



**Nanjala (Suing on Behalf of Joseph Onyango Ogallo) v Okada (Suing on
Behalf of John Oduku Balongo) (Environmental and Land Originating
Summons E012 of 2022) [2025] KEELC 5469 (KLR) (8 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2022**

BN OLAO, J

JULY 8, 2025

BETWEEN

FELIX ONYANGO NANJALA PLAINTIFF

SUING ON BEHALF OF JOSEPH ONYANGO OGALO

AND

ROSEMARY BARASA OKADA DEFENDANT

SUING ON BEHALF OF JOHN ODUKU BALONGO

RULING

1. vide a judgment delivered on 17th September 2024 by way of electronic mail, this Court directed, inter alia, that Felix O. Nanjala (the Plaintiff herein) had acquired by way of adverse possession 3½ acres out of the land parcel No. Bunyala/Mudembi/1773. Rosemary Barasa Okada (the Defendant herein) was directed to surrender to the Land Registrar Busia the original title deed to the said suit land and execute all the necessary documents to facilitate the registration of the 3½ acres out of the suit land in the name of the Plaintiff and in default thereof, the Deputy Registrar of this Court would do so on behalf of the Defendant. The trial had proceeded to hearing on 25th July 2024 ex-parte as the record shows that although the Defendant had been served on 8th July 2022 with the Originating Summons by one Joseph Orata Kweyu, she did not attend the hearing and neither did any counsel from the firm of Omeri & Associates Advocates who had filed a Notice of Appointment on 18th February 2023 indicating that they would act for her in these proceedings.
2. What calls for my determination is the Defendant's Notice of Motion dated 7th February 2025 anchored on the provisions of Sections 1A, 1B and 3B of the *Civil Procedure Rules*, Orders 10, 11 and 12 of the *Civil Procedure Rules* as well as Articles 159(2) (d) of the *Constitution* 2010. The Defendant seeks the following orders:



- a. Spent
 - b. Spent
 - c. That the ex parte judgment entered in this matter on 17th September 2024 and any other order subsequent in this matter be set aside and the Defendant be allowed leave to file a defence or response to the Originating Summons out of time.
 - d. That the annexed Memorandum of Appearance and Replying Affidavit be deemed to be filed within time upon paying the requisite fees.
 - e. That costs of the application be in the cause.
3. The gravamen of the application in which the Defendant is acting in person, is that she was never served with any Court documents relating to this case and the affidavit of service by Joseph Oratasworn on 1st August 2022 is a fabrication and that it was only on 8th October 2024 when she was informed about this case by Mr. Onsongo who had been acting for her in two other cases. That she instructed counsel to act for her in this matter but he did not inform her about the ex-parte judgment herein. She denied having instructed the firm of Omeri & Associates to act for her in this matter and that she only came to learn about the judgment on 15th January 2025 when the Plaintiff and the County Surveyor visited the suit land to hive off 3½ acres. This being a land matter, the Defendant should be accorded audience to defend herself as dictated by the law of Natural Justice rather than being condemned unheard. That the Defendant being an illiterate and lay person, she had entrusted the firm of Obwoye - Onsongo Advocates to guide her and she should not be punished for the failure and mistake of the said firm. That she has a reasonable defence which ought to be heard on merit as the claim against her is baseless. That she had agreed with the firm of Obwoye Onsongo to pay Kshs.150,000 to represent her in this matter in which she was never served.
4. The following documents are annexed to the application:
1. Copy of Citation to accept or refuse letters of Administration filed in Busia Chief Magistrate's Court Misc Application No E128 of 2021.
 2. Copy of receipt NO 525 dated 9th May 2022 issued to the Defendant by Obwoye - Onsongo & Company Advocates for Kshs.5,000 being payment for Busia Misc Application No E128 of 2021.
 3. Copy of receipt NO 419 dated 7th March 2022 issued to the Defendant by Obwoye - Onsongo & Company Advocates for Kshs.15,000 being payment for Busia Misc Application No E128 of 2021.
 4. Copy of Summons for Confirmation of Grant filed in Busia Chief Magistrate's Court Succession Cause No E502 of 2021.
 5. Copy of receipt NO 437 dated 26th May 2023 issued to the Defendant by Obwoye - Onsongo & Company Advocates for Kshs.45,000 being filing fees in P&A NO E502 of 2021.
 6. Copy of receipt NO 394 dated 7th February 2022 issued to the Defendant by Obwoye - Onsongo & Company Advocates for Kshs.15,000 for Busia Chief Magistrate's Court Succession Cause No E502 of 2021.
 7. Copy of receipt NO 689 dated 8th October 2024 issued to the Defendant by Obwoye - Onsongo & Company Advocates for Kshs.500 being consultation fees.



8. Copy of Bond and Bail Bond granted to Peter Okada Haduli in Milimani Chief Magistrate's Court for the offence of conspiracy to defraud c/s 317 [Penal Code](#).
 9. Copy of charge sheet in Milimani Chief Magistrate's Court Criminal Case NO 906 of 2017 accused Peter Okada Haduli and Titus Mwinzi Muthama.
 10. Copy of Memorandum of Appearance dated 7th February 2025 and filed by the Defendant in this case on 10th February 2025.
 11. Copy of replying affidavit dated 7th February 2025 and filed by the Defendant in this case on 10th February 2025.
 12. Copy of certificate of Official Search for the land parcel No. Bunyala/Mudembi/1773.
5. The Motion is opposed and the Plaintiff filed a replying affidavit dated 5th March 2025 in which he has deposed, inter alia, that the Originating Summons was duly served upon the Defendant on 8th July 2022 as per the affidavit of service by one Joseph Orata Kweyu. Also served upon the Defendant was the Plaintiff's application dated 12th October 2022 and the firm of Omeri & Associates Advocates filed a Notice of Appointment on 16th February 2023 to represent the Defendant and subsequently, processes were served upon that firm including the hearing notice that the case would be heard on 27th February 2024 although the hearing did not proceed. That the Plaintiff is aware that the Defendant was personally served for the hearing on 15th July 2024 but refused to attend. The Defendant cannot therefore allege that she was not aware about the hearing. That it cannot be true that the firm of Obwoye Onsongo is the Defendant's advocate yet no pleadings have been filed by that firm. In any event, the application offends the provisions of Order 9 Rules 9 and 10 of the [Civil Procedure Rules](#) as the Defendant did not seek leave to act in person having previously been represented by the firm of Omeri & Associates Advocates.
 6. When the Motion was placed before me, I directed that it be canvassed by way of written submissions.
 7. The submissions were subsequently filed both by the Defendant in person and by MR FWAYA instructed by the firm of Fwaya Masakhwe Were Advocates for the Plaintiff.
 8. I have considered the Motion, the rival affidavits and annexures as well as the submissions by MR FWAYA and those of the Defendant.
 9. In response to the Motion, the Plaintiff has deposed in paragraphs 20, 21, 22 and 23 of his replying affidavit as follows:
 - “20: “That in any event, for all intents and purposes, I am advised by my Advocate on record that the application offends the procedure provided under Order 9 rules 9 and 10 of the [Civil Procedure Rules](#).”
 - 21: “That the reliefs sought can only be considered on the face of a properly filed application as per Order 9 Rules 9 and 10 of the [Civil Procedure Rules](#) whose language is in mandatory terms.”
 - 23: “That no notice to act in person has been filed and or served upon my advocate's office or myself.”



Counsel for the Plaintiff then submits as follows on that issue at page 1:

“The application before your Lordship is drawn and filed in person by Rosemary Barasa Okada. No notice to act in person has been served and or filed. The same ought to have been filed upon obtaining leave of Court. No application for leave has been filed or served upon the Plaintiff’s Advocates as per Order 9 Rule 9 of the *Civil Procedure rules*. There is equally no consent to that effect. The application filed herein pending determination has no prayer pursuant to Order 9 Rule 10 of the Civil Procedure Rules.”

Order 9 Rule 9 of the *Civil Procedure Rules* provides that:

- “9: “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court -
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

The Plaintiff and his counsel are therefore urging this Court to dismiss the Motion for non-compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. It is of course correct that the firm of Omeri & Associates Advocates did file a Notice of Appointment to act for the Defendant dated 16th January 2023 and judgment herein was delivered on 17th September 2024. The Defendant has now moved to this Court acting in person and there is no doubt that there has been no compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. However the issue as to whether non compliance with the provision of Order 9 Rule 9 of the *Civil Procedure Rules* renders this application fatal has been settled by the Court of Appeal in the case of *Tobias M Wafubwa v Ben Butali* C.A. Civil Appeal No 3 of 2016 [2017 eKLR] where the Court was dealing with a case where there was a change of advocate without complying with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. The Judges expressed themselves as follows:-

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.”

The Appellate Court was of course dealing with a case where there was an appeal from the decision of a subordinate Court. That is not the position in this case. But the Court went on to add as follows which is relevant to the circumstances in this case:

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to miscarriage of justice, then, Article



159 of the Constitution and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

The Judges then went on to cite their own decision in the case of *Boniface Kiragu Waweru v James K Mulinge* 2015 eKLR where they said:

“All in all we are not persuaded that non-compliance with Order III rule 9A of the *Civil Procedure Rules* was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all...”

Guided by the above precedents and taking into account the circumstances of this case, I am not persuaded that failure to comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* renders this Motion incompetent or that it has prejudiced the Plaintiff in any manner. The Motion is properly before me and there is no basis upon which I should dismiss it on account of non-compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.

10. Having said so, there is no doubt that this Court has the power to set aside an ex-parte judgment. That power is discretionary and must be exercised judiciously and on good grounds but not capriciously – *CMC Holdings Ltd v nzioki* 2004 I KLR 173. And in exercising that discretion, the Court must consider why the defence was not filed, whether there is a reasonable defence, why the Applicant did not turn up on the hearing date etc. Even where the ex-parte judgment was regular, the Court, in the quest for justice, still retains the power to set it aside because the main concern of a Court of law is to do justice to the parties and there is a cardinal rule of practice that a party should not be condemned un-heard. Indeed this is replicated in Article 50(1) of the *Constitution* which provides:

“50(1) “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

In the case of *James Kanyitta Nderitu & Another v Marios Philotas Ghikas & Another* C.A. Civil Appeal No 6 of 2015 [2016 eKLR], the Court of Appeal made the following observations regarding the power of the Court to set aside an ex-parte judgment. It held thus:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 other ...



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 issues 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.”

Although the Plaintiff alleges that he was not served with summons by the process server one Joseph Orata Kweyu who filed an affidavit of service on 16th September 2022, it is instructive to note that the firm of Omeri & Associates Advocates filed a Notice of Appointment to act for her in this matter on 16th February 2023. It is unlikely that the said firm could have placed itself on record to act for the Defendant unless it had been instructed by her to do so. The process server has also gone at length to name the time, village, sub-location and location where he served the Defendant on 12th January 2023 and other than alleging that the affidavit of service is fabricated, I did not hear the Defendant dispute those salient facts. Indeed when the firm of Omeri & Associates Advocates was served with the hearing notice on 12th February 2024, it did not deny being on record for the Defendant in this matter. Instead, it accepted service and stamped the same with the following comments:

“Received under protest. We have no proper instructions to proceed with this matter.”

I find that rather strange. When counsel no longer wishes to act for a party, the proper action to take is to apply to the Court to be allowed to cease acting for that party. For as long as the firm of Omeri & Associates Advocates were on record in this matter for the Defendant, they remained so and it was unprofessional to fail to file a formal application to cease acting for the Defendant. I do not think counsel can elect, once on record, to decide which matters to prosecute in a suit and which matters to ignore. Once on record, counsel must remain so throughout the litigation for which instructions have been given by a party and accepted. To purport to choose when to act and when not to act is clearly below the standard expected of counsel who is essentially an agent of the instructing party. It is also not lost to this Court that even as it received the hearing notice under protest, the said firm did not even ask that the Defendant be served personally if that is what it intended to convey. Given the above, it is clear to me that the Defendant instructed the firm of Omeri & Associates Advocates to defend this suit on her behalf and the attempt to suggest otherwise is a misplaced afterthought.

11. On the other hand, the Defendant’s suggestion that firm of Obwoye - Onsongo Advocates were acting for her in this matter cannot be correct. Firstly, the said firm did not file any Notice of Appointment to act for her. And even though she claims to have paid the said firm some sums of money and has filed several receipts, a close perusal of the said receipts shows that they were for other different suits and not for this particular suit. The Defendant has deposed in paragraph VIII of her supporting affidavit that she is “an illiterate and lay person who entrusted the said firm of Obwoye - Onsongoto guide her hence she should (sic) be punished for the failure and mistake of the said firm”. This is an issue which has weighed heavily on my mind in this application. The receipts which she has annexed to the Motion clearly shows that the firm of Obwoye - Onsongo Advocates, though not on record for her in this matter, was indeed appearing for her in Busia Court P&A Cause No E502 of 2021 as well as Busia Court Miscellaneous Application No E128 of 2021 for which the Defendant paid them upto



Kshs.80,500 which was acknowledged. This is both a Court of law and of mercy and it cannot rule out the possibility that the Defendant illiterate as she is, may have been under the mistaken impression that the said firm was also receiving those sums of money in respect to this suit. That is an issue that must be resolved in favour of allowing this application.

12. Further, when this matter came up for hearing on 25th July 2024, Mr Fwaya who was present for the Plaintiff addressed the Court and said:

“It is for hearing. I served both Mr Omeriand his client for today’s hearing. The Defendant did not file any response to the Originating Summons. I am ready with the Plaintiff and his witness.”

The Court then set a time allocation for hearing at 9.30am and at 10am, the Plaintiff and his witness testified and closed his case after which judgment was delivered on 17th September 2024. A perusal of the record shows that infact there was no service of the hearing notice for 25th July 2024. What is on record is the service for the hearing of 2nd July 2024 when the Court did not sit. Therefore, even if there was confusion as to who was counsel for the Defendant, it is clear that she was not personally served with the hearing notice for 25th July 2024 when the case actually proceeded to hearing. It is only fair that she be allowed an opportunity to defend the Plaintiff’s claim. As was held in the case of *Sebei District Administration v Gasyali* 1968 EA 300, “to deny the subject a hearing should be the last resort of a Court.”

13. Finally, I have also looked at the replying affidavit to the Originating Summons filed herein. It raises triable issues. One of which is that the land parcel No. Bunyala/Mudembi/1773 which is the suit land herein is infact no longer registered in the name of Oduki Balongowhose Estate the Defendant represents. It is infact, since 1st August 2023, registered in the names of John Ogana, Douglas Abwori and Kennedy Olande each owning a portion thereof. Indeed in paragraph 19 of the Defendant’s annexed replying affidavit dated 7th February 2025 and filed in response to the Originating Summons, she has deposed thus:

“19: “That moreover, the said Estate of the late John Oduki Balongohas already been distributed by the lower Court *vide* BusiaCM Succession No E502 of 2021 and the suit land parcel is now registered in name of four registered owners with there (sic) respective share of land hence there is no way I can transferred (sic) to him the purported 3½ acres that he claims. Annexed and marked RBO-1 is a copy of official search.”

14. The import of all the above is that by setting aside the judgment delivered on 17th September 2024, the Plaintiff will not be prejudiced. If anything, that will give him an opportunity to bring on board the other owners of the suit land. Indeed, following the disclosure that the suit land is infact registered in the names of the Defendant and other co-owners, the judgment herein is incapable of execution without impleading the other co-owners.

15. The up-shot of all the above is that having considered the Notice of Motion dated 7th February 2025, this Court makes the following disposal orders:

1. The judgment dated 17th September 2024 as well as all consequential orders are hereby set aside.
2. The Defendant’s replying affidavit dated 7th February 2025 in response to the Originating Summons filed herein together with the annexures be deemed as duly filed and the same be served within 14 days of this ruling.



3. The parties shall each bear their own costs.

BOAZ N. OLAO

JUDGE

8TH JULY 2025

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 8TH DAY OF JULY 2025 AS WAS DIRECTED ON 24TH MARCH 2025.

Mr Okeyo for Mr Were for Plaintiff present.

Defendant Absent.

BOAZ N. OLAO

JUDGE

8TH JULY 2025

