



REPUBLIC OF KENYA



**KENYA LAW**  
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**Olang v Njeru & 13 others (Environment & Land Case 52 of 2019)  
[2023] KEELC 22019 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22019 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 52 OF 2019  
SM KIBUNJA, J  
DECEMBER 6, 2023**

**BETWEEN**

**MARGARET AKOTH OLANG ..... PLAINTIFF**

**AND**

**LUCAS NJAGI NJERU ..... 1<sup>ST</sup> DEFENDANT**  
**MARY YOSI ..... 2<sup>ND</sup> DEFENDANT**  
**MARGARET MUENI ..... 3<sup>RD</sup> DEFENDANT**  
**PAUL MUTINDA ..... 4<sup>TH</sup> DEFENDANT**  
**DANIEL MAKUNYI MWITHI ..... 5<sup>TH</sup> DEFENDANT**  
**ANDEGE ..... 6<sup>TH</sup> DEFENDANT**  
**CLARA KAKULA ..... 7<sup>TH</sup> DEFENDANT**  
**PATRICIA MUSINI ..... 8<sup>TH</sup> DEFENDANT**  
**REV. ERNEST OMBEVA ..... 9<sup>TH</sup> DEFENDANT**  
**SIMON D WEKESA ..... 10<sup>TH</sup> DEFENDANT**  
**SAMUEL OUMA AWOUR ..... 11<sup>TH</sup> DEFENDANT**  
**TITUS CALEB WEGULO ..... 12<sup>TH</sup> DEFENDANT**  
**MARIAM WANJIRU NJERU ..... 13<sup>TH</sup> DEFENDANT**  
**CATHERINE WAIHERA MUHORO ..... 14<sup>TH</sup> DEFENDANT**



## RULING

1. The application before the court for determination has been brought by the defendants under Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A & 63 of the Civil Procedure Act, Articles 25 (c), 50 (1) and 159 (2)(a), (b), (d) of the Constitution of Kenya, and seeks for orders that;
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to set aside the ex parte proceedings and judgement dated 26<sup>th</sup> June 2023 herein and any other/further proceedings.
  4. That this honourable court be pleased to grant the defendants/applicants leave to file their defence to the plaint and admit the matter for hearing on merits with the parties hereto arguing and tendering evidence on their respective positions.
  5. That the costs of this application be in the cause.

The application is grounded on fifteen (15) grounds on its face and supported by the affidavit of one Lucas Njagi Njeru, the 1<sup>st</sup> defendant, who inter alia deposes that the defendants instructed the firm of Mkan & Company advocates to represent them when this suit was filed vide a plaint dated 20<sup>th</sup> March 2019; that the defendants had a legitimate expectation that the firm of Mkan & Company advocates would file the requisite documents; that despite being instructed, the said firm of advocates failed, neglected and/or refused to file any documents; that the defendants were mere laymen with little knowledge of the legal processes and as such relied entirely on the skill and judgement of the said firm of advocates; that due to the omissions of the said firm of advocate, the plaintiff's suit went undefended, judgment was entered in her favour on 26<sup>th</sup> June 2023 and the defendants were ordered to vacate the suit property within 60 days from the date of judgment; that the court should stay its judgement lest the defendants suffer irreparable harm; that they have a formidable defence and counterclaim against the plaintiff that ought to be heard on merit; that it was the mistake of the defendants' advocate that caused them not to defend the matter, and such a mistake should not be visited upon the litigants; that the plaintiff stands to suffer no prejudice since costs will be determined when the suit is heard afresh, and the court should allow the application as prayed.

2. The plaintiff opposed the application through her replying affidavit sworn on 20<sup>th</sup> September 2023 inter alia deposing that the defendants were at all material times represented by an advocate on record who was duly served with the hearing notice; that when the suit came up for hearing, Mkan advocate, representing the defendants, sought an adjournment which was declined by court and the plaintiff proceeded to give evidence; that the defendants advocate refused to participate in the trial proceedings; that the proceedings herein could not be said to be ex parte, since the defendants had an opportunity to defend the matter throughout the trial but chose not to file any documents, though they had an advocate on record who had filed notice of appointment on 16<sup>th</sup> April 2019; that she had a valid judgment and ought to execute the same since the court declared that the defendants were in continuous trespass; that the defendants don't have any reasonable defence as seen in their draft defence and counterclaim and maintained that the same was an afterthought fueled by the plaintiff's request for execution; that Ms. Nzaro Chai & Company Advocates are not properly on record as it seeks to



replace a firm that is neither on record nor properly on record after judgement and the pleadings filed through that firm should be struck out; that the defendants are trespassers and cannot suffer irreparable damages in giving vacant possession of the suit land to the legal owner; that the draft defence and counterclaim do not raise triable issues and should be decided summarily under Order 36 of the Civil Procedure Rules.

3. The learned counsel for the defendants and plaintiff filed their submissions dated the 3<sup>rd</sup> October 2023 and 17<sup>th</sup> October 2023 respectively which the court has considered.
4. The issues before the court for determination are as follows:
  - a. Whether the defendants had been served with summons in this suit.
  - b. Whether the defendants have met the threshold for setting aside the judgement and proceedings of the 26<sup>th</sup> June 2023.
  - c. Whether the defendants should be granted leave to file their defence and for the suit to be heard afresh.
  - d. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following determinations:
  - a. This suit was instituted vide a plaint dated 20<sup>th</sup> March 2019 and filed in court on 26<sup>th</sup> March 2019. That going by the copies on the file, summons to enter appearance were issued on the 27<sup>th</sup> March 2019 and confirmed served upon each of the defendants as per the affidavit of service sworn by Thomas Joshua Were of 3<sup>rd</sup> April 2019, and filed on 8<sup>th</sup> April 2019.
  - b. Though there is no evidence of the defendants ever entering appearance and or filing statements of defence in person or through counsel, the plaintiff strangely effected service of notices upon Ms. Nabwana Nabwana & Company Advocates as confirmed by the affidavits of service by Sephania Odhiambo, Roy Odero and Thomas Joshua Were sworn on the 25<sup>th</sup> November 2019, 8<sup>th</sup> January 2021 and 19<sup>th</sup> May 2022 respectively. Then plaintiff then served hearing notice upon Ms. Ochieng Eddie Vincent & Company Advocates as shown in the affidavit of service sworn by Thomas Joshua Were on the 2<sup>nd</sup> December 2022. There is no notice on the court record under Order 9 of the Civil Procedure Rules that had been filed by the firms of Ms. Nabwana Nabwana & Company Advocates and Ms. Ochieng Eddie Vincent & Company Advocates signaling their coming on record for the defendants, and the court is left wondering how counsel for the plaintiff decided to serve the notices to those firms instead of the defendants directly.
  - c. The two firms served with notices on behalf of the defendants never attended court on the stated dates. That should have made the plaintiff rethink the strategy and confirm whether the counsel they had served were indeed formally on record for the defendants. The court proceedings of 21<sup>st</sup> June 2019, show that when the matter came up before the Deputy Registrar for pre-trial directions, only the plaintiff's counsel was in court. The Deputy Registrar, Hon Ongweno noted that the defendants had not entered an appearance and directed the plaintiff to serve them with pleadings before fixing the matter for pretrial. There is no evidence on this order being complied with.



- d. During the subsequent mention of 18<sup>th</sup> July 2019 the record show that Muganda and Egunza advocates were present for the defendants and plaintiff respectively. There is nothing on court record to confirm which firm of advocates the said Muganda had represented and in the absence of an appropriate notice of appointment under Order 9 of the Civil Procedure Rules, the court is unable to confirm whether he was the legal representative for the defendants in the proceedings of that day.
- e. There is no other occasion in the subsequent court appearances that the defendants attended court either in person or through counsel. I do note that on 13<sup>th</sup> February 2023 when the matter proceeded for hearing of the plaintiff's case, there was no representation for the defendants. Mr Jengo, counsel for the plaintiff informed the court that service was effected on the defendants and the court proceeded with taking the plaintiff's evidence and thereafter directions on filing of submissions was given. During the mention of 15<sup>th</sup> March 2023, one Mkan advocate attended the court for the defendants and when his appointment was contested, he indicated that he had filed notice of appointment on the 21<sup>st</sup> September 2022. Counsel for the plaintiff indicated that he has never been served with the notice and as there was none on the court record, Mr. Mkan was directed to ensure service upon Mr. Jengo for the plaintiff and avail the court copy for the record in the course of the day. The matter was mentioned again on the 27<sup>th</sup> March 2023 with both Mkan and Jengo advocates present. Mr. Jengo indicated that he was yet to be served with the notice but Mr. Mkan insisted he had served. The court also notified counsel that it had not received the court copy of the notice and proceeded to set the suit down for judgement. I have perused the record and there is no notice of appointment or change of advocate filed by Mkan advocate.
- f. From the above analysis of the facts, the defendants neither entered an appearance nor filed a defence within the required timelines. Further to that, no evidence has been adduced that the firm of Nabwana & Company Advocates or Ochieng Eddie Vincent & Co Advocates were ever on record for the defendants. The court has perused the court file and there is no notice of appointment filed by either of the two firms to be the advocate on record for the defendants. The plaintiff therefore had no reason to be serving the firm of Nabwana & Company Advocates or that of Ochieng Eddie Vincent & Co Advocates with any notices as advocates representing the defendants. Their obligations was to serve the defendants directly or in person until such time a counsel came on record formally and in accordance with Order 9 of the Civil Procedure Rules for the defendants.
- g. From the court record, it is clear that the defendants were never represented by any counsel in the proceedings preceding this application. The plaintiff did not properly serve the defendants with the summons to enter an appearance or the pleadings as directed by the Deputy Registrar during the pre-trial proceedings on 21<sup>st</sup> June 2019. There is no affidavit of service, from the plaintiff with copies of summons to enter appearance indicating that each of the defendants were served and appended their signatures on them. The affidavit of service on record, sworn on 3<sup>rd</sup> April 2019 claims to have served the summons to enter appearance, plaint, list of documents and witness statements to each of the defendants. However, the court [Deputy Registrar] was of the view that the summons to enter appearance had not been collected from the registry and directed the plaintiff to serve the defendants afresh on 21<sup>st</sup> June 2019. That order was most probably issued after the court found the return of service sworn on 3<sup>rd</sup> April 2019 had not satisfied the requirements of proper service. That order has not been reviewed and or set aside and since the court had directed the plaintiff to serve afresh, the same ought to have complied with. Further, the argument by the plaintiff that Mr. Mkan was on record for the



defendants and present on the hearing date and that he sought an adjournment is not entirely true, as the court record show that there was no advocate on record for the defendants before the instant application. I hasten to add that the practice of an advocate appearing in court proceedings ostensibly representing a certain party or parties, as Mr. Mkan did on 15<sup>th</sup> March 2023 and 27<sup>th</sup> March 2023, and before that Mr. Muganda on the 18<sup>th</sup> July 2019, without first filing and serving the appropriate notice of appointment as required under Order 9 of the Civil Procedure Rules, is not only an affront to proper conduct of the legal practice but a waste of judicial time and resources. This practice should be stopped.

- h. From the evidence on record, the defendants were not properly served with summons and it follows the proceedings of 13<sup>th</sup> February 2023 and the judgement delivered on the 26<sup>th</sup> June 2023 was irregular. Setting aside such irregular proceedings and judgement is the right way to go because the defendants were not given an opportunity to be heard and rules of justice cannot permit a party to be condemned unheard. The Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR distinguished a default judgement which is irregularly entered and held that,

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In *Frigonken Ltd v. Value Pak Food Ltd*, HCCC NO. 424 of 2010, the High Court expressed itself thus:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set a



side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

Earlier in *Kabutha v. Mucheru*, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:

“[W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an *ex parte* judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.

(See also, *Bouchard International (Services) Ltd v. M’Mwereria* [1987] KLR 193, *Remco Ltd v. Mistry Jadva Parbat & Co. Ltd. & 2 Others* [2002] 1 EA 233 and *Baiwo v. Bach* [1987] KLR 89.”

The above decision confirms that the judgement herein was irregular. The Deputy Registrar had expressly directed the plaintiff to serve the defendants with the pleadings afresh before proceeding with pre-trial, but that was never complied with. It is unfortunate that the matter proceeded to pretrial and the hearing was conducted without the plaintiff first confirming that she had served the defendants with the pleadings as directed by the court. It is the finding of this court that the default judgment made without evidence of effective service of summons to enter appearance is irregular and ought to be set aside to afford the defendants an opportunity to be heard.

- i. That having found that Ms. Mkan & Company Advocates had not filed any notice under Order 9 of the Civil Procedure Rules to represent the defendants in this matter, then the consent dated the 14<sup>th</sup> August 2023 with Ms. Nzaro Chai & Company Advocates is not only irregular but invalid and of no legal consequences. That as was held in the case cited above that “In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion”. The finding that the consent through which the counsel through whom the instant application was filed came on record is invalid and irregular, does not change the fact this the court has found the proceedings of 13<sup>th</sup> February 2023 and judgement of 26<sup>th</sup> June 2023 as irregular and therefore, for setting aside for reasons that the defendants had not been served with summons to enter appearance contrary to the orders of 21<sup>st</sup> June 2019.
- j. Ms. Nzaro Chai & Company Advocates, or any other advocates who may be appointed to come on record for the defendants on the delivery of this ruling should be at liberty to file a notice of appointment under Order 9 Rule 7 of the Civil Procedure Rules, as the defendants have not had a formally appointed legal representation on record.



1. Consequently, the court finds that the defendants/applicants' notice of motion dated 17<sup>th</sup> August 2023 is merited and is hereby allowed in the following terms:
  - a. That the judgement dated 26<sup>th</sup> June 2023 and all consequential orders are hereby set aside, for being irregular due to non-service of summons to appear and pleadings as directed by the Hon Deputy Registrar on 21<sup>st</sup> June 2019.
  - b. The defendants are hereby granted leave to enter appearance and or file their defence with or without counterclaim, plus their statements and documents and serve in thirty (30) days from today.
  - c. That the plaintiff to file and serve a reply and defence to the counterclaim if any plus any supplementary documents and statements in fifteen (15) days after service.
  - d. The costs of the application awarded to the defendants.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2023**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF:**

PLAINTIFF : Mr. Hamisi for Jengo.

DEFENDANTS : Mr. Nzovo.

WILSON – COURT ASSISTANT.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

