



REPUBLIC OF KENYA



**Durahard Limited v Mbarak & 3 others (Environment and Land Case
E043 of 2023) [2025] KEELC 5058 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5058 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E043 OF 2023**

YM ANGIMA, J

JULY 3, 2025

BETWEEN

DURAHARD LIMITED PLAINTIFF

AND

SALIM MBARAK 1ST DEFENDANT

ABDALLA MAGRAM 2ND DEFENDANT

MOHAMED FAHIYE 3RD DEFENDANT

SALIM MBARAK 4TH DEFENDANT

RULING

A. 1st and 2nd Defendants' Application

1. The applicants filed a notice of motion dated 15.10.2024 brought under Sections 1A, 3A of the [Civil Procedure Act](#) and Order 10 Rule 11 and Order 22 Rule 22 of the Civil Procedure Rules and sought, inter alia, orders that the court do aside the ex parte judgement dated 12.06.2024 and allow the defendants to defend the suit.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit of Salim Mohamed Salim sworn on 15.10.2024 and the annexures thereto. The deponent contended that he an employee of the Kenya Defence Forces and was deployed in the Democratic Republic of Congo at the time of filing the suit for two years and returned to Kenya in May of 2024. He maintained that he was unaware of these proceedings and the resultant decree until 05.10.2024 when the plaintiff served him with a copy of the decree. He further contended that upon perusal of the court file, he discovered that the plaintiff had served him summons to enter appearance via substituted service through the Star newspaper on 9 – 11 June 2023. He argued that the application seeking to serve by way of substituted service did not mention the reasons for serving



through alternative means yet the plaintiffs had not attempted to effect physical service on him prior. He maintained that they had a complete defence to the claim for eviction which should be heard on merit. He attached a draft defence to the affidavit in support of the application. The court was urged to allow the application, set aside the judgment and allow them to defend the suit.

B. Plaintiff's response

3. The plaintiff opposed the application vide a replying affidavit sworn by Mukeshchandra M. Shah on 20.01.2025. He deposed that the 1st defendant was aware of these proceedings upon his return to Kenya in May 2024 since he was served and acknowledged receipt on his own behalf and on behalf of the other defendants, who were his family members. Further, he maintained that the court exercised its discretion when it granted the plaintiff leave to serve by way of substituted service after the plaintiff's attempts to serve the defendants were met by violence from the defendants. The plaintiff argued that the draft defence was a mere sham and did not raise any triable issues that would warrant the orders sought. The court was urged to dismiss the application with costs.

C. 1st and 2nd Defendants' reply

4. The applicants filed a further affidavit sworn by Salim Mohamed Salim on 05.02.2025 in response to the plaintiff's replying affidavit. He deposed that service by substituted service was not a safe mode of service since not all persons have access to a newspaper, especially the Star newspaper. He argued that the said advertisement was so minuscule that no person merely perusing the newspaper without prior knowledge of its existence would spot it. In addition, he claimed that there was no violent attack on the plaintiff since no attempt was made to serve the defendants in the first place.

D. Directions on Submissions

5. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The applicants filed their submissions on 14.02.2025 in support of their application, while the plaintiff filed submissions on 28.02.2025 in opposition to the application.

E. Issues for Determination

6. The court has perused the application, the response thereto and the material on record. The court is of the view that the following key issues arise for determination herein:
 - a. Whether the court should set aside the ex parte judgment dated 12.06.2024.
 - b. Who shall bear the costs of the application.

F. Analysis and Determination

a. Whether the court should set aside the ex parte judgment dated 12.06.2024

7. From the material on record, the plaintiff was granted leave by the court on 05.06.2023 to serve court process upon the defendants through substituted service in one of the local dailies. The plaintiff caused an advert to be placed in the Star newspaper dated 9 – 11 June 2023 and filed a return of service. The suit proceeded undefended and on 12.06.2024 the court entered judgment in favour of the plaintiff. The court granted the following orders:



- i. A declaration that the plaintiff is the registered and absolute owner of the suit property known as plot No. 1241/I/MN.
 - ii. A permanent injunction to issue against the defendants/respondents either by themselves, their employees, servants and/or agents, from preventing the plaintiff from constructing a perimeter wall on the suit property.
 - iii. The defendants are to vacate the suit property known as Plot No. 1241/I/MN within 90 days after service of this order and in default eviction order to issue.
 - iv. No order as to costs as the suit was undefended.
8. The applicants submitted that the substituted service effected was wanting and that no reasonable man perusing the newspaper would be expected to see the said advert. It was submitted that the intention of substituted service was never met since it failed to bring to the attention of the defendants the existence of proceedings. It was the applicants' case that they never saw the advertisement. The plaintiff, on the other hand, submitted that the substituted service was proper and in conformity with the orders of this court. It was further submitted that the defendants had no plausible defence to the suit.
9. It is clear to the court that service by way of substituted service was done in conformity with the orders of 05.06.2023 since the court did not specify the newspaper to carry the publication. The plaintiffs chose to publish in the classified pages of The Star on 9-11 June 2023. The court is of the view that the defendants ought to be given a chance to ventilate their defence to the action given that they are now available. The court is of the view that the newspaper advertisement was so tiny in size that it may have passed unnoticed by the intended defendants. In Phillip Mutiso Mulalya v Samuel Dominic Muathe & 2 others [2022] eKLR it was held that;

“The applicants have stated that they did not see the advertisement herein. In my view, it is possible that indeed the applicants failed to see the said advertisement, considering that not everyone in Kenya reads all the newspapers daily. In addition, it is possible that a person may read only a section of a newspaper and fail to read other sections like the classified/advertisement section, depending on what they deem relevant to them. Therefore, substituted service is based on the rebuttable presumption that the defendant shall be able to see the advertisement. The purpose of effecting service, in whichever form, is to notify the defendant of the pendency of a suit against them and to give them opportunity to defend themselves. The provision for substituted service is allowed as an alternative where personal service is not possible. The most desirable and effective mode of service being personal service. However, the bottom-line and the expected outcome of any mode of service is to make the defendant aware of the suit pending against them. If that outcome is not achieved, then subsequent proceedings will not result in substantive justice. In the circumstances, it is my considered view that the reason given by the Applicants that they did not see the advertisement and were therefore not aware of this suit is a reasonable explanation to warrant setting aside the *ex parte* judgment.”

10. The court is further of the view that the proposed defence is not entirely frivolous hence the defendants ought to be given a chance of being heard. In CMC Holdings Limited vs. James Mumo Nzioki [2004] eKLR the court held;

“The law is now well settled that in an application for setting aside *ex parte* judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant



has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues. The case of Tree Shade Motors Limited vs D T Dobie & Company (K) Limited & Joseph Rading Wasambo, Civil Appeal No 38 of 1998 was a case on an application to set aside a default judgment. However, the legal principles are the same as in a case where an ex parte judgment is obtained for nonappearance of a party at the hearing of his case. In that case this Court stated as follows:-

“The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim. If it does, the defendant should be given leave to enter and defend.”

11. The court is thus satisfied that the defendants’ application is merited. The defendants ought to be granted an opportunity to defend the suit and be heard by this court. as such, the court is inclined to allow the application.

(b) Who shall bear the costs of the application

12. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA. In view of the fact that the suit is being heard de novo the court is of the view that the appropriate order to make is for costs of the application be in the cause.

G. Conclusion and Disposal Order

13. The upshot of the foregoing is that the court finds and holds that the 1st and 2nd defendants’ application dated 15.10.2024 is merited. As a consequence, the court makes the following orders for the disposal of the application;
 - a. That the ex parte judgment dated 12.06.2024 is hereby set aside together with all consequential orders.
 - b. That the defendants are granted unconditional leave to defend the Plaintiff’s suit.
 - c. That the defendants are granted leave of 14 days from the date hereof to file and serve their defence and any other pleading they deem fit.
 - d. The plaintiff is granted corresponding leave of 14 days from the date of service to file its response to the defendants’ defence and any other necessary pleading.
 - e. Costs of the application shall be in the cause.
 - f. The suit shall be mentioned on 18.09.2025 for pretrial directions.

Orders accordingly

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 3RD DAY OF JULY, 2025.

.....
Y. M. ANGIMA



JUDGE

In the presence

Gillian Court Assistant

Mr. Bunde for the plaintiff

Mr. Mwakisha for the 1st and 2nd defendants

N/A for the 3rd and 4th defendants

Mr. Mohamed for the intended interested parties.

