



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nderitu v Nderitu & 3 others (Environment & Land Case
823 of 2013) [2025] KEELC 476 (KLR) (11 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 476 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 823 OF 2013
TW MURIGI, J
FEBRUARY 11, 2025**

BETWEEN

JANE MUTHONI NDERITU PLAINTIFF

AND

GODFREY HINGA GATIRO 1ST DEFENDANT

GEOFFREY KARIUKI MURIITHI 2ND DEFENDANT

JOYCE NYAMBURA MACHARIA 3RD DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 4TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 24th October 2024 brought under Order 51 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules, Article 159(2)(d) and Article 50(1) of *the Constitution* and Sections 3A, 1A and 1B of the Civil Procedure Rules in which the Applicants seeks the following orders:
 - a. Spent;
 - b. The Honourable Court be pleased to set aside the judgment delivered on 27th April 2022 and the orders made consequently;
 - c. The Honourable Court be pleased to grant the DefendantsApplicants leave to file their Defence to the amended Plaint and defend the suit;
 - d. This Honourable Court be pleased to set aside the proceedings that have been conducted when the Applicants were absent and have the suit heard afresh; and
 - e. Costs of the application be provided for.



2. The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Godfrey Hinga Gatiro sworn on his own behalf and on behalf of the 2nd and 3rd Applicants.

The Applicants' Case

3. The deponent averred that they were not aware of this suit as they were never served with summons to enter appearance.
4. He further averred that sometime in May 2024, he instructed one Samuel Murithi to clean up the suit property in preparation for setting up a business and in the process, he was arrested and charged with a criminal offence.
5. That upon his arrest, he established that the Plaintiff had obtained judgment against them without their knowledge.
6. He deposed that upon perusing the court file, he established that Anthony Gikaria Advocate had filed an affidavit of service alleging that he had personally served them with a hearing notice at Kayole. He contended that the signatures appearing at the back of the affidavit of service were forged and specifically that of the 3rd Applicant who is illiterate and advanced in age.
7. He further deposed that failure to attend court or to participate in the proceedings herein was occasioned by the fact that they were never served with summons to enter appearance. He denied having seen the advertisement placed in the newspaper effecting service of summons.
8. He contended that they have a strong defence which raises triable issues as they are the registered proprietors of the suit property. He further contended that their ownership of the suit property was confirmed by the court in ELC No. 1275 of 2007 where judgment was entered in their favour.
9. The Applicants are apprehensive that they will suffer prejudice if the judgment herein is not set aside. They asserted that the Plaintiff will not be prejudiced if the orders sought are granted. In conclusion, the Applicants urged the court to allow the application as prayed.

The Plaintiff's Respondent's Case

10. The Respondent filed a replying affidavit dated 5th December 2024 in opposition to the application. She deposed that the application is tainted with mala fides, lack of candour, and material non-disclosure. She further deposed that this court delivered a regular judgment on 27th April 2002 and that no appeal has been preferred against the decision.
11. The Deponent denied the Applicants allegations that they were unaware of this suit and insisted that they were personally served and on several occasions, they were also by way of substituted service.
12. She contended that the Applicants have not offered any sufficient reasons for the delay in filing the present application and added their inertia is contrary to the overriding objectives.
13. She pointed out that she will suffer prejudice if the orders sought are granted because she will be denied her rights to enjoy the fruits of her judgment. She asserted that the draft Defence does not raise any triable issues raising a prima facie case that would invite this court to re-open the proceedings.
14. The Respondent argued that the application is untenable, an abuse of the court process and does not meet the threshold for the grant of the orders sought. She contended that should this court be inclined to set aside the judgment, the Applicants should be ordered to deposit the decretal sum in a joint interest earning account held by the advocates for the parties pending the hearing and determination



of the suit. That in addition, the Applicants should be ordered to pay party and party costs incurred so far with regards to this suit.

15. In conclusion, the Respondent urged the court to dismiss the application with costs.
16. Though duly served, the 4th Defendant did not file any response to the Application.
17. The application was canvassed by way of written submissions.

The Applicants' Written Submissions

18. The Applicants' filed their submissions dated 31st December 2024. On their behalf, Counsel submitted that the only issue for determination is whether the court should set aside the judgment entered on 27th April 2022 and allow the Applicants to defend the suit.
19. Counsel submitted that the Applicants have demonstrated that they were never served with summons to enter appearance. Counsel further submitted that the Applicants defence raises triable issues which should be determined on merit. Concluding his submissions, Counsel urged the court to allow the application as prayed.
20. To buttress his submissions, Counsel relied on the following authorities:-
 - i. David Kiptanui Yego & 134 others vs Benjamin Rono & 3 others(2021) Eklr
 - ii. Arithi Selasio Murungi vs Bright Wanja Julius (2020) eKLR

The Plaintiff's Respondent's Submissions

21. The Respondent's filed her submissions dated 15th January 2025
On her behalf, Counsel outlined the following issues for the court's determination: -
 - i) Whether there is a regular judgment
 - ii) Whether the Applicants have a good and bona fide defence.
22. On the first issue, Counsel relied on the contents of the replying affidavit to submit that the Applicants were duly served with Summons to enter appearance and Plaintiff.
With regards to the second issue, Counsel submitted that the draft defence does not raise any triable issues raising a prima facie defence which should go for trial.
23. Counsel Submitted that a post judgment survey report by MSmoklan Services shows that Plot No. A102 Komarock Estate Market (the suit property herein) is distinct from Plot No. NairobiBlock 1112022 which the Applicant claims is owned by the 3rd Applicant.
24. Counsel further submitted that the 1st Applicant has not bothered to file an authority to plead or a power of attorney to act on behalf of the 3rd Applicant. Counsel termed the defence as a sham and added that no meaningful purpose will be served if the proceedings herein are re-opened.
25. On the third issue, Counsel submitted that the Applicants have not offered any valid reasons for their failure to enter appearance and file a defence within the stipulated period.
26. On the fourth issue, Counsel submitted that the Applicants have not demonstrated the substantial loss or prejudice they are likely to suffer if the orders sought are not granted. Counsel contended that should the court be inclined to allow the application, the Applicants should be ordered to deposit the decretal sum in a joint earning interest account pending the hearing of the defence case.



27. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

4th Defendant's Submissions

28. The 4th Defendant filed its submissions dated 7th November 2024. Order 51 Rule 14 of the Civil Procedure Rules provides for the manner an application may be opposed. The 4th Respondent's submissions are not hinged on a replying affidavit or grounds of opposition and as such the court will not consider the same.

Analysis and Determination

29. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the issue that arises for determination is whether this court should set aside the ex parte judgment delivered on 22nd April 2022.

30. Order 10 Rule 11 of the Civil Procedure Rules provides for setting aside of ex parte interlocutory judgments in default of appearance or defence as follows:

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or upon such terms as are just.”

31. Courts have the discretionary power to set aside ex parte judgment with a view of doing justice to the parties.

32. The well established principles of setting aside interlocutory judgment were laid down in the case of Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75 where the court held that: -

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules”.

33. In Shah v Mbogo & Another (1967) E.A 116, the Court of Appeal stated that the discretion to set aside an ex parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to assist a party who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.

34. The Applicants denied having been served with summons to enter appearance and plead. They contended that they became aware of this matter after they instructed one Simon Murithi to clean the suit property in preparation of starting a business. The Respondent on the other hand insisted that the Applicants were personally served and on several occasions, they were served by way of substituted service.

35. The record shows that the Plaintiff instituted this suit against the Defendants vide a Plaint dated 8th July, 2013 and amended on 10th March 2014 seeking the following orders: -

- a) A declaration that the Plaintiff Jane Muthoni Nderitu is the legal owner of parcel of land known as Plot No. A102Komarock Estate Market.
- b) An order of permanent injunction do issue restraining the 1st, 2nd and 3rd Defendants whether by themselves, their authorized agents, servants, employees, workers or otherwise howsoever from trespassing on, alienating, selling, transferring, and/or in any other manner whatsoever



dealing with or interfering or staking any claim to the property known as Plot Number A102 Komarock Estate Market.

- c) An order compelling the Defendants to compensate the Plaintiff the cost of replacement of the demolished two storey building erected on Plot No. A102 Komarock Estate Market and whose replacement costs was valued at the sum of Kshs. 7,644,000= as per the Valuation Report of Ms Cog Consultants Limited dated 20th February 2014 together with the loss of anticipated monthly rental income in the sum of Kshs 92, 000= which the Plaintiff would have been earning by now computed from the date of the filing of the suit until final determination of this matter.
 - d) General and exemplary damages.
 - e) That the Defendants be condemned to pay the costs of the suit and all incidentals thereto.
 - f) Any other or further relief that this Honourable court may deem fit to grant
 - c) Costs and interest.
36. On 15072017, the Respondent was granted leave to serve the Applicants with summons to enter appearance by way of substituted service. Subsequently, on 10th April 2017, the Respondent effected service of summons to enter appearance by placing an advertisement in the Daily Nation newspaper. The Respondent equally served the Applicants with a hearing notice of the application dated 772017, and a hearing notice of the main suit by placing an advertisement in the Daily Nation Newspaper.
37. The Defendants having failed to enter appearance or file defence, the matter proceeded for hearing on 18112021 and on 22nd April 2022, judgment was delivered in favour of the Plaintiff.
38. The Applicants did not request to cross examine the Advocate to challenge the veracity of his averments in his affidavit of service sworn on 18032014. The Applicants chose to forego the opportunity to be heard by failing to enter appearance and file defence within the stipulated period. I therefore find that the Applicants were duly served with the summons to enter appearance and plaint. The judgment is therefore a regular judgment.
39. Where a regular judgment has been entered, the court has discretion under Order 12 Rule 7 of the Civil Procedure Rules to set aside such judgment on such terms that are just. It is trite that a regular judgment should not be set aside unless the court is satisfied that the defence raises triable issues.

In the case of James Kanyita Nderitu & another v Marios Philotas Ghika & another (2016) eKLR, the Court of Appeal set out the criteria to be adopted when exercising jurisdiction to set aside a regular and an irregular ex-parte judgment as follows:

“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.



In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default judgment is set aside ex-debito justitiae as a matter of right. The court does not even have to be moved by the party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.”

40. This court is also called upon to determine whether the Defendants have shown sufficient cause to enable the court to exercise its discretion in their favour.

The Applicants contended that their defence raises triable issues which ought to be determined on merit. They further contended that they are the legal proprietors of the suit property. According to the Respondent, the defence is a sham and does not raise any triable issues.

41. In the case of Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Micheal Rono the court of Appeal defined triable issues as follows:-

A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed but just one that warrants further intervention by the court.”

In the case of Chemwolo & another vs Kubendi (1986) KLR the court of Appeal held that:-

The concern of the court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion. However, where a regular judgment has been entered, the court will not set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go for trial.”

42. In my view, the issue of ownership of the suit property is a matter that requires interrogation in a full trial. I am satisfied that the draft defence raises triable issues which should be determined on merit. In the end I find that the application dated 24/10/2024 is merited and the same is hereby allowed in the following terms:-

- i. The judgment delivered on 27th April 2022 and the consequent orders are hereby set aside.
- ii. The Defendants are granted 7 days leave to enter appearance and file their Defence from the date hereof.
- iii. The hearing of this suit shall be on a priority basis.
- iv. The Plaintiff is awarded thrown away costs of Kshs 200,000= payable within 14 days from the date hereof.
- v. The Plaintiff is awarded the costs of the application.

.....
HON. T. MURIGI
JUDGE



RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11TH DAY OF FEBRUARY, 2025.

In the presence of:

Anthony Gikaria for the PlaintiffRespondent

Mukathe for 1st, 2nd, 3rd Defendant

Ms Naazi holding brief for Mr. Kithi for 4th Defendant

Ahmed –Court assistant

