



REPUBLIC OF KENYA



Lua & another v Nzioka & 7 others (Environment & Land Case E011 of 2023) [2025] KEELC 4086 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4086 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E011 OF 2023**

EO OBAGA, J

MAY 29, 2025

BETWEEN

GEOFFREY WAMBUA LUA 1ST PLAINTIFF

DANIEL KYALO LUA 2ND PLAINTIFF

AND

FRANCIS NZIOKA 1ST DEFENDANT

MUANGE NZIOKA 2ND DEFENDANT

NDAMBUKI NZIOKA 3RD DEFENDANT

LAKAYANA LAVULA 4TH DEFENDANT

SAMMY KIENDI 5TH DEFENDANT

FRANCIS N. MUNYAO 6TH DEFENDANT

NZYIMI KIMAU 7TH DEFENDANT

MUTUNGA MULI 8TH DEFENDANT

RULING

1. This is a ruling in respect of a Notice of a Chamber Summons dated 8th Augusts, 2024 in which the Defendants/Applicants sought the following orders:
 1. That the advocates now on record for the Defendants, be granted leave to cease acting for the 1st, 2nd, 3rd, 4th and 5th Defendants and be allowed to proceed acting for the 6th, 7th and 8th Defendants.



2. That the interlocutory judgment entered against the 6th, 7th and 8th Defendant on 2nd May, 2024 be set aside and be granted leave to file defence and list of documents since their defence raises triable issues.
 3. That cost be in cause.
2. The affidavit in support of the application was sworn by the Applicants' counsel Francis Manthi Masika who states that the Applicants had instructed him in this matter. He filed a memorandum of appearance on 8th January, 2023. He states further that the 1st to 5th Applicants failed to pay him his professional fees and that is why he did not file a defence. He states that the Applicants have a defence which raises triable issues. It is on this basis that he prays that the interlocutory judgment entered against the Applicants be set aside.
 3. The Applicants' application was opposed by the Plaintiffs/Respondents based on grounds of opposition dated 4th October, 2024. The Respondents contend that application is pegged on wrong provisions of the law; that there is no dispute that the Applicants were served with summons to enter appearance; that failure of the Applicants to pay fees to their advocate is not ground for not filing defence; that there is no attached draft statement of defence; that the Respondents will be prejudiced if the interlocutory judgment is set aside and that the Applicants are out to delay the expeditions conclusion of this case.
 4. The parties were directed to file written submissions. The Applicants filed their submissions dated 28th January, 2025. The Respondents filed their submissions dated 7th February, 2024. I have carefully considered the Applicants' application, the opposition to the same by the Respondents, the submissions by the parties as well as the authorities cited.
 5. The only issue for determination is whether the interlocutory judgment entered herein on 2nd May, 2024 should be set aside. Before ideal with this issue I wish to point out that on 9th December, 2024, the Applicants' advocate withdrew prayer 1 of the application and indicated to court that the firm was now acting for all the Applicants. For good order, the advocate should have made an oral application to amend prayer 2 to indicate that it is all the Applicants who were seeking to set aside the interlocutory judgment but this was not done.
 6. There is no contention that the Applicants were served with summons. This is why they instructed their advocate who entered appearance for them. The Applicants cannot be heard to argue that no service of summons to enter appearance were served as they argue in their submissions. If there was no service of summons to enter appearance served, on what basis was the advocate entering appearance? I find that there was service and entry of appearance but there was failure to file defence. This being the case the entry of judgment which followed was a regular one.
 7. The Court of Appeal in the case of James Kanyita Nderitu v Marie Philotas Ghika & another [2016] eKLR had the following to say on setting aside a regular judgment.

“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 appearances 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 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 such party is likely to suffer.....”

8. In the instant case, the Applicants’ lawyer states that he did not file defence as the 1st to 5th Applicants did not pay him his professional fees. It is common knowledge that advocates ought to be paid their fees in order to represent their clients unless they chose to do so pro bono. In this case the Applicants’ advocate has stated that he was not paid his fees by the 1st to 5th Applicants. He went ahead to file an application to cease to act for them but this prayer was withdrawn on 9th December, 2024 as his fees had been paid.
9. The Applicants’ advocate entered a memorandum of appearance on 8th January, 2023. Interlocutory judgment was entered on 2nd May, 2024. The application to set aside the interlocutory judgment was made on 8th August, 2024. Though no draft statement of defence was annexed to the application, I notice from the Plaintiff that the Defendants have been on the suit property since 2014. The suit was filed against them in 2023 a period of about 9 years. It is therefore clear that they ought to be given a chance to say why they have been on the property for now over 11 years.
10. In sum therefore, I find that the reason given for not filing defence is understandable. The period between the entry of interlocutory judgment and the application for setting aside is not inordinate. There will be no prejudice suffered by the Respondent. I therefore proceed to set aside the interlocutory judgment entered on 2nd May, 2024. The Applicants are granted leave to file their defence within 14 days. The costs of this application shall be in the cause.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF MAY, 2025.

In The Presence Of:

Ms. Lokoi for Defendants.

Mr. Waweru Kihara for Plaintiffs.

Court Assistant – Steve Musyoki.

