



REPUBLIC OF KENYA



KENYA LAW
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**Oketch v Hussein & 3 others (Environment & Land Case
2141 of 2007) [2025] KEELC 4018 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2141 OF 2007**

CG MBOGO, J

MAY 27, 2025

BETWEEN

TOM ONYANGO OKETCH PLAINTIFF

AND

HASSAN ALI HUSSEIN 1ST DEFENDANT

AMINA HASSAN 2ND DEFENDANT

JOHN GATOBU KIRIMANIA 3RD DEFENDANT

CITY COUNCIL OF NAIROBI 4TH DEFENDANT

RULING

1. Before me is the notice of motion dated 11th July, 2024 filed by the 1st and 2nd defendants/applicants, and it is expressed to be brought under Articles 48, 50 (1) and 159 of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 8 Rule 3, Order 10 Rule 11 and Order 51 Rules 1 and 3 of the Civil Procedure Rules and Section 28 of the *Land Registration Act*, seeking the orders: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. That this honourable court be pleased to order that the name of the 1st defendant/ applicant be amended to read Dr. Hassan Mohammed Adam, as the beneficial owner of all that suit property instead of Hassan Ali Hussein.
 5. That this honourable court be pleased to set aside the judgment in default delivered by the court on 17th June, 2021 and the consequent decree issued therefrom pending hearing and determination of the main suit.



6. That this honourable court be pleased to issue a temporary order of injunction restraining the plaintiff/respondent, his agents, servants, employees and/or any other person acting in his stead from interfering with the applicant's possession and use of Nairobi/Block 63/6X7, pending the hearing and determination of the main suit.
7. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that the 2nd defendant/ applicant is the legal owner of title no. Nairobi/Block 63/6X7, the suit property which was purchased from the 3rd defendant/respondent in 2001.
3. The application is supported by the affidavit of the 2nd defendant/ applicant sworn on even date. The 2nd defendant/applicant deposed that parcel no. Nairobi/ Block 63/6X66 and the suit property, were purchased from the 3rd defendant/respondent and his brother for value without notice. Further, that in 2004, both properties were amalgamated for development approvals from the 4th defendant/respondent and at the time of filing the suit, the suit property was already occupied.
4. The 2nd defendant/applicant deposed that upon service of the application dated 12th March, 2024, they learnt that proceedings had been instituted, and judgment in default delivered on 17th June, 2021. Further, she deposed that the plaintiff/respondent neglected to effect service of the summons and pleadings on their agent, and that the postal address used to effect service is not only erroneous but also purported to effect service on a different person. Further, it was deposed that the plaintiff/respondent fell short of the requirements in effecting service in addition to effect service on the subsequent hearing, mention and judgment dates.
5. The 2nd defendant/applicant deposed that the plaintiff/respondent intentionally concealed material information from this court, and should not be allowed to benefit from this omission. She deposed that she has a strong case to be determined on merit among them that as the proprietor of the suit property acquired through first registration, her interest in the land cannot be defeated by a letter of allotment.
6. The application was further supported by the replying affidavit of W.S Ogola, the Acting County Solicitor of the 4th defendant/respondent sworn on 9th August, 2024. The 4th defendant/respondent deposed that due and reasonable diligence was not exercised in service of the summons unlike in service of the application seeking eviction which need to be looked by this court. Further, he deposed that if the court deems fit, it can issue an order that the process server who swore the affidavit of service to be examined to prove service of summons. Further, that the issues raised in the application can only be proved and determined if the parties are given an opportunity to be heard.
7. The plaintiff/respondent opposed the application vide his replying affidavit sworn on 29th July, 2024. The plaintiff/respondent deposed that all the details as to his ownership of the suit property was proved in a judgment delivered on 17th June, 2021. He deposed that after his advocates had made efforts to serve the 1st, 2nd and 3rd defendants with the pleadings, he was allowed to serve via substituted service, including inviting them to the court registry to fix a hearing date. He further deposed that vide the standard newspaper on 4th June 2009, the 1st to 3rd defendants/ applicants were properly served via the same address which appears on the official search, and green card. He deposed that the service was in accordance with Order 5 of the Civil Procedure Rules.
8. The plaintiff/respondent deposed that the same address used by the 2nd defendant/applicant which is P.O. Box 220 Wajir, is the same address used to serve via registered post, and it is the same address used by the department of lands to invite her for cross examination which she failed to appear. Further, that the 2nd defendant/ applicant contradicts herself by stating that her postal address is P.O. Box 226 Wajir



- which is not the address contained in the search and the title. He deposed that based on the documents provided by the 2nd defendant/applicant there are two separate plots, and there is no amalgamation as alleged. In conclusion, the plaintiff/respondent deposed that the application is frivolous, bereft of merit and misguided.
9. The 2nd defendant/applicant filed a further affidavit in response thereto sworn on 28th October, 2024. The 2nd defendant/applicant deposed that the title deed issued to her is yet to be cancelled and revoked, and that there are pertinent issues of ownership that make it critical for this matter to be heard on merit. She deposed that it would only be logical and in the interest of justice that the default judgment be set aside and, in any event, she has filed a draft defence and counterclaim which raises justiciable issues to be determined by this court.
 10. The application was canvassed by way of written submissions. The 1st and 2nd defendants/applicants filed their written submissions dated 28th October, 2024 where they raised three issues for determination as follows: -
 - a. Whether the default judgment entered on 17th June, 2021 is regular.
 - b. Whether the applicants have raised triable issues in their supporting affidavit and draft statement of defence and counter claim.
 - c. Whether this application has been made without unreasonable delay.
 11. On the first issue, the 1st and 2nd defendants/applicants submitted that the order for substituted service was obtained through false premise that the applicants were untraceable which was untrue. They submitted that they did not see the purported standard newspaper advertisement, and were not aware of these proceedings. They further submitted that by the misdescription of the 2nd defendant/applicant, the summons via substituted service were improper, and should be a ground for setting aside the default judgment. To buttress on this submission, they relied on the cases of *George Stephen Macharia v Issa Njawiri Jabiri & 2 others* [2021] eKLR, and *Phillip Mutiso Mulalya v Samuel Dominic Muathe & 2 others* [2022] eKLR.
 12. On the second issue, the 1st and 2nd defendants/applicants submitted that they have attached a draft statement of defence and counterclaim which raises triable issues, that can only be resolved through hearing the parties. Reliance was placed in the case of *Tree Shade Motors Limited v D.T Dobie and Company (K) Limited & another* [*CA 38 of 1998*](#).
 13. On the third issue, the 1st and 2nd defendants/applicants submitted that they have demonstrated that they were only aware of the proceedings when they were served with an application for eviction, and thus the present application was filed without unreasonable delay.
 14. The plaintiff/respondent filed his written submissions dated 13th December, 2024 where he raised two issues for determination: -
 1. Whether the 1st and 2nd defendants were properly served.
 2. Whether the application dated 11th July, 2024 should be allowed.
 15. On the first issue, the plaintiff/respondent submitted that the 1st and 2nd defendants/applicants were properly served, and in a ruling delivered on 31st October, 2008, the court noted that he conducted a search at the Ministry of Lands Registry which found their address, and which the 2nd defendant/applicant has continuously used even in the current application. He relied on the cases of *Ephraim Njugu Njeru v Justin Bedan Njoka Muturi & 2 others* [2006] eKLR.



16. On the second issue, the plaintiff/respondent submitted that the 2nd defendant/applicant has used the postal address for many years and it would not be just and reasonable for her to say that she has never served through the same postal address which she has used in this application. He reiterated that the defendants/applicants were served in a proper manner as directed by this court, and should the court find that they ought to have been served in another manner, then he should be paid costs for the unreasonable delay. To buttress on this submission, the plaintiff/ respondent relied on the case of Sebei District Administration v Gasyali [1968] EA 300, 301-302, and Port Services Ltd v Mobay Under Sea Tours Ltd & Firemans Fund Insurance Co. SCCA 18/ 2001, and Shah v Mbogo [1969] EA 116.
17. I have considered the application, replies thereof, and the written submissions filed as well as the authorities cited. I am of the view that the issue for determination is whether the application has merit.
18. This court has unfettered discretion under Order 10 Rule 11 of the Civil Procedure Rules to set aside or vary judgment. In Mwala v Kenya Bureau of Standards EALR [2001] 1 EA 148, it was discussed as follows;

“[A] distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”

19. First and foremost, it would be necessary to determine whether there was a regular or irregular judgment. The 1st and 2nd defendants/applicants seek to set aside the judgment of this court delivered on 17th June, 2021 in favour of the plaintiff/respondent. The 2nd defendant/applicant contended that the judgment was irregular owing to failure to effect service upon its agent present on the suit property, and using a wrong postal address to serve the summons. The 2nd defendant/applicant argued that service was effected on a totally different person by the name of Hassan Ali Hussein while her father's name is Hassan Mohammed Adam. I have perused the pleadings in this file, and I do note that indeed judgment was delivered in this matter on 17th June 2021. In paragraphs 2, 3 and 5 of the judgment, the court was satisfied as to the service of the pleadings and summons and proceeded to pronounce itself in favour of the plaintiff/respondent.
20. Equally so, the 2nd defendant/applicant has not refuted the postal address used being 220 Wajir which appears in the title, and search as the proper address used for service. Instead, she argues that service was erroneous as it was effected on a totally different person besides his father who is said to be known as Hassan Mohammed Adam. Again, this allegation has not been substantiated, because how else is the court able to ascertain that the said Hassan Mohammed Adam is her father in the absence of documents to prove so. In my view, I do not hesitate to find that judgment was regular. As this court noted, the 1st and 2nd defendants/applicants were served but they failed to enter appearance and file a defence.



21. Having found that the judgment was regular, the next consideration is whether this court ought to exercise its unfettered discretion to set aside the said judgment. In the case of *Shah –v- Mbogo* (1960) EA 16X6 it was held as follows:

“This discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

22. In her further affidavit, the 2nd defendant/applicant annexed a copy of a defence and counter claim dated 28th October, 2024. This in my view appears to be an afterthought for the reason that no prayer to grant them leave to file their defence and counter claim has been sought. However, I have perused the said defence and counter claim, and the same raises triable issues, and whether these allegations are true, the same can only be tested in a trial. Bearing in mind the need to do justice, I find it needful to do justice and to grant all the parties a chance to ventilate their claims. The plaintiff/respondent is also entitled to costs thus far.

23. This court thus allows the notice of motion dated 11th July, 2024 in the following terms: -

- i. The judgment delivered by this court on 17th June, 2021 is hereby set aside.
- ii. The draft statement of defence and counter claim dated 28th October, 2024 is deemed as duly filed subject to payment of the requisite filing fees.
- iii. The plaintiff/respondent is entitled to costs of this application to be borne by the 2nd defendant/applicant. The same to be paid before the matter is set down for hearing.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 27TH DAY OF MAY, 2025.

HON. MBOGO C.G.

JUDGE

