



**Wara v Wara (Environment and Land Miscellaneous Application
E050 of 2024) [2025] KEELC 3138 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E050 OF 2024
SO OKONG'O, J
APRIL 3, 2025**

BETWEEN

ALPHONCE OWILI WARA APPLICANT

AND

EDWARD NYAKINDA WARA RESPONDENT

RULING

1. The Applicant and the Respondent are brothers. The Respondent filed a suit against the Applicant in the Senior Resident Magistrate's Court at Nyando on 17th March 2021 in Nyando MC ELC No. 14 of 2021 (hereinafter referred to as "the lower court"). The Respondent averred that the Applicant had trespassed on his parcel of land known as Kisumu/Lower Kadianga/680 (hereinafter referred to as "the suit property") and sought the Applicant's eviction from the property. According to the affidavit of service filed in the lower court, the Applicant was served with Court Summons on 19th March 2021, and he entered appearance on 12th April 2021. The Applicant did not file a defence and interlocutory judgment was entered against him on 7th June 2021. On 14th June 2021, the suit was fixed for mention on 1st July 2021.
2. From the lower court record, when the matter came up for mention on 1st July 2021, the Applicant was absent and the court proceeded to hear the suit his absence notwithstanding. After hearing the suit on the mention date as aforesaid, the lower court delivered a judgment on the matter on 12th August 2021. The lower court ordered the Applicant to move out of the suit property within 3 months of the date of the judgment failure of which he be evicted therefrom.
3. On 28th July 2022, the lower court ordered on an application by the Respondent in which the Applicant participated that the Applicant be evicted from the suit property with the help of Police Officers from Sondu-Miriu Police Station. According to the order in the lower court file made on 18th July 2024, the Applicant was evicted from the suit property and the Respondent put in possession.



4. The Applicant filed an appeal against the lower court judgment namely, Kisumu ELCLA No. E061 of 2024 which he withdrew on 30th January 2025. What is now before me is the Applicant's application brought by way of Notice of Motion dated 8th November 2024 in which the Applicant has sought the following orders;
 1. That the Applicant be granted leave to file a defence out of time against the judgment of the lower court that was delivered on 12th August 2021 and the subsequent ruling delivered on 28th July 2022.
 2. That the court be pleased to issue an order of stay of execution of the said judgment pending the hearing of the application inter-partes.
 3. That the costs of the application be provided for.
5. The application was brought on the grounds that the Applicant was desirous of filing a defence in the lower court suit and that he had a good defence to the suit. The applicant averred that the lower court suit was heard in his absence because he did not file a defence on time. When the application came up for hearing, the Applicant reiterated that he was not heard in the lower court before a judgment was delivered against him. The Applicant told the court that he wanted to be heard in the matter with his witnesses. In reply, the Respondent's advocate submitted that the application was not properly before the court as it should have been filed in the lower court and not before this court. In a rejoinder, the Applicant contended that he had approached the lower court with a similar application, but that court refused to hear him.
6. I have considered the Applicant's application together with the affidavit filed in support thereof. I have also considered the submissions by the parties. I agree with the Respondent that the Applicant's application is not properly before this court. Save where the trial court (lower court) hears an application to set aside a judgment, dismisses such an application and an appeal is lodged before this court, this court has no jurisdiction to set aside a lower court judgment and to grant leave to a defendant in a suit before the lower court to file a defence out of time. The Applicant's application has, therefore been brought before a court that has no power in the first instance to grant the orders sought. As rightly pointed out by the Respondent, the Applicant's application should have been filed in the lower court at Nyando. According to the proceedings of the lower court, the lower court file was marked as closed on 18th July 2024 but the Applicant was given the liberty to move the court if he wished to do so. There is no evidence on record that the Applicant had made an application to set aside the lower court judgment in the lower court. It is therefore not true that the lower court refused to hear the Applicant.
7. In conclusion, I find no merit in the Applicant's application dated 8th November 2024. The application is dismissed with no order as to costs since the Respondent did not file a response to the application. The Deputy Registrar shall return the lower court file for Nyando SPM ELC No. 14 of 2021, which is inside this file, back to Nyando Law Court together with a certified copy of this ruling so that the Applicant can file a fresh application before that court if he is so advised.

DELIVERED AND DATED AT KISUMU ON THIS 3RD DAY OF APRIL 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ojuro for the Applicant

The Respondent in person



Ms. Maureen-Court Assistant

