



REPUBLIC OF KENYA



KENYA LAW
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**Muigua & another v Kuria & 17 others (Environment & Land Case
123 of 2022) [2025] KEELC 3366 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 123 OF 2022**

JM ONYANGO, J

APRIL 23, 2025

BETWEEN

JENNIPHER KABUGI MUIGUA 1ST PLAINTIFF

JANET WAMBU GICHARU 2ND PLAINTIFF

AND

JANE WANJIKU KURIA 1ST DEFENDANT

**MURETA MUGUTHA SELF HELP GROUP (THROUGH ITS TRUSTEES
GABRIEL KAMAU KIBATHI, CHARLES KURIA MWANGI & JOHN KAMAU
KANGETHE 2ND DEFENDANT**

JAMES MWANGI KIRAGU 3RD DEFENDANT

MICHAEL FRANCIS MINYOTA 4TH DEFENDANT

JOHN WAMBUGU GICHUHI 5TH DEFENDANT

GEORGE MBUGUA NGUGI 6TH DEFENDANT

JOHN MACHARIA KARANJA 7TH DEFENDANT

JOHN KAMAU KANG'ETHE 8TH DEFENDANT

JOHN MATHERI WACHIRA 9TH DEFENDANT

EDWARD GATHII KIBE 10TH DEFENDANT

SIMON KIMANI NJOROGE 11TH DEFENDANT

FRANCIS KARANJA KIGIRA 12TH DEFENDANT

GEORGE KAMAU KIRUKU 13TH DEFENDANT

FRANCIS NJAGI GACHUKA 14TH DEFENDANT



PAUL KURIA MUNGAI	15TH DEFENDANT
CTHERINE NYAKINYUA KURIA	16TH DEFENDANT
TITUS KIAMBI WACHIRA	17TH DEFENDANT
THE LAND REGISTRAR THIKA	18TH DEFENDANT

RULING

1. What is before me for determination is the 2nd-17th Defendant's Notice of Motion dated 24th July 2024 seeking various orders including an order to set aside the judgment delivered on 5th December 2023, a stay of execution, an injunction restraining the Respondents from interfering or dealing with L.R No. Ruiru/Ruiru East Block 2/1909 and Ruiru/Ruiru East Block 2/1910 pending the hearing of the main suit, an order that the service of Summons to enter appearance effected upon the 2nd-17th Applicants was improper, an order that the Land Registrar, Ruiru and Nyakinyua Investment Ltd be enjoined as third parties inter alia.
2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Supporting affidavit of Catherine Nyakinyua Kuria (16th Defendant) sworn on her own behalf and on behalf of the 2nd -17th defendants on 24th July 2024.
3. In the said affidavit she depones that she and the other Applicants were not served with Summons to enter appearance or the pleadings herein and they only became aware of the existence of the suit when the area chief of Theta ward visited Mr. Kamau the owner of land parcel number Ruiru/Ruiru East Block 2/8285 in April 2024 and ordered him to vacate the premises without giving him any court order. All he gave him was the case number.
4. That upon getting the information from the area chief, Mr. Kamau went out in search of the other co-owners of the suit property being the 2nd -17th Applicants as they do not physically reside on the property since most of it is undeveloped.
5. She further depones that the Applicants thereafter held consultations as the news shocked them since some of them had sold their portions to third parties while the three trustees of Murera Mugutha Self Help Group (2nd Defendant) had died. They later learnt that service had been effected upon them through substituted service by way of an advertisement in one of the local dailies.
6. That it was only when their advocate perused the court file that it was established that they had been served by substituted service. She avers that she is aged 72 years and she does not purchase or read newspapers and she therefore did not come across the advertisement serving them with the Summons to enter appearance and it was therefore prejudicial to her and her co-defendants some of whom are older than her.
7. She avers that the Plaintiffs mischievously failed to inform the court that all the three trustees of Murera Mugutha Self help Group jointly sued as the 2nd Defendant as well as the 8th Defendant were deceased by the time the suit was instituted.
8. It is her deposition that the Respondents failed to file an affidavit of service in respect of the Summons to enter appearance in order to demonstrate the efforts made and the challenges encountered in tracing the Defendants before seeking leave to serve by way of substituted service and therefore the leave they obtained to serve by substituted service was premature and unmerited.



9. She avers that the Respondents had in their application dated 14.10.2022 confirmed to the court that the Applicants had constructed permanent houses on the suit property and others had disposed of their portions so they misdirected the court when they sought leave to serve the Defendants by substituted service on account of the fact the defendants' whereabouts were unknown.
10. She further avers that the Respondents claimed they had inherited the suit property from their late mother Margaret Nduhu Gicharu and they filed Succession Cause No. 1677 of 2014. However, upon perusal of the court file, L.R No. Ruiru/Ruiru East Block 2/1909 and Ruiru/Ruiru East Block 2/1910 do not form part of the estate of the deceased hence the need for the DCI –Juja to investigate a possible fraud by the Respondents and Nyakinyua Investment Ltd in the acquisition of the suit property.
11. That in 2018, the Plaintiffs/ Respondents placed a caveat on the suit property through the National Land Commission but the same was subsequently removed in 2023. She avers that the parcel file for the suit property was transferred from Kiambu Land Registry to Ruiru Land Registry hence the need to add the Land Registrar Ruiru as a party to this suit so that he can produce all the relevant documents and parcel file to enable the court make an informed decision.
12. It is her deposition that the Applicants have an interest in the suit property and they have an arguable case with triable issues and prays that they be allowed to ventilate their issues. They fear that the Respondents may dispose of the suit property and if that happens, the Applicants will suffer irreparable loss.
13. The application was strenuously opposed by the Respondents through the Replying Affidavit of Janet Wambui Gicharu sworn on the 30th September 2024. In the said affidavit she maintains that the Applicants were served through substituted service and they were therefore aware of the proceedings herein but they opted not to participate in the suit hence it proceeded as an undefended suit.
14. She depones that she has been issued with a title deed in respect of land parcel number Ruiru/Ruiru East Block 2/1909 as directed in the judgment and she is therefore entitled to quiet possession thereof.
15. She insists that the Applicants were served by substituted service as they could not be traced for physical service since the 2nd Plaintiff had sold the suit property to several people. She adds that the service was proper and in accordance with the relevant law.
16. She denies that the Applicants have been in quiet possession of the suit properties as the plaintiffs have been trying to recover the suit properties since 2014. She urged the court to dismiss the application.
17. The application was disposed of through written submissions.

Analysis and Determination

18. Having considered the application, the Replying Affidavit and rival submissions filed by the parties, the following issues arise for determination:
 - i. Whether the service of summons to enter appearance upon the Applicants was proper.
 - ii. Whether the judgment ought to be set aside.
 - iii. Whether the Applicants should be granted the orders sought in their application.
19. Service by substituted service is provided under Order 5 Rule 17 of the Civil Procedure Rules which stipulates that:
 17. Substituted service



1. “Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the rules of this order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court house and also in some conspicuous part of the house if any in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.
 2. Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
 3. Where the court makes an order for substituted service, it shall fix such time for appearance of the defendant as the case may require.
 4. Unless otherwise directed, where substituted service of summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as circumstances require.
20. Although substituted service is one of modes of service of summons recognized by the Civil Procedure Rules, the court in the case of *Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 Others* Civil Appeal No. 238 of 2003 set out the following principle:
- “The truth of the matter is that personal service remains the best form of service in all areas of litigation and to say that Members of Parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law”
21. Further in the case of *Ephraim Njugu Njeru v Justin Bendan Njoka Muturi & 2 Others* Civil Appeal No. 314 of 2003 (2006) eKLR the Court pronounced itself as follows:
- “We agree that the best form of service is personal service. It is the only mode of service which would assure the court that the party sued had due notice of the matters complained of against him., and therefore had ample opportunity and possibly time to respond to those complaints”
- The court further observed as follows:
- Generalized statements by a process server regarding service cannot justify resort to substituted service. Substituted service is resorted to after all reasonable and proper efforts have been made to trace the Respondent but in vain.
22. What can be gleaned from the above authorities is that before one can be granted leave to serve a party by substituted service, he or she must satisfy the court that the defendant cannot be served physically.
 23. I have perused the Plaintiffs’ application dated 18.10.2022 seeking leave to serve the Defendants herein by substituted service. The supporting affidavit sworn by Gilbert Kinyua Advocate is bereft of any reasons why it was necessary to serve the Defendants by way of substituted service as all he states is that Justice Eboso granted an order for the Defendants to be served within 3 days.
 24. Taking into account the averments in the supporting affidavit of Catherine Nyakinyua Kuria to the effect that the Plaintiffs made no efforts to trace the defendants, and also noting that the trustees of the Murera Mugutha Self Help Group and the 8th defendant were dead by the time service was effected upon them through an advertisement in the daily newspaper, I am constrained to find that service of summons upon the defendants was not properly effected.



25. The second issue for determination is whether the judgment entered against the defendants on 5th December 2023 should be set aside. The court's power to set aside an ex-parte judgment is governed by Order 10 Rule 11 of the Civil Procedure rules which provides that the court may set aside or vary such a judgment and any consequential decree upon such terms as are just. The court has unfettered discretion in determining whether or not to set aside the default judgment. In the case of James Kanyiita Nderitu & Another –vs- Marios Philotas Ghikas & Another [2016] Eklr and observed that:

“In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other...”

26. See also the case of CMC Holdings Ltd V Nzioki (2004) KLR 173 where the Court of Appeal held that:

“In an application for setting aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised judiciously. ..In law the discretion that a court of law has in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice as a result of amongst others an excusable mistake or error, It would not be proper use of discretion if the court turns its back on a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.”

27. In the present case the Defendants have explained that they never saw the advertisement through which they were served with Summons to enter appearance. The said judgment was entered on 5th December 2023 and a decree was issued on 5th February 2024 while the application herein was filed on 24th July 2024. Since the defendants have explained that they became aware of this suit later in April 2024 when the occupant of parcel number 8285 was served with an eviction order, the delay is not inordinate.

28. I have also perused the draft Defence annexed to the Defendants' application and I am of the view that it raises trial issues.

29. Taking all factors into account, it is in the interest of justice that the judgment and subsequent decree issued on 5th February 2024 be set aside.

30. The Defendants have also sought an order of temporary injunction restraining the Plaintiffs from dealing with the suit properties pending the hearing and determination of the main suit.

31. The principles for the grant of a temporary injunction were set out in the celebrated case of Giella v Cassman Brown Company Limited (1973) E.A 358 which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”



32. Additionally, in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court held that: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

33. The Applicants have demonstrated through the documents annexed to the supporting affidavit of Catherine Nyakinyua Kuria that they have an interest in the suit properties which is likely to be infringed by the Plaintiffs unless the order of injunction is granted and they therefore they have a prima facie case with a probability of success.

34. Regarding the question of irreparable loss, the defendants have stated that they have been in possession of the suit properties for a period of 14 years and since the Plaintiffs have recently had the suit properties transferred to their names, the Defendants are apprehensive that that the Plaintiffs may dispose of the suit properties to third parties in which event the Defendants would suffer irreparable loss.

35. With regard to the balance of convenience, the Plaintiffs in their *Plaint* alleged that the defendants had fraudulently had the suit properties transferred to them and it would be in the interest of justice if the suit properties were preserved so that the case can be determined on the merits.

36. Corollary to the foregoing, the Nyakinyua Investment Company Limited and the Land Registrar, Ruiru ought to be joined to the suit in order to shed light on who is the lawful owner of the suit properties. I am guided by the case of *Municipal Council of Garissa v Ahmed Siad Mohammed & Another HCCC No. 7 of 2011 (Garissa)* cited in *Kenya Pipeline v Redate Investments Limited & 3 Others* (2013) eKLR where the court was of the view that:

“The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage.”

37. Although the Applicants sought orders of specific performance compelling the Land Registrar Ruiru and Nyakinyua Investments to produce certain documents, I am of the view that these prayers are premature as they should be dealt with during the pre-trial conference. The prayer directed at the DCI Juja is also unnecessary as it has not been demonstrated that a report has been made to the DC1 Juja and they have failed to conduct the necessary investigations.

38. Having considered the application, the rival submissions as well as the authorities cited to me and the relevant law I am satisfied that the application is merited and I grant it and make the following orders:



- a. The judgment delivered on 5th December 2023 and decree issued on 5th February 2024 are hereby set aside.
- b. The 2nd to 17th Defendants are granted leave to enter appearance and filed their Defences within 21 days from the date of this ruling.
- c. A temporary injunction is hereby issued restraining the Plaintiffs/ Respondents, their agents, servants, employees, representatives or any other person acting on their behalf from selling, leasing, disposing off, transferring, sub-dividing, putting up structures or in any other way dealing or interfering with the land parcels known as L.R No. Ruiru/Ruiru East Block 2/1909 and Ruiru/Ruiru East Block 2/1910.
- d. The Land Registrar Ruiru and Nyakinyua Investment Company Limited are hereby enjoined in the suit as Defendants.
- e. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF APRIL 2025.

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr. Kahuki for Miss Gakara for the 2nd-17th Defedants/ Applicants
2. Mr. Kinyua for the Plaintiffs/ Respondents.

Court Assistant: Hinga

