



United Way Kenya Limited & another v Mereu & 5 others (Environment & Land Case 959 of 2017) [2025] KEELC 3246 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 959 OF 2017**

MD MWANGI, J

APRIL 4, 2025

BETWEEN

UNITED WAY KENYA LIMITED 1ST PLAINTIFF

MAGADI SOLAR PLANT LIMITED 2ND PLAINTIFF

AND

NGAYAMI OLE MEREU 1ST DEFENDANT

JOHN LAMISON OLE MEREU 2ND DEFENDANT

RUKIYA ENE LAMISON 3RD DEFENDANT

NANKPOYA ENE NGAYAMI 4TH DEFENDANT

LEKUTUK OLE SIMPALA 5TH DEFENDANT

RESIATO ENE LEKUTUK 6TH DEFENDANT

RULING

(In respect of the 1st to 6th Defendants Notice of Motion dated 27th May, 2024 and the Intended 7th to 34th Defendants' Notice of Motion dated 4th October, 2024)

Background

1. This Ruling is in respect of two applications being the 1st to 6th Defendants Notice of Motion dated 27th May, 2024 and the Intended 7th to 34th Defendants Notice of Motion dated 4th October, 2024.

A. 1st to 6th Defendants Notice of Motion dated 27th May, 2024

2. The Defendants' Notice of Motion dated 27th May, 2024 is under Article 159(1)(d) of *the Constitution*, Order 10 Rule 11; Order 12 Rule 7; Order 42 Rule 6; and Order 51 Rule 1 of the Civil Procedure



Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act primarily seeking for the following prayers;

- a. The court does set aside the default judgment obtained by the Plaintiffs in this matter together with all ex- parte proceedings against the Defendants, consequential orders and the resultant decree.
 - b. The Defendants be granted unconditional leave to defend the suit.
 - c. The Defendants' annexed draft defence be deemed duly filed and served.
 - d. Costs of the Application be provided for.
3. The Application is supported by the supporting affidavits of Lekutuk Ole Simpala sworn on 28th May, 2024 and 4th October, 2024. The deponent avers that the Defendants only learnt about the existence of this suit upon being issued with notice to vacate in accordance with the judgment delivered on 3rd October, 2022. According to the vacation notice, the Defendants were required to vacate L.R No. KAJIADO/LOODARIAK/638 not later than 1st June, 2024 at 7.00 am along with their livestock and families and to demolish all the structures therein.
4. The Defendants asserts that given their illiteracy, they heavily relied on their counsel Ms. Carol Mburugu then of Kituo Cha Sheria to update them on the matter. However, she did not notify them first that the suit had been transferred from Nairobi to Kajiado neither did she inform them of its progress. They assert that the mistakes of the counsel should not be visited upon litigants. The Defendants affirms that bearing in mind that their defence raises triable issues, then, it is in the interest of justice that their application be allowed. They affirm that they stand to suffer irreparable loss if the orders sought are not granted.

Rejoinder

5. The application is strenuously opposed by the Plaintiffs through the Replying Affidavit of Charles Wachira Ngundo sworn on 1st August, 2024. The deponent deposes that he is a director of Plaintiffs' companies. The deponent asserts that throughout the proceedings, Advocate Carol Mburugu of Kituo Cha Sheria appeared on behalf of the Defendants. In addition, Kituo Cha Sheria was served with a hearing date of 29th October, 2022 as well as the application dated 2nd May, 2023. He further explains that in compliance with the courts directions, the Defendants were served with a 90 days' vacation notice in English and Kiswahili after the delivery of the judgement against them. The Notice was likewise served upon the Kajiado West Sub-County Deputy County Commissioner, the Sub county Police Commander and the area Assistant Chief
6. The Plaintiffs implores the court not to set aside its judgment which was entered upon the hearing of the case on its merits because the Defendants have been indolent in participating in these proceedings. Further, they never filed their responses nor appeared in court despite being served.

B. 7th to 34th Defendants/ Applicants Notice of Motion dated 4th October, 2024

7. The Notice of Motion application dated 4th October, 2024 by the intended 7th to 34th Defendants/ Applicants is brought under Order 1 Rule 10; Order 10 Rule 1; Order 12 Rule 7; and Order 50 Rule 1 of the Civil Procedure Rules as well as Sections 1A and 1B of the Civil Procedure Act. It seeks for orders that;



- a. The default judgement dated 3rd October, 2022 obtained by the Plaintiffs' in Kajiado ELC No. 959 of 2017 together with all ex-parte proceedings against the Defendants, and all the consequential orders and resultant decree be set aside.
 - b. The court does order that the intended 7th to 34th Defendants be joined in this suit as Defendants.
 - c. Leave be granted to the intended 7th to 34th Applicants/Defendants to fully participate in this instant suit and file such pleadings, affidavits, submissions and other documents subsequent to the joinder.
 - d. The intended 7th to 34th Defendants be granted 14 days leave to file and serve a response to the plaintiffs' amended Plaint dated 30th April, 2018 upon being enjoined.
 - e. Costs of the Application be provided for.
8. The Application is premised on the grounds on the face of it as well as the supporting affidavit of Gilbert Mure Nawoiki sworn on 4th October, 2024. He avers that the intended Defendants/Applicants have a clear, proximate interest and identifiable stake over KAJIADO/LOODARIAK/638 which they have occupied since their birth together with their forefather's way before 1990. He explains that they received a vacation notice emanating from the judgment dated 3rd October, 2022 in this matter. According to the notice, the intended Defendants/Applicants were required to vacate the property together with their livestock and family and to demolish their residential premises by 1st June, 2024 at 7.00 am.
 9. He deposes that since the judgment was delivered in their absence, it has left them vulnerable as they risk losing their land which they hold with significant sentimental value to themselves and their community.
 10. It is the intended Defendants/Applicants' case that they were not privy to the proceedings in this case neither did they have an opportunity to exercise their legal rights and defend their interests. They further aver that it is necessary that they be enjoined in this suit for an effective and complete adjudication of the dispute herein. They opine that their participation in these proceeding will prevent a likely course of proliferation of litigation. Further, that the Plaintiff will not suffer any prejudice in any event.

Response

11. The Plaintiffs in their response pray that the application be dismissed. Their response is through the grounds of opposition dated 2nd December, 2024 where they state that;
 - a. The 2nd plaintiff is the registered propriety of KAJIADO/LOODARIAK/638 having bought it from the 1st plaintiff.
 - b. The 7th to 34th Defendants are stranger to the proceedings. They never participated in main suit nor do they have any proprietary rights in the suit property. Therefore it is improper for them to come to these proceedings at this juncture after the matter was closed to upset the judgment delivered on 3rd October, 2022.
 - c. Having rendered a decision on the matter and ordering that the Defendants in this matter by themselves, their livestock, servants, agents, employees and or persons claiming under them to move out and vacate the subject land via the judgment delivered on 3rd October, 2022, this



court is “funtus officio” and lacks jurisdiction to reopen the matter, bring in new parties and entertain the 7th to 34th Intended Defendants’ application to stop the execution.

- d. The 7th to 34th Intended Defendants purported claim is not properly before the court as their application raises a challenge on the 2nd Plaintiff’s ownership of the suit property. This can only be ventilated via a proper suit in a separate proceeding to be filed against all the necessary parties if the issues being raised are to receive real judicial adjudication. Their claims cannot be addressed by way of an application.
- e. The 7th to 34th Intended Defendants have not attached a draft defence to their application to demonstrate what they wish to tell the court should they be allowed to come into this matter. The instant application is a ploy to vex the Plaintiffs, waste judicial time and keep the Plaintiffs’ from enjoying the fruits of a judgment in their favor.

Directions by the court

12. When the two applications came up for mention on 30th January, 2025, the court directed that they be disposed of through written submissions. All parties duly complied with the directions and filed their respective submissions which the court has had the opportunity of reading and considering in making its findings.

Determination

13. Upon careful consideration of the two applications, their respective responses as well as the party’s submissions, the following are the issues for determination;
 - a. Whether the judgment delivered on 3rd October, 2022 and the decree therein should be set aside?
 - b. Whether the 1st to 6th Defendants should be granted leave to defend the suit?
 - c. Whether the 7th to 34th Intended Defendants/Applicants have made a case to warrant their enjoinder in this matter.

Determination

14. Upon perusal of the court record in this matter, the following findings are critical as they will influence the outcome of the 1st -6th Defendants/Applicants application. On 13th August, 2013, the firm of Ongoya and Wambola filed a memorandum of appearance dated 13th August, 2013 on behalf of the 1st - 6th Defendants herein. During the pendency on this suit, Mr. Ongoya for the Defendants only appeared twice in court on behalf of the Defendants.
15. The Defendants filed a Notice of Motion dated 3rd April, 2014 seeking orders that the interlocutory judgment entered on 16th January, 2014 in default of defence be set aside. They also sought for leave to file their defence out of time. After considering the application and through a ruling delivered on 18th December, 2014, the trial court granted the Defendants leave to file and serve their Defence, bundles of documents and witness statements within 60 days from the date of the ruling. The court further stated that in default, the suit would proceed to formal proof of the Plaintiffs’ case.
16. At the time the ruling was being delivered on 18th December, 2014, there was no appearance by the Defendants. The court record further demonstrates that the Defendants never appeared in court from 22nd September, 2014 to 27th May, 2017 whenever the matter was cause listed.



17. A notice of change of advocates dated 3rd April, 2014 was filed by Ms. Carol Mburugu for Kituo Cha Sheria who came on record for the Defendants in place of the previous firm of Advocates.
18. This suit was transferred from Nairobi to this court on 27th May, 2017. On this date, Ms. Maina holding brief for Mr. Kinyua for the 1st to 6th Defendants told the court that they wished to file an application to cease from acting for the Defendants. The application to cease acting was indeed lodged through the Notice of Motion dated 1st March, 2019 by Carol Mburugu Advocate of Kituo cha Sheria. She deposed that she had obtained instructions to represent the Defendants while working for Kituo Cha Sheria, but had since left employment with the organization. The application was premised on the grounds that she had been unable to get in touch with the Defendants.
19. The record further shows that from 8th July, 2019 to the conclusion of this suit, there was no appearance by the Defendants. Regardless, the Plaintiffs continued to served pleadings and notices upon the 1st to 6th Defendants through the Legal Department of Kituo Cha Sheria as evidenced from the affidavit of service by Stephen Kinuthia.
20. While rendering its judgments dated 3rd October, 2022, the trial court noted that the Defendants through their counsel on record filed a memorandum of appearance dated 13th August, 2013 but they never filed any defence despite being granted ample opportunity to do so. The court further stated that the Defendants never attended the hearing on 21st March, 2021 despite being served with a hearing notice on 29th October, 2021 as demonstrated in the Affidavit of service dated 3rd November, 2021.
21. The Notice of Motion dated 2nd May, 2023 which was disposed of through a ruling of 5th December, 2023 leading to the issuance of the eviction notice was served upon Kituo Cha Sheria. This is according to the Affidavit of Service of Stephen Kinuthia sworn on 30th June, 2023.
22. The Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR), had this to say on setting aside a default judgement;

“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 judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 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 others.”

23. Proceeding from the above holding by the Court of Appeal, the judgement herein as against the 1st to the 6th Defendants is a regular default judgement. In such circumstances, court has unfettered discretion to set aside such judgment but which discretion, being judicial discretion must be exercised judiciously taking into account the factors enumerated by the court.



24. Differently constituted, the Court of Appeal in *Kenya Power & Lighting Co Ltd vs Abdulkakim Abdulla Mohamed & another* [2017] KECA 527 (KLR), stated that;
- “The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties.”
25. The Plaintiffs contend that the Defendants are not deserving of the prayers sought because there were indolent.
26. The 1st - 6th Defendants have beseeched this court not to punish them because of the mistakes of their counsel. The evidence before the court points to the fact that the notices meant for service upon the Defendants were consistently served upon Kituo cha Sheria for the sole reason that Carol Mburugu Advocate who had taken over the conduct of the Defendants’ case was at the time of taking up the matter working there. In an application seeking leave to cease from acting for the Defendants, the said advocate deposed in her supporting affidavit that she was no longer working for Kituo cha Sheria and had further lost contacts with the Defendants. This validates the Defendants’ assertion that they were not aware or informed of the progress of the case. No wonder, the case proceeded in their absence.
27. Kituo cha Sheria is not a law firm. Carol Mburugu Advocate had taken up the matter of the Defendants as their Advocate. Notices therefore ought to have been served upon her and not upon Kituo cha Sheria. Otherwise, the Defendants ought to have been served personally.
28. The provisions of Article 159(2) of *the Constitution* read together with sections 1A and 1B of the *Civil Procedure Act* enjoins the courts in exercise of their judicial authority to foster and facilitate the overriding objective of rendering justice in a just expeditious, proportionate and affordable manner. Courts exist for purposes of dispensing justice.
29. The Court of Appeal in *Martha Wangari Karua vs Independent Electoral & Boundaries Commission & 3 others* [2018] KECA 791 (KLR) emphasized that;
- “The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
30. My finding is that the Defendants in their application raise serious and triable issues which ought to be determined on their merits. It is the court’s finding that the Defendants ought to be granted an opportunity to defend this suit but with a condition that they pay a sum of Kshs. 50,000/= to the Plaintiffs as throw away costs within the next 30 days to cater for out of pocket expenses incurred. Consequently, the judgement delivered in this matter on 3rd October 2022, the resultant decree and all consequential orders is hereby set aside in its entirety.
31. Accordingly, the Defendants’ applications succeed on condition that the Defendants pay to the Plaintiffs throw away costs amounting to Ksh.50,000/= within 30 days of this ruling. The Defendants are hereby directed to file and serve their statement of defence within 30 days accompanied by their list of witnesses, witness statements and list and bundle of documents.
32. Having allowed the reopening of the case upon finding merit in the Defendants’ application, the 7th to 34th Defendants/Applicants are hereby enjoined as Defendants since they claim similar interests on the suit property as those of the 1st-6th Defendants. They have in their application demonstrated that they have an interest in the suit property that entitles them to be joined as principal parties in



this matter. Similarly, the 7th to 34th Defendants are hereby directed to file and serve their statement of defence within 30 days accompanied by their list of witnesses, witness statements and list and bundle of documents.

33. The Plaintiff will have an automatic right to respond to the Defendants' statements of Defence and file any further necessary documents and or witness statements within 15 days after service. Afterwards the matter will subsequently be listed for pre-trial.
34. In conclusion, both the 1st to 6th Defendants Notice of Motion dated May 27, 2024 and the Intended 7th to 34th Defendants Notice of Motion dated October 4, 2024 are allowed. The judgement delivered in this matter on 3rd October 2022, the resultant decree and all consequential orders is hereby set aside in its entirety and the Defendants herein to file and serve their statement of defence within 30 days accompanied by their list of witnesses, witness statements and list and bundle of documents. The 1st to the 6th Defendants shall pay throw away costs of Kshs. 50,000/= to the Plaintiffs in the next 30 days of this ruling.
35. The costs of the applications shall be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 4TH DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kyeva h/b for Mr. Thiongo for the 1st to 6th Defendants/Applicants

Mr. Muturi for the Plaintiffs

Mr. Kamba for the Intended 7th – 34th Defendants

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

