



**Oketch v Birdee & another (Environment & Land Case  
281 of 2017) [2025] KEELC 3050 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3050 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 281 OF 2017  
SM KIBUNJA, J  
APRIL 2, 2025**

**BETWEEN**

**JOSEPH MWAI OKETCH ..... PLAINTIFF**

**AND**

**RESHAM SINGH BIRDEE ..... 1<sup>ST</sup> DEFENDANT**

**HARKEVAL SINGH BIRDEE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The defendant filed the notice of motion dated 17th June 2024 under certificate of urgency dated 17<sup>th</sup> July 2024, and supported by the affidavit sworn on the 17<sup>th</sup> July 2024, seeking for the following orders:
  1. Spent.
  2. That the Defendants/Applicants' Advocates M/s Selina Egesa & Company Advocates, be granted leave to come on record for the 1st and 2nd defendants/applicant after Judgment;
  3. That this Honourable court be pleased to stay execution of the judgment issued herein by Honourable C. Yano. J. on the 15th day of February 2018 and Decree issued on the 21st day of February 2018 and any consequential orders herein pending the hearing and determination of this application and suit.
  4. That this Honourable Court be pleased to set aside, review, suspend and or vary the Judgment issued by Honourable C. Yano J. on the 15th Day of February 2018 and Decree issued on the 21st day of February 2018 pending the hearing and determination of this application and suit.



5. That this Honourable Court be pleased to stay the proceedings in miscellaneous Application number E032 of 2023 Joseph Mwai Oketch versus The Lands Registrar at the Environmental and Land Court Mombasa coming up for a Ruling on the 23rd day of July 2024 pending the hearing and determination of this application and suit.
6. That the Honourable Court do grant the Defendants/Applicants leave to file their Defence and serve their Defence upon the Plaintiff/Respondent out of time.
7. That the costs of this application be provided for.”

The application is premised on the eight (8) grounds on its face and is supported by the affidavit of Harkeval Singh Birdee, 2<sup>nd</sup> defendant, sworn on 17th July 2024, in which he deposed inter alia that he is the biological son of 1<sup>st</sup> defendant and together, they are the registered owners of Subdivision Number MN/III/2731 registered as CR 26544 (Original No. MN/III/557/5); that he learnt about the suit when one Matthew Mwazigi called him on phone and him that Misc. App E032 of 2023, Joseph Mwai Oketch versus The Lands Registrar was coming up in Mombasa court; that upon perusing that record, he noted in that miscellaneous application, the said Joseph Mwai Oketch was seeking to have the name of the 1<sup>st</sup> respondent removed/deleted from the title, and it was related to this suit filed on 27<sup>th</sup> July 2017, against him and his father, and which had a judgement entered on 15<sup>th</sup> February 2018 against him and he had not been aware about it; that they have never been served with summons or pleadings in this suit, and are being condemned to pay the decretal sums, costs and charges without being heard; that the attachment and execution process by the plaintiff against them is unlawful, unprocedural and illegal for they had not been served with summons and should be set aside in the interest of justice; that their annexed draft defence raises triable issues and their instant application is made without delay, and as no prejudice shall be suffered by the plaintiff, it should be allowed.

2. The application is opposed by through the replying affidavit of Joseph Mwai Oketch, plaintiff, sworn on 12<sup>th</sup> August 2024, inter alia deposing that the process server named Paul Odhiambo Outah, had tried to serve the defendants physically, but was unable and filed an affidavit of service sworn on 2<sup>nd</sup> August 2017; that his advocates on record filed an application for substituted service dated 16th August 2017 which was heard and allowed on 27th September 2017; that the defendants were served through substituted service by advertisement in Standard Newspaper of 4th October 2017, and an affidavit of service of even date was filed; that the defendants did not enter appearance and the suit proceeded to hearing as undefended and determined, and the decree is in the process of execution; that the defendants have filed the application after six (6) years and have not sufficiently explained the delay, and they should not be allowed to enjoy their indolence; that there are no triable issue raised in the draft defence, and the application should be dismissed.
3. The learned counsel for the defendants and plaintiff filed their submissions on 30th September 2024, and 9th December 2024, respectively, which the court has considered.
4. The issues for determination by the court are as follows:
  - a. Whether the defendants have met the threshold for stay of execution; review, setting aside suspending or varying the judgement, and leave to defend the suit.
  - b. Who bears the costs?



5. The court has carefully considered the grounds on the instant notice of motion, the affidavit evidence, submissions by the learned counsel, the record and come to the following determinations:

a. The application is premised on the setting aside of ex parte judgment under Order 10 Rule 11 of the *Civil Procedure Rules*. In the case of *Stephen Ndichu versus Monty's Wines and Spirits* (2006) eKLR, the court opined as follows:

“The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See *Patel –vs-E. A. Cargo Handling Services Ltd* (1974) E. A. 75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah –vs- Mbogo* (1969) E. A. 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration –vs- Gasyali* (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered.”the court citing relevant cases on the issue held inter alia:-

“ the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd*. the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see *Shah vs. Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali*.)It also goes without saying that the reason for failure to attend should be considered.”

Bearing in mind the above, the defendants’ reasons for failing to file a defence to the plaintiff’s claim for adverse possession is that they did not know of the suit until they made aware by one Mathew Mwazighi about a related Misc. Application No. E032 of 2023 Joseph Mwai Oketch versus The Land Registrar.

b. The court has established that Misc. Application No. E032 of 2023 *Joseph Mwai Oketch versus The Land Registrar*, was dated 28th July 2023 and was heard and dismissed on 24th July 2024. I have also noted that the defendants did not disclose the date the said Mathew Mwazighi alerted them of the suits matters so as to assess whether they delayed in filing the instant application. In the case of *Philip Keipto Chemwolo & another versus Augustine Kubende* [1986] KECA 87 (KLR) the Court of Appeal advanced the following principles for setting aside an ex parte judgment:

(a) if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one, which the Court must set aside ex debito



justitiae (as a matter of right) on the application by the defendant and such a Judgment is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. (See Winnie Vvambui Icibinge & 2 Others v Match Electricals Limited (2012) eKLR)

- (b) The court has unlimited discretion to set aside or vary judgment tendered in default of appearance upon such terms as are just in the light of facts and circumstances both prior and subsequent and of respective means of the parties.
- (c) Where a regular judgment had been entered, the court would not usually set aside the judgment unless it was satisfied there was a triable issue.
- (d) In that case, there was a triable issue on contributory negligence which would affect the quantum of damages.

Applying the above principles to the instant matter, I find the judgment entered in this suit was regular, as the plaintiff has demonstrated that after failing to trace the defendants for physical service, he moved the court through an application for substituted service which was granted. That he then had the defendants served through an advertisement in a daily newspaper of wide circulation as directed by the court. However, the defendants have demonstrated that they never saw the advertisement in the newspaper and did not know of the suit until when Mathew informed them about the related miscellaneous application as detailed above.

- c. I have perused the annexed draft defence/replying affidavit and I am satisfied it discloses reasonable triable issues to the plaintiff's claim. The defendants have claimed that the plaintiff was their caretaker on the suit property, under their employment at a monthly salary of Kshs.14,000. If that is established as a fact, then reasonable defence to the plaintiff's claim based on adverse possession will have been raised. In this, I am guided by the decision in case of *Burbani Engineers Ltd versus Spectre International Limited* [20151 eKLR, in which the court cited with approval the decision in the case of *Isaac Awuondo V Surgipharm Limited & Another* [2011] eKLR where the Court of Appeal had the following to say:

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend... We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel vs. EA. Cargo Handling Services Ltd.* [1974/ EA. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it triable issue ” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

In the court's opinion the defence placed forward by the defendants of the plaintiff having been their caretaker on the suit property, amounts to reasonable defence to his adverse possession claim, and their draft defence therefore raises triable issues.

- d. Though the judgement hearing was regularly entered, the defendants constitutional right to be heard as provided under Article 50 of *the Constitution* before they are condemned, especially in respect to their right to own property under Article 40 of *the Constitution* is in my view reason enough to grant their prayers to review and set aside the exparte judgement and allow them to file and serve their defence and generally defend this suit. whatever inconvenience the plaintiff is likely to suffer can be addressed through an award of thrown away costs, for it is



in the interest of justice to all parties and posterity for the suit to be heard and determined on merit now that the defendants are before the court. Since the plaintiff is yet to execute, a reasonable compensation of Kshs.30,000/= would in my view suffice as thrown away costs. Having found merit in the review and setting aside prayer (4), then there would be no need to consider stay of execution and proceedings at prayers (3) & (5) cannot be considered as the *exparte* judgment herein has been reviewed and set aside and the Misc. Application No. E032 of 2023 Joseph Mwai Oketch versus The Land Registrar, was heard and dismissed on 24th July 2024. Prayer (2) for Ms. Selina Egesa & Company Advocates to be granted leave to come on record for the defendants has not been opposed and is granted.

- e. Under section 27 of the *Civil Procedure Act*, chapter 21 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless where the court direct differently for good cause. In the instant case, though the defendants have successfully prosecuted their application and would ordinarily have been entitled to costs, I find justice of the suit will better be served by an order that costs abide the outcome of the suit as the court has found the *exparte* judgement that has been set aside was regular and the plaintiff could not be blamed for it.
6. From the foregoing determinations on the notice of motion dated 17<sup>th</sup> June 2024, the court finds and orders as follows:
- a. That Ms. Selina Egesa & Company Advocates, is hereby granted leave to come on record for the defendants after judgement.
  - b. That the *exparte* judgement delivered herein by Hon. C. Yano J, on the 15<sup>th</sup> February 2018, and decree issued thereof on 21<sup>st</sup> February 2018 are hereby reviewed and set aside.
  - c. That the defendants are granted leave to file their defence to the plaintiff's claim, and defend this suit.
  - d. That the defendants defence be filed and served within thirty (30) days from today.
  - e. That the defendants to pay the plaintiff thrown away costs of Kshs.30,000/= [thirty thousands] as thrown away costs within thirty (30) days from today.
  - f. That the costs in the application to abide the outcome of the suit.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiff : Mr Robinson Malobo

Defendants : M/s Egeza

Shitemi – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

