEPH MWANGI WAMAI PLAINTIFF

AND

JANE MUTHONI DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 30th August 2024 brought under Articles 50 2(b) and 159 2(d) of *the Constitution*, Sections 1A, 1B, 3A, 20 and 95 of the *Civil Procedure Act* in addition to Order 51 Rule 15 of the Civil Procedure Rules and Section 152F of the *Land Act* in which the Applicant seeks the following orders:-
 - a) Spent.
 - b) Spent.
 - c) That the Honourable Court be pleased to set aside its orders of 17th April 2024 pending the hearing and determination of the main cause and the Applicant be allowed to file her response out of time and to defend this matter unconditionally.
 - d) That the Honourable court be pleased to summon Maina Karanja Advocate and Anthony Nzioka Mule the process server who purported to have effected service of the application dated 13th December 2022 and various notices upon the Applicant for cross examination.
 - e) That the court do make any other or further orders in the interest of justice.
 - f) That the costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Jane Muthoni sworn on even date.



The Applicant's Case

3. The Applicant averred that the Respondent, her estranged husband had on several occasions attempted to evict her from the suit property after separating in the year 2020 with the with the sole intention of disposing the same. She further averred that she contributed money towards the purchase of the suit property and single handedly constructed the house thereon.
4. She denied having been served with the application dated 13/12/2024 together with the mention and hearing notices regarding this matter. The Applicant deposed that she became aware of this matter on 26th April 2023 when she was summoned by the Chief Kayole North location and served with the orders issued on 17th April 2024.
5. She contended that she will suffer irreparable loss if the orders sought are not granted.

The Respondent's Case

6. The Respondent filed a replying affidavit in opposition to the application. He denied the averments contained in the affidavit in support of the application. He contended that this court lacks jurisdiction to entertain a claim touching on contribution towards the acquisition of the suit property.
7. The Respondent deposed that he is the registered proprietor of the suit property having paid the purchase price for the same. He further deposed that the Applicant did not contribute any money towards the purchase of the suit property and that she only witnessed the sale agreement. He asserted that the Applicant has not adduced any evidence to show her alleged contribution or development of the suit property.
8. He further asserted that the Applicant has refused to vacate the suit property despite having been issued with notices to vacate. He explained that the Applicant agreed to vacate the suit property when they appeared before the chief on 4th August 2021 because she could not demonstrate proof of ownership or contribution thereof. That arising from her persistent refusal to vacate the suit property, the court directed that service of pleadings be effected upon the Applicant personally.
9. He went on to state that on 21st April 2022, he served the Applicant with a three months notice to vacate the suit property in accordance with Section 152E of the *Land Act*. That in addition, on 22nd April 2022 he served the Deputy County Commissioner in charge of the area as well as the Officer Commanding Police division. He informed the court that on 16th January 2023 and on 15th June 2023, the Applicant was served with the application dated 13/12/2022 together with the Mention Notice dated 13/1/2023 via her mobile whatsapp number in accordance with Order 5 Rule 22 C of the Civil Procedure Amendment Rules.
10. That despite being duly served, the Applicant failed to attend court on 28th June 2023, 25th October 2023, and on 7th November 2023. That when the matter came up on 11th March 2024 the court confirmed that the Applicant was duly served but had failed to enter appearance.
11. The Respondent explained that Applicant's Advocate was also served with a Notice of Motion dated 13th December 2022 together with a mention Notice dated 13th January 2023 vide their official email address. He contended that the Applicant did not dispute that she is the registered owner of the mobile number or that she was served on 17th October 2023 at 18:35 hours in the presence of the Deputy County Commander Kayole Police Station.



12. He argued that the Applicant has not demonstrated the loss that she is likely to suffer if she evicted from the suit property. He further argued that the Applicant has not raised any triable issues to warrant this court to set aside the orders issued on 17th April 2024.

The Response

13. The Applicant filed a further affidavit in response to the Respondent's replying affidavit. She reiterated the contents of her affidavit in support of the application and denied the averments contained in the replying affidavit.
14. The application was canvassed by way of written submissions.

The Applicant's Submissions

15. The Applicant filed her submissions dated 19th February 2025.
16. On behalf of the Applicant, Counsel outlined the following issues for the court's determination:-
 - i) Whether the Applicant was served with the pleadings in this matter.
 - ii) Whether the court should set aside the ex parte orders dated 17th April 2024
17. On the first issue, Counsel submitted that service effected upon Counsel via email was irregular as it did not have any attachment to show that the said documents were served. Counsel further submitted that the WhatsApp screenshot bearing the name Jane Muthoni does not show the cell phone number to confirm that indeed the documents were sent to the Applicant.
18. With regards to the service effected upon the Applicant at Kayole Police Station, Counsel submitted the OCS, the Deputy OCS and the constable who were allegedly present did not confirm in writing that the Applicant was served in their presence.
19. It was further submitted that the Advocates herein were not on record for the Applicant as their instructions were limited to responding to the demand letter issued to the Applicant. To buttress this point, Counsel relied on the case of *Mulanya & another v Kyalo & another* (suing as the legal representatives of the Estate of Wycliff John Syengp (Deceased) (Civil Appeal E024B of 2021) KEHC 15393 (KLR) (14 NOVEMBER 2022) (Judgment).
20. Counsel contended that in view of the irregular service, the Applicant was condemned unheard. To buttress this argument, Counsel relied on the case of *James Kanyiita Nderitu & another vs Marios Philatos Ghikas & another* (2016) eKLR where the court explained the effect of an irregular judgment.
21. On the second issue Counsel submitted that this court should exercise its discretion and set aside the order in the interest of justice. It was submitted that the draft response raises a defense with high chances of success.
22. Counsel contended that if the orders sought are not granted, the Applicant will be rendered destitute if she is evicted from the suit property.
23. On the issue of delay, Counsel submitted that the Applicant moved the court immediately she became aware of this matter.
24. In conclusion, Counsel urged the court to allow the application as prayed.



The Respondent's Submissions

25. The Respondent filed his undated submissions on 31st January 2025.
26. On behalf of the Respondent, Counsel outlined the following issues for the court's determination:-
 - a) Whether there was proper and adequate service of the Notice of motion dated 13/01/2023 upon the Applicant herein?
 - b) Whether the Applicant is entitled to the orders sought?
 - c) Who shall bear the costs of the Application?
27. On the first issue, Counsel submitted that service of the application dated 13/12/2022 was properly effected upon the Applicant as shown in the affidavit of service. It was submitted that the Applicant was served with the relevant court documents in accordance with the provisions of Order 5 Rule 22B and Order 5 Rule 22C of the Civil Procedure Amendment Rules 2020. It was further submitted that the Applicant did not present any evidence to challenge the propriety of the service effected by the Respondent's Counsel and the process server to warrant their cross examination on the issue of service.
28. On the second issue, Counsel submitted that the Applicant has not met the threshold for the grant of the orders sought. Counsel further submitted that the Applicant was indolent and neglected her right to be heard despite having been served on several occasions.
29. Counsel further submitted that the Respondent is the absolute and indefeasible owner of the suit property as his title has not been challenged. To buttress this point, Counsel relied on Section 26 of the *Land Registration Act* which provides for instances where a title can be challenged.
30. Counsel submitted that the Respondent had denied the allegations that Applicant was his spouse as at the time when he purchased the suit property. It was submitted that no evidence was adduced to show that the Applicant contributed towards the acquisition or development of the suit property.
31. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

Analysis and Determination

32. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the order issued on 17th April 2024 should set aside.
33. Order 12 Rule 7 of the Civil Procedure provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
34. The power of the court to set aside its orders is discretionary. The discretion must be exercised judiciously.

In the case of *Patel v E.A. Cargo Handling Services Ltd* (1974) E.A 75 the court held that: -

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules”.



35. The record shows that the application dated 13/12/2022 came up for hearing on 11th April 2024. Having confirmed that the Defendant was duly served, the court allowed prayers No. 1 and 2 of the application. The Applicant denied having been served with the said application.
36. I am satisfied from the evidence before me that the Applicant was served with the application dated 13/12/2022 together with the hearing/mention notices.
37. Having found that the Applicant was properly served, the issue for determination is whether the draft response annexed to the application raises a reasonable defence.
38. In the case of *Tree Shade Motors vs D.T Dobie and Company (K) Limited and Joseph Rading Wasambo Civil Appeal No. 38 of 1998*, the Court of Appeal stated as follows: -
- “Where a draft defence is tendered with the application to set aside the default judgment the court is obliged to consider it to see if it raises a reasonable defence to the Plaintiff’s claim. If it does, the Defendant should be given leave to enter and defend.”
39. The Applicant asserted that the draft response raises triable issues which should be heard on merit. I have carefully perused the draft replying affidavit annexed to the application in which the Applicant alleges that she contributed towards the acquisition and development of the suit property. In my view, these are issues which ought to be determined in a full hearing.
40. The court has inherent discretion to give orders which are necessary to meet the ends of justice. Section 3A of the *Civil Procedure Act* provides that:-
- Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
41. Article 50 of *the Constitution* entitles every person to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard.
42. Given the nature of the dispute, I find that it will be prudent to exercise the court’s discretion in favour of the Applicant.
43. From the foregoing, I find that no prejudice will be occasioned to the Respondent if this matter is heard and determined on merit. It would be unjust and indeed a miscarriage of justice to deny the Applicant an opportunity to be heard.
44. The upshot of the foregoing is that the application dated 30th August 2024 is merited and the same is hereby allowed in the following terms: -
- a. The orders of 17th April 2024 be and are hereby set aside.
 - b. The Applicant shall pay to the Respondent thrown away costs of Kshs 20,000/= within 14 days from the date of this ruling.
 - c. In default of prayer No. (b) above the orders herein shall lapse automatically.
 - d. The Respondent is awarded the costs of the application.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2025.

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T. MURIGI



JUDGE

In the presence of

Maina holding brief for Karanja for the Applicant/Respondent

S.M Gioche for the Applicant.

Susan- Court assistant

