



**Kanyua v Kariuki & another (Environment & Land Case
E023 of 2023) [2025] KEELC 3465 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E023 OF 2023
CA OCHIENG, J
APRIL 28, 2025**

BETWEEN

JAMES KANYUA APPLICANT

AND

MOHAMMED NURU KARIUKI 1ST RESPONDENT

MARIAM NYAMBURA MOHAMMED 2ND RESPONDENT

RULING

1. This court entered default Judgement herein on 30th May 2024, declaring the Applicant to be the rightful owner of LR No. 209/ 10715. Subsequently, the Respondents/Applicants filed the Notice of Motion application dated the 18th November 2024, which is for determination. They seek the following Orders:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this application and suit, this Honourable Court be pleased to issue an interim order of stay of the execution of the judgement delivered herein on 30th May 2024, the resultant decree issued on 5th June 2024 and all other consequential orders including the letter dated 4th July 2024.
 - d. That pending the hearing and determination of this suit, this Honourable Court be pleased to set aside and or vacate the judgement delivered herein on 30th May 2024, the resultant decree issued on 5th June 2024 and all other consequential orders including the letter dated 4th July 2024.



- e. That this Honourable court be pleased to grant leave to the Defendants to file their response to the Applicant's Originating summons dated 23rd November 2023 out of time.
 - f. That this Honourable Court be pleased to issue any and further orders as it may deem fit for the proper administration of justice.
 - g. That costs of this application be provided for.
2. The application is based on grounds on its face and on the 2nd Respondent's supporting affidavit sworn on 18th November 2024. She avers that together with the 1st Respondent, they are registered proprietors of LR No. 209/10715 which they have been in possession of, from the time of acquisition in 1989. Further, that they were surprised to learn of the existence of the suit, the default judgment entered on 30th May 2024 and the resultant Decree issued on 5th June 2024. She claims that neither the 1st Respondent/applicant nor herself were personally served with the pleadings filed herein and even if service was done by way of substituted service, they were not able to sight the newspaper advertisement. Further, that such an oversight on their part is not sufficient ground to deny them their right to a fair hearing.
 3. She contends that she was married to the 1st Respondent/Applicant but following divorce, she dropped the name 'Mariam Mohammed Kariuki ' and changed her name to Mariam Nyambura Miring'u and at the time of divorce, she filed Nairobi High Court Civil Case No. 3365 of 1993 Mariam Nyambura Kariuki v Mohamed Kariuki and in the suit, they recorded a consent concerning their properties of which the 1st Respondent/Applicant relinquished all his interests in the suit property thus there is no dispute between her and her former husband as the suit property belongs to her.
 4. She asserts that she has been paying rates for the suit property and has been using it for various purposes to earn a living, the latest one being the issuance of a Lease to Shanxi Lu' Engineering Company Limited through her company, Feridan Graphic Limited. She points out that in March 2024, she applied to Nairobi City County Government for approval for construction of a perimeter wall since one side of the suit property is not yet fenced and her application was approved. She explains that when she started excavation for purposes of constructing the said wall around 1st November 2024, the Applicant purported to forcibly enter the property claiming ownership prompting her to investigate culminating in the discovery that he had obtained default judgement herein on 30th May 2024.
 5. She states that that the Applicant/Respondent has already written to the Lands Office demanding change of registration of particulars of the suit property. Further, that he has visited the suit property in company of other strangers and she fears they are potential buyers.
 6. The suit is opposed by the Applicant/Respondent vide his Notice of Preliminary Objection dated the 17th February 2025. He contends that this court is functus officio, as the Respondents/Applicants having been properly served, failed to respond to the suit. He insists that the Respondents/Applicants' application dated the 18th November 2024 offends the Doctrine of Laches as the Respondents are guilty of inordinate delay.
 7. The 2nd Respondent/Applicant filed a further affidavit claiming that despite this court's interim status quo orders issued on 19th February 2025, restraining further excavation on the suit property, the Applicant is in contempt of court since on 1st March 2025, he continued to excavate and further erected a makeshift iron fence around the said suit property.
 8. The application was canvassed by way of written submissions.



Submissions

9. The Respondents/Applicants in their submissions contend that Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules, grants this court discretion to vary judgement and such discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake but it is not designed to assist a person to obstruct justice. They deny seeing the notice in the newspaper serving them and argue that they should not suffer the fate of their land being taken away fraudulently when they are the registered proprietors and have been paying rent and leasing it out. Further, that the Applicant/Respondent has no evidence of occupation. They rely on Articles 50 and 25 of *the Constitution* to submit that a party to proceedings should not suffer the penalty of not having his or her case heard and that the right to a fair hearing is non-derogable. They insist that the functus officio doctrine does not apply herein since they are not inviting the court to re-examine its judgement of 30th May 2024 but are seeking an opportunity to have a bite at the cherry. Further, that the doctrine of laches does not apply since they have denied delaying in asserting their rights and have demonstrated that immediately they learnt of the existence of the suit about 1st November 2024, they filed the instant application on 18th November 2024. To buttress their averments, they relied on the following decisions: Oithon Waweru Maina v Thuka Mugiria [1983] eKLR and Nyokabi Karanja & 3 Others v Kamuingi Housing Company Limited [2015] eKLR.
10. The Applicant/Respondent in his submissions reiterates his averments and insists that this court is functus officio and is barred from dealing with this application. The Applicant further submits that Order 5 Rule 17 (4) of the Civil Procedure Rules allows for substituted service. Further, that the Respondents are guilty of laches for delay in filing the instant application and staying away from their parcel of land for a period of over 21 years. To buttress his averments, he relied on the following decisions: Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 1996 former employees of Telkom Kenya Limited) [2014] eKLR; John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR; Silas Kathiira v Timothy Mugambi [2021] eKLR; Amina Karama v Njagi Gachangua & 3 Others [2020] eKLR and Ziro Mutei & another (Environment & Land Case 374 of 2016) [2022] KEELC 2747 (KLR) (12 July 2012) (Ruling).

Analysis and Determination

11. Upon consideration of the instant Notice of Motion application, Notice of Preliminary Objection including the affidavits as well as the rivalling submissions, the following are the issues for determination: Whether this Court is functus officio and barred from dealing with the instant application. Whether the default judgement entered on 30th May, 2024 should be set aside.

As to whether this court is functus officio and barred from dealing with the instant application.

12. The Applicant/ Respondent has claimed this Court is functus officio and is barred from dealing with the instant application. On functus officio, the Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has



been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

See the case of Telkom Kenya Ltd v John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd).

13. In this instance the Respondents / Applicants have sought to set aside the default judgement of 30th May, 2024 and be allowed to file their defence, which fact is vehemently opposed by the Applicant/ Respondent. From perusal of the instant application, it is evident that the Respondents /Applicants have not sought to vary the terms of the impugned judgement but to set it aside. Based on the facts before me while relying on the decisions cited, I find that this Court is not functus officio in dealing with an application to set aside a default judgment.

As to whether the default judgment entered on 30th May, 2024 should be set aside.

14. On setting aside default judgment, Order 10 Rule 11 of the Civil Procedure Rules, stipulates thus:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

15. On setting aside a judgment, 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), held inter alia:

“Whereas the nature of conditions to be imposed by the court in setting aside an ex parte judgement is an exercise of discretion, just like any other exercise of discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles.....”

16. While in James Kanyita Nderitu & Another [2016] eKLR, the Court observed that there is a distinction between regular default judgement and irregular default judgment:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others.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 justiae, 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....”

17. In this instance the Court entered judgment in favour of the Applicant/Respondent on 30th May, 2024. I note the Applicant/Respondent contends that the Respondents/Applicants were served via substituted service of summons in the Daily Nation Newspaper but failed to enter appearance and file a Defence. The Respondents/Applicants have confirmed that they never saw the newspaper advertisement but immediately they learnt of the impugned Judgment, they made the instant application to set it aside and defend the suit.
18. On perusal of the pleadings and proceedings herein, I note the Applicant/Respondent filed an Originating Summons seeking to be declared owner of the suit property, by way of adverse possession, which land is registered in the Respondents/Applicants. Further, the instant suit proceeded undefended culminating in the Applicant/ Respondent being declared owner of the suit property.
19. I note the instant application was filed on 18th November, 2024 after the Judgment was delivered on 30th May, 2024, which was within six months. I opine that this was not too late as claimed by the Applicant/ Respondent and hence does not offend the Doctrine of Laches as it was brought without inordinate delay. It is my considered view that the Respondents/Applicants have explained their failure to file a Defence as they did not see the Newspaper Advertisement serving them with summons, which explanation I find plausible. Since the Respondents/Applicants are the registered proprietors of the suit property and in line with the principles espoused under Articles 25 and 50 of *the Constitution* on the right to fair hearing, I opine that they should be granted an opportunity to defend this suit, whose fulcrum revolves around their land.
20. Further, I note the Applicant/ Respondent has not demonstrated the prejudice he stands to suffer if the impugned judgment was set aside, since he did not indicate if there were any developments on the suit property. The Applicant/ Respondent has further not denied that it is only in 2025 that he commenced to excavate the suit property.
21. In the interest of justice, while associating myself with the decisions cited, I will proceed to set aside the default judgement dated the 30th May, 2024 including the resultant Decree emanating therefrom dated the 5th June 2024 and all other consequential orders as well as the letter dated 4th July 2024 and direct the Respondents/ Applicants to file and serve their response to the Originating Summons within fourteen (14) days from the day hereof.
22. In the foregoing, I find the Notice of Motion application dated the 18th November 2024, merited and will allow it. I however find the Notice of Preliminary Objection dated the 17th February 2025 unmerited and will disallow it.
23. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Shisanya for Kwame for Respondent

Majimbo for Respondent/Applicant

Court Assistant: Joan

