



**Muigai v Ndimu Farmers Co-operative Society & 2 others (Environment and Land Case 121 of 2015) [2025] KEELC 5057 (KLR) (8 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5057 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE 121 OF 2015**

**MAO ODENY, J**

**JULY 8, 2025**

**BETWEEN**

**GEOFFREY MAINA MUIGAI ..... PLAINTIFF**

**AND**

**NDIMU FARMERS CO-OPERATIVE SOCIETY ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MAINA NDUNG’U ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR NAKURU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the 2<sup>nd</sup> Defendant/Applicant’s Notice of Motion application dated 13<sup>th</sup> January 2025 which seeks the following orders:
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this application, this Honourable Court be pleased to stay the execution of the judgment issued on 13<sup>th</sup> December, 2024.
  - d. That this Honourable Court be pleased to review vary or set aside the judgment issued on 13<sup>th</sup> December, 2024 and allow the Defendant/Applicant to defend his case.
  - e. That cost of this application be provided for.
2. The application is supported by the annexed affidavit of James Maina Ndungu, the 2<sup>nd</sup> Defendant/Applicant sworn on 13<sup>th</sup> January, 2025 where he deponed that the hearing proceeded in his absence and judgment was entered in the Plaintiff’s favor. He further deponed that he was not served with the judgment and only learnt of it on 30<sup>th</sup> December, 2024 when he visited the court registry. The



Applicant also stated that if the Plaintiff proceeds to execute the judgment, he and his family will be rendered homeless and lose their source of livelihood.

3. It was the Applicant's deposition that he is eager to defend this case and he is willing to abide by any conditions that will be set by this Honourable Court and urged the court to allow the Application as prayed.
4. Geoffrey Maina Muigai, the Plaintiff, herein, filed a Replying Affidavit sworn on 2<sup>nd</sup> February, 2025 and deponed that the application is an abuse of the court process as it is meant to deny him the fruits of a valid judgment. He deponed that there is no intended appeal and the applicant slept on his rights to appeal within the stipulated time. He deponed that the review application, which has not been annexed is an afterthought.

## **2<sup>nd</sup> Defendant/applicant's Submissions**

5. Counsel for the Applicant filed submissions dated 3<sup>rd</sup> May 2025 and submitted that the applicant seeks to set aside the judgment and decree as he was not served with the judgment notice or any notices of hearing dates. Counsel relied on Article 50 of *the Constitution* of Kenya to submit that he was not given an opportunity to defend his case. Counsel relied on the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.
6. It was counsel's submission that the Applicant should not be penalized for the failures of his counsel and relied on the case of Lazarus Bwire vs Uganda Electricity Transmission Company Limited (2015) eKLR. Counsel further submitted that the Applicant and his family have lived on the suit land for over 40 years and eviction would deprive them of their livelihood and relied on the case of Gulf Fabricators Ltd vs Ali & Another (2017) eKLR.
7. Mr. Siah submitted that judgment was delivered on 13<sup>th</sup> December 2024 and the application herein was filed on 23<sup>rd</sup> January, 2025 as the Applicant only learnt of the judgment on 30<sup>th</sup> December, 2024. Counsel submitted that the delay is justifiable and not inordinate as it arose from counsel's oversight, not the Applicant's indolence. Counsel relied on the Jaber Mohsen Ali & Another vs Priscillah Boit & another E& L No 200 of 2012 [2014] eKLR.

## **Plaintiff's/respondent's Submissions**

8. The Plaintiff filed submissions dated 13<sup>th</sup> March, 2025 and submitted that the Applicant did not give plausible reasons for delay as there was a series of events that took place preceding the judgment and the time lapse cannot be rectified by the Applicant stating that his advocates did not act. The Plaintiff submitted that the Applicant has a duty to follow up on his case.
9. The Plaintiff further submitted that granting the orders sought would be prejudicial to him as he followed the due process in achieving the fruits of his judgment. The Plaintiff relied on Order 42 Rule 6 of the Civil Procedure Rules and Section 79 G of the *Civil Procedure Act*.
10. The Plaintiff also relied on the cases of Vishram Ravji Halai vs Thronton & Turpin Civil Application No Nai 15 of 1990 [1990] KLR 365, Selestica Ltd vs Gold Rock Development Ltd (2015) eKLR, Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR, Itute Ingu vs Ismael Mwakavi Mwenda (1994) eKLR, Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR and Stanley Kahoro Mwangi & 2 others vs Kanyamwi Trading Company Limited (2015) eKLR.



## Analysis And Determination

11. The issues for determination are whether this court should stay the execution of the judgment issued on 13<sup>th</sup> December, 2024, whether the court should review, vary or set aside the said Judgment to allow the Applicant to defend the case.
12. This application has three prayers, namely, stay of execution of the Judgment dated 13<sup>th</sup> December 2024, review/ varying or setting aside the said judgment on the grounds that he was never served with the Judgment.
13. From the onset, it should be noted that this is a 2015 matter which has a long history. It would be prudent to give a brief background of this case. The Plaintiff filed this suit against the Defendants, which was subsequently amended to include the Land Registrar Nakuru.
14. M/S Simiyu & Company Advocates filed a Memorandum of Appearance on behalf of the 2<sup>nd</sup> Defendant/Applicant on 2<sup>nd</sup> June 2015 and a Notice of Preliminary Objection dated 7<sup>th</sup> July 2015 on the ground that the Plaintiff's Application is fatally defective.
15. The said Advocates filed a Defence on behalf of the 2<sup>nd</sup> Defendant dated 9<sup>th</sup> July 2015. The Defendant was served with a Hearing Notice vide an Affidavit of service dated 1<sup>st</sup> September 2015 by a Process Server called Caleb Omosa.
16. The Plaintiff filed an amended Plaintiff to include the Land Registrar as a party dated 3<sup>rd</sup> March 2022, and A. J. Simiyu Advocate was served with a mention Notice on 9<sup>th</sup> March 2022. Counsel was further served with a Hearing Notice scheduled for 14<sup>th</sup> February 2023, on 26<sup>th</sup> January 2023 of which he acknowledged by affixing his office stamp.
17. On 14<sup>th</sup> February 2023, the Plaintiff proceeded with the matter but neither the Defendants nor their counsel were in court to defend the same. On 15<sup>th</sup> October 2024 after the Amendment and inclusion of the Land Registrar, and all parties having been served, Mr. Simiyu counsel for the 2<sup>nd</sup> Defendant, indicated to the court that they neither filed witness statements nor documents as they had lost touch with their client. The defence cases were therefore marked as closed.
18. Ms. Wanjeri for the AG urged the court to adopt the proceedings if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who were served do not appear and slate the matter for submissions and a judgment date. The plaintiff and the 3<sup>rd</sup> Defendant filed their submissions and a Judgment was delivered on 13<sup>th</sup> December 2024 which is the subject of this application.
19. Having given that background, it is imperative to note that the 2<sup>nd</sup> Defendant was served with summons to enter Appearance, which he headed to by instructing a lawyer, Simiyu & Co. Advocates who filed a Memorandum of Appearance and Defence. The said lawyer participated in the last proceedings where he stated that he neither filed statements nor documents. Counsel should have sought leave to file an application to cease acting for the client he purported to have lost contact with. This is a real disservice to clients.
20. The Applicant cannot be heard that he was not aware of the Judgment as he had a counsel on record who received all communication from the court including Judgments and Rulings uploaded on the CTS portal directly to the Advocates' email addresses in real time.
21. On the issue as to whether the court should vary/ review or set aside the Judgment dated 13<sup>th</sup> December 2024, from the Application itself, the grounds and the supporting affidavit, I see no ground advanced



to support such a prayer. The application does not have any grounds as set out under Order 45 of the Civil Procedure Rules which was never even quoted in the Application.

Order 45 of the Civil Procedure Rules 2010 states thus:

- “ 45. 1(1) Any person considering himself aggrieved-
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
  - (b) by a decree or order from which no appeal is hereby allowed
- And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order may apply for a review of judgment to the court which pass the decree or made the order without unreasonable delay”

22. Similarly Section 80 of the *Civil Procedure Act* states as follows:

- “ 80. Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

23. In the case of *Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006* cited with approval the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR* the Court of Appeal held as follows:

“ An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

24. The Applicant has not stated that there is any discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record. Further, there are no sufficient reasons to warrant the variation or review of the Judgment. This is a case of indolence and the tired phrase of mistake of counsel should not be visited on the client. A case belongs to a client and such a client should follow up his/her case.

25. On the issue as to whether the court should grant an order of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules 2010 provides as follows:

6.



- (1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub-rule (1) unless-
  - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

26. The Applicant must satisfy the court that there exists a sufficient cause to grant a stay and whether the defendant will suffer substantial loss if the orders are not made and secondly, whether the defendant is willing to give such security for the due performance of the decree or order in issue, as may ultimately be binding on him. The Applicant has stated that he will lose his livelihood, as he resides on the suit land. Although the Applicant has stated that he will lose his livelihood, he has not demonstrated the loss he will suffer if the order is not granted.

27. In the case of Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR, the Court of Appeal held that:

“ ... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

28. I have considered the application, the submissions of the parties and the relevant authorities and find that the Applicant’s Application lacks merit and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 8<sup>TH</sup> DAY OF JULY 2025.**

**M. A. ODENY**

**JUDGE**

NAKURU-ELCC/121/2015-RULING

