



**Munai v Langat (Environment and Land Case 80 of 2018)
[2025] KEELC 5252 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE 80 OF 2018
LA OMOLLO, J
JULY 10, 2025**

BETWEEN

MOSES MUTAI MUNAI APPLICANT

AND

ELIJAH KIPKOSKE LANGAT RESPONDENT

RULING

1. This ruling is in respect of the Respondent/Applicant’s Notice of Motion application dated 25th November, 2024. The application is expressed to be brought under Order 51 Rule 15 & Order 42 Rule 6 of the *Civil Procedure Rules* and Sections 1A & 3B of the *Civil Procedure Act*.
2. The application seeks the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to set aside the judgement entered in these proceedings and do allow the Defendants/Applicants in this case unconditional leave to defend this suit as per the response to the Originating Summons attached herein.
 - c. Spent
 - d. Spent
 - e. That this Honourable Court be pleased to make or issue orders that are just expediate in the circumstances. (sic)
 - f. That the costs of this application be provided for.
 - g. That the Respondent in this application be compelled to pay the cost of this application.



3. The application is based on the grounds on its face and the supporting affidavit of one Elijah Kipkoske Langat.

Factual Background.

4. The Applicant/Respondent commenced the present proceedings vide the Originating Summons dated 13th December, 2018 where he sought the determination of the following questions;
 - a. Whether the Applicant is entitled to one (1) acre of land comprised in the land parcel LR No. Kericho/Kibwastuiyo/433 registered in the name of Taplelei w/o Chemosit (Deceased) by virtue of the Applicant's adverse possession of the same in open, quiet and peaceful occupation for a period of over 38 years.
 - b. Whether the Applicant should be registered as the proprietor of the portion measuring one (1) acre comprised in the land parcel LR No. Kericho/Kibwastuiyo/433.
 - c. Whether the Respondent should be ordered to execute the transfer and all the requisite forms and perform all acts necessary to effect registration of the Applicant as the proprietor of the said one (1) acre, and in default, the Deputy Registrar of the Court be authorized to execute them.
 - d. Whether or not the Applicant is entitled to an order of permanent injunction restraining the Respondent, his brothers, agents, employees and other beneficiaries of the estate of Taplelei w/o Chemosit (Deceased) from entering, cultivating, occupying, trespassing alienating, transferring, and/or in any other manner adversely dealing with the Applicant's portion measuring one (1) acre aforesaid.
 - e. Whether an order do issue that the Officer Commanding Station (OCS) Litein Police Station oversees the enforcement and compliance with these orders.
 - f. Whether the Respondent should be ordered to pay the costs of this suit to the Applicant.
5. The Respondent/Applicant neither entered appearance nor filed a response to the Originating Summons.
6. On 19th January, 2023, this Court delivered judgement and determined the Originating Summons dated 13th December, 2018 in favour of the Applicant.
7. The application under consideration first came up for directions on 26th November, 2024 when the Court directed that it be served upon the Applicant/Respondent.
8. On 29th January, 2025 the Court issued directions that the application be disposed off by way of written submissions. It was mentioned on 26th February, 2025 and reserved for ruling.

The Respondent/Applicant's Contention.

9. The Respondent/Applicant contends that he became aware of this suit on 25th November, 2024 when he was called by their area Chief and shown a letter stating that there was a scheduled visit to their land on 26th November, 2024 at 10:00 am by surveyors.
10. The Respondent/Applicant also contends that he came to learn that the surveyor's visit was in execution of the judgement and decree that had been issued by this Court.
11. The Respondent/Applicant further contends that he had never been served with the summons to enter appearance or the pleadings in this matter.



12. It is the Respondent/Applicant's contention that none of his family members or other beneficiaries have been served with summons to enter appearance or pleadings.
13. It is also his contention that the process server should be summoned to Court and be cross examined on the affidavit of service that was filed alleging service of summons to enter appearance.
14. It is further his contention that he has an arguable defence which raises triable issues which he seeks that he be allowed to ventilate.
15. It is his contention that he seeks that the Court grants an order of stay of execution of the decree and judgement in this matter. He goes on to state that he should not be condemned unheard and that he should instead be given an opportunity to be heard.
16. He ends his deposition by stating that he is likely to suffer loss and damage if the judgement and decree is executed.

The Applicant/Respondent's Response.

17. In response to the Respondent/Applicant's application, the Applicant/Respondent filed a Replying Affidavit sworn on 27th January, 2025.
18. He deposes that the Respondent/Applicant has all along been served with the Court processes that include summons to enter appearance, mention and hearing notices which documents he chose to disregard.
19. He also deposes that the Respondent/Applicant has been unwilling and uncooperative in resolving the land dispute. He goes on to state that the Respondent/Applicant failed to honour the Chief's Summons when this suit was at the preliminary stage and that it is in the same vein that he disregarded Court Summons.
20. He further deposes that the Respondent/Applicant filed the application under consideration after a period of over one year had lapsed. The Respondent/Applicant was served with the Notice of entry of Judgement dated 19th April, 2023 and his (Respondent/Applicant) excuse for the failure to file his pleadings on time is untenable.
21. It is his deposition that the Respondent/Applicant's contention that he was not served with summons to enter appearance and pleadings is false and misleading and that it is an attempt to evade the Court process that has culminated in execution.
22. It is also his deposition that the Court at paragraph 4 of its judgement observed that the matter did not take off immediately due to numerous adjournments that were granted in order to secure the Respondent/Applicant's appearance in Court. He goes on to state that the said observation is proof that the Respondent/Applicant herein was served but chose not to participate in the suit.
23. It is further his deposition that the matter proceeded for hearing on 30th May, 2022 after the Court was satisfied that the Respondent/Applicant was not interested in defending the suit. He adds that the Court made the said observation in its judgement that was delivered on 19th January, 2023.
24. He deposes that upon delivery of the judgement, the Respondent/Applicant was served with the Notice of Entry of Judgment dated 19th April, 2023 and he was therefore aware of the judgement that had been delivered against him.



25. He also deposes that the Respondent/Applicant has not given any cogent reason for the delay in the filing of the application under consideration and he should therefore not be exonerated from the due process of the law.
26. He further deposes that the application under consideration is an attempt by the Respondent/Applicant to stall execution of the judgement which was delivered in his favour. He goes on to state that he stands to suffer prejudice from the continued infringement of his rights if the application is allowed.
27. It is his deposition that the Respondent/Applicant is engaging in delay tactics with the intention of denying him the fruits of his judgement.
28. He ends his deposition by stating that the application under consideration is a waste of the Court's precious time and it amounts to an abuse of the Court process. He adds that the application is frivolous, vexatious, has not been brought in good faith and it should be struck out with costs.

Issues for Determination.

29. The Respondent/Applicant filed his submissions on 22nd February, 2025 while the Applicant/Respondent filed his submissions on 28th February, 2025.
30. The Respondent/Applicant submits on the following issues;
 - a. Whether the Respondent/Plaintiff (sic) issued proper service to the Applicant/Defendant (sic).
 - b. Whether this Honourable Court should set aside the judgement, stay execution of decree and judgement and consequential orders and grant the Defendant (sic) unconditional leave to defend this suit.
 - c. Who should bear the costs of the application.
31. With regard to the first issue, the Respondent/Applicant reiterates his averments in his affidavit in support of the application and submits that the Applicant/Respondent has attached to his Replying Affidavit copies of several affidavits of service sworn by David Obara and Vincent C. Lelgo. They aver in the said affidavits of service that they served him but they did not attach any proof in the form of photographs or signatures to show that they ever effected service.
32. The Respondent/Applicant also submits that the Applicant/Respondent attached a letter from the Chief dated 4th December, 2015 and yet the suit was commenced in the year 2018 and adds that the said letter did not therefore confirm service upon him.
33. The Respondent/Applicant further submits that the Applicant/Respondent has not met the threshold for the claim of adverse possession as he has not made any developments on the suit parcel. He urges the Court to give him an opportunity to ventilate his defence and prove that his (Applicant/Respondent) claim of adverse possession is not merited.
34. The Respondent/Applicant relies on the judicial decision of *Bowskill v Jofwe & 7 Others* (Civil Suit 89 of 2018) [2024] KEELC 5836 (KLR) (31 July 2024) (Ruling) in support of his submissions.
35. On the second issue, the Respondent/Applicant relies on Article 50(1) of the *Constitution* of Kenya, the judicial decisions of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013] eKLR, *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 and submits that had he been served with the pleadings filed in the present suit, he would have filed a defence because the interests of his brothers, children and the other beneficiaries is at stake.



36. The Respondent/Applicant reiterates that the Applicant/Respondent has not made any developments on the suit parcel and neither has he occupied it.
37. The Respondent/Applicant submits that the Applicant/Respondent will not be prejudiced if the suit is heard on merit and if there is any such prejudice, it can be compensated by way of costs.
38. The Respondent/Applicant relies on Section 27(1) of the Civil Procedure Act and urges the Court to allow his application with costs.
39. The Applicant/Respondent reiterates the averments in his replying affidavit and submits on the following issues;
 - a. Whether the Applicant has demonstrated sufficient cause to warrant setting aside of the *ex parte* judgement.
 - b. Whether there should be stay of execution.
 - c. Who should bear the costs of this application.
40. On the first issue, the Applicant/Respondent relies on the judicial decision of *Shah v Mbogo* [2022]eKLR as was cited in *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022]eKLR, the judicial decision of *Wachira Karani v Bildad Wachira* [2016] eKLR and submits that the Respondent/Applicant was served with the pleadings in this matter and failed to file a defence.
41. The Applicant/Respondent also submits that the Respondent/Applicant's plea that he be granted an opportunity to be heard under Article 50 of the Constitution is not tenable as he (Respondent/Applicant) has not explained why he did not defend the suit when he had the opportunity to do so.
42. The Respondent/Applicant relies on the judicial decisions of *John Mwangi Mbugua v Janet Nduta Gichobi* [2016] eKLR, *Mbitbuka Titus v Jackline Mutindi* [2020] eKLR and submits that the application under consideration has been filed two years after judgement was delivered and it is therefore a clear demonstration of indolence on his part. He goes on to state that the Respondent/Applicant is therefore not deserving of the orders sought.
43. The Applicant/Respondent submits that the Respondent/Applicant has not given any satisfactory reason to warrant the setting aside of the *ex parte* judgement.
44. On the second issue, the Applicant/Respondent submits that the Respondent/Applicant has not fulfilled the conditions necessary for the grant of orders of stay of execution. He goes on to state that there has been inordinate delay in the filing of the application under consideration and the Respondent/Applicant has not demonstrated any loss he stands to suffer if the orders are not granted.
45. The Applicant/Respondent concludes his submissions by urging the Court to dismiss the Respondent/Applicant's application with costs.

Analysis and Determination.

46. I have considered the application, the response thereto and the submissions. My view is that the following issues arise for determination;
 - a. Whether judgement delivered on 19th January, 2023 should be set aside.
 - b. Who should bear costs of the application.



A. Whether judgement delivered on 19th January, 2023 should be set aside.

47. The Respondent/Applicant is seeking that this Court sets aside the judgement delivered on 19th January, 2023 on the ground that he was not served with pleadings in this matter.
48. The Respondent/Applicant contends that he only became aware of the present matter when he was summoned by their area Chief on 25th November, 2024 and informed that there was an intended visit by surveyors the following day.
49. The Respondent/Applicant also contends that he was later informed that the intended Surveyor's visit was in execution of the judgement and decree that was issued by this Court.
50. In response, the Applicant/Respondent contends that the Respondent/Applicant has all along been served with the pleadings in this matter and further that there has been a delay in the filing of the application under consideration.
51. The Applicant/Respondent has attached to his Replying Affidavit copies of various Affidavits of Service.
52. The Affidavits of Service are sworn on various dates by one David Obara and Vincent C. Lelgo. They depone that they served the Respondent/Applicant with mention and hearing notices at Yakwai Shopping Center, Lulusik Village in Bureti Sub County.
53. This Court notes that neither of the affidavits of service attached speak to service of pleadings and/or summons upon the Respondent/Applicant.
54. The first affidavit of service on the Court record is sworn by David Obara on 8th October, 2019. He deposes that on 4th September, 2019 he served the Respondent/Applicant with a hearing notice at Rurusik Village in Chebwagan location and adds that he was accompanied by the Applicant/Respondent. He deposes that the Respondent/Applicant accepted service but declined to sign.
55. The second affidavit of service on the Court record is also sworn by David Obara on 5th June, 2021. He deposes that on 5th June, 2021 he served the Respondent/Applicant with a mention notice at Rurusik Village, Chebwagan Location. He accepted service but declined to sign.
56. The next affidavit of service on record is sworn by Vincent C. Lelgo on 5th November, 2021. He deposes that on 4th November, 2021 he served upon the Respondent/Applicant a mention notice at Lulusik Village, Litein. He accepted service but declined to sign.
57. The rest of the affidavits of service on the Court record are with respect to service of various hearing and mention notices upon the Respondent/Applicant.
58. From the Court record, there is no evidence that the Respondent/Applicant was served with summons to enter appearance and/or pleadings in this matter.
59. The Applicant/Respondent contends that there has been a delay in the filing of the application under consideration.
60. The Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) held as follows;

“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 a 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 raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason 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. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.” [Emphasis Mine]

61. In the above cited judicial decision, the Court of Appeal held that once it is evident that judgement was entered against a party who was not served or properly served with summons to enter appearance, the said judgement is set aside as a matter of right and the Court will not consider the issue of whether or not there was inordinate delay in the filing of the application to set aside the judgement.
62. In the judicial decision of *Frigoken Limited v Value Pak Food Limited* [2011] eKLR the Court held as follows;

“I note that the principles governing the setting aside of ex parte judgments are fairly clear. In the first instance, 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 on the application by the defendants. Such 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.” (Emphasis mine)
63. While it is true that paragraph 4 of the Judgment delivered by this court on 19th January, 2023 speaks to numerous adjournments causes in pursuit to secure the Respondent’s appearance in court, there is not affidavit of service in respect of service of summons to enter appearance upon the Respondent. There is also no copy of summons in the Court file.
64. It is evident that the Respondent/Applicant was not served with the summons to enter appearance in this matter. The judgement delivered on 19th January, 2023, therefore, ought to be set aside.

B. Who should bear costs of the application.

65. On the question of costs, it is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

66. Taking the foregoing into consideration, I find that the application dated 25th November, 2024 is merited and I hereby order as follows:
 - a. The judgement delivered by this Honourable Court on 19th January, 2023 is hereby set aside.
 - b. The Respondent/Applicant shall file his response to the Originating Summons, list of witnesses and documents within 14 days of the date hereof.
 - c. Costs of this application shall abide the outcome of the suit.
67. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 10TH DAY OF JULY, 2025.



L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kirui for the Respondent/Applicant.

Miss Esang for the Applicant/Respondent.

Court Assistant; Mr. Joseph Makori

