



Mulalya v Muathe & 2 others (Environment and Land Case Civil Suit 27 of 2017) [2025] KEELC 6019 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT 27 OF 2017
AY KOROSS, J
SEPTEMBER 16, 2025**

BETWEEN

PHILIP MUTISO MULALYA PLAINTIFF

AND

SAMUEL DOMINIC MUATHE 1ST DEFENDANT

JAMAL ABDALA 2ND DEFENDANT

ABDI ABDALA 3RD DEFENDANT

RULING

1. The notice of motion before this court is dated 5/03/2024 and has been filed by the 1st defendant, who has moved it within the provisions of Article 50 of *the Constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rules 10 and 11, and Order 51 Rules 1 and 15 of the Civil Procedure Rules. He seeks the following reliefs from this court: -
 - a. Spent.
 - b. The firm of Mbiriri Ngugi & Co. Advocates be granted leave to come on record to represent the 1st defendant.
 - c. Spent.
 - d. This honourable court be pleased to set aside, and/or vary its interlocutory judgment made by the hon. Justice A. Nyukuri on 8/03/2023 or any other date, for the plaintiff against the 1st defendant, together with any consequential decree and orders thereof.
 - e. Leave be granted to the 1st defendant to defend the suit and to file his statement of defence with the list of documents, list of witnesses and witness statements on such terms as the court may deem necessary.



- f. Costs of the motion be in the cause.
2. The motion is supported by several grounds on the face thereof and the 1st defendant's supporting affidavit, sworn on 5/03/2024. The grounds in support of the motion are materially as follows: a) he recently became aware that a judgment was entered against him in default of appearance to the tune of kshs. 14,555,000/- and only learnt of the case on 15/02/2024 when he was served with documents by the plaintiff's counsel and, b) the various returns of service on record were falsified as he was never served with documents or notices, thus denying him an opportunity to be heard, and c) he has a good and valid defence and urged the court to exercise discretion in his favour.
 3. The plaintiff strenuously opposed the motion by his replying affidavit of 20/04/2024, where he stated: a) the motion lacks merit, is misplaced, misconceived and is meant to deny him his right to enjoy the fruits of judgement that was regularly obtained, b) final judgement was delivered on 8/03/2023, which is as a result of the 1st defendant's inaction despite service, c) it is clear that proper service was effected upon the 1st defendant and he was misleading the court and the motion was an abuse of the court process; and
 4. D) The motion was filed 18 months post-judgment and is belated, stale, and overtaken by events, as the suit property's title has already been registered in the names of the 2nd and 3rd defendants as per the judgement and lastly, e) in the unlikely and unfortunate event that the court grants the 1st defendant the prayers sought in the motion, then the 1st defendant should be directed to pay throw away costs of Kshs. 150,000/-.
 5. Similarly, the 2nd and 3rd defendants opposed the motion through the 2nd defendant's replying affidavit of 16/12/2024, where he maintained inter alia:
 - a) they were the bona fide owners of land parcel no. Donyo Sabuk/ Komarock Block 1/16 (suit property), having purchased it from the 1st defendant at kshs. 13,000,000/-,
 - b) the judgment found they were not culpable and entered judgment against the 1st defendant and finally,
 - c) the judgment of the court should not be disturbed.
 6. Upon directions from the court, all parties' counsels complied with court directions and filed their respective written submissions, and they were received from Mss. Mbiriri Ngugi & Co. Advocates for the 1st defendant dated 7/02/2024, Jim Ojiambo & Company Advocates for the plaintiff dated 24/02/2024 and Kamotho Njomo & Company Advocates for the 2nd and 3rd defendants dated 20/02/2024.
 7. Having carefully given thought to the motion, its grounds, affidavits, and considering the rival submissions, the issues that arise for resolution and shall be addressed consecutively are: -
 - a. Whether Mbiriri Ngugi & Co. Advocates needed to seek leave to come on record for the 1st defendant.
 - b. Whether the judgment dated 8/03/2023 and consequential orders should be set aside in the circumstances of the case.



a. Whether Mbiriri Ngugi & Co. Advocates needed to seek leave to come on record for the 1st defendant.

8. Order 9 Rule 9 of the Civil Procedure Rules captures the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision provides as follows;

“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.”

9. This proviso does not impede a litigant from choosing an advocate of its choice, and the mischief of this legal provision is to cure instances of a litigant circumventing paying the legal fees of an advocate who was previously on record and also to inform the court and parties of such a change.

10. However, in the circumstances of this case, where the 1st defendant has never entered an appearance, it was unnecessary for his counsel to seek leave, as what his advocates simply needed to do was to file a notice of appointment of advocates and serve all the other counsels. Thus, this court finds this relief is misplaced.

b. Whether the judgment dated 8/03/2023 and consequential orders should be set aside in the circumstances of the case.

11. The 1st defendant has argued that the judgment was an irregular default judgment because he was allegedly never served with notices, pleadings, or summons. On these grounds, he properly sought this court’s intervention as provided by Order 10 Rule 11 of the Civil Procedure Rules (CPR), which allows the court to set aside or vary such judgment and any subsequent decree or order on just terms.

12. To counter this argument, the plaintiff’s counsel argues that the judgment was regular as evidenced by returns of service and contends that the motion should be considered from the prism of a regular default judgment and for this court to exercise its unfettered discretion in determining whether the threshold to set aside the regular default judgment has been met. To this end, counsel relies on the decision of James Kanyiita Nderitu & Another [2016] eKLR.

13. The 2nd and 3rd defendants did not dwell much on the issue of service. Still, they posited that the draft defence did not raise a triable issue and, to buttress this, relied on the decision of Shanzu Investment Ltd v Commissioner of Lands [1993] eKLR.

14. Having reviewed the entire record, it appears that this is the second occasion on which this court has entertained a motion to set aside its judgment. Previously, the 2nd and 3rd defendants succeeded in a ruling rendered on 03/03/2022 in setting aside a regular default judgment entered by this court on 06/12/2020. Subsequently, the matter was heard de novo, resulting in the judgment of 03/08/2023, which is now subject to this ruling.

15. Since the 1st defendant claims he was never served with the summons, this court has taken time to review the return of service dated 17/02/2017 by Peter Mutia Muthoka, deposed on 17/02/2017. On



- scrutiny, it is obvious that the summons was not served on the 1st defendant but on Christine Mutua at Shell Petrol Station in Tala, who was alleged to be an employee of the 1st defendant.
16. Concerning this and upon examining the 1st defendant's annexures, it appears that the petrol station mentioned in the return of service is operated by Vivo Energy Kenya (Vivo), which has leased it from the 1st defendant for a period of 15 years, from 2014 to 2029. An affidavit by Christine dated 5/03/2024 confirms that she has never been an employee of the 1st defendant, but rather, an employee of Vivo. These statements have not been challenged by any party, particularly the plaintiff.
 17. Furthermore, and in agreement with the 1st defendant, it is suspicious that all along, the plaintiff purportedly served documents on Christine in her capacity as an employee of the 1st defendant, yet after the delivery of judgment, he suddenly had a change of heart and considered it appropriate to personally serve the 1st defendant with the judgment on 24/01/2024. This raises eyebrows concerning the conduct of the process server. Therefore, this court is not convinced that summons and pleadings were ever properly served on the 1st defendant.
 18. To this court's mind and as held in *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] KECA 259 (KLR), summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves, to first of all enter appearance. The provisions relating to summons to enter appearance, which are anchored on Article 50 of *the Constitution*, are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence.
 19. Once the court establishes that there is an irregular default judgment, the court does not exercise discretion, but instead sets it aside *ex debito justitiae*, as a matter of right. Guidance on this is drawn from the decision of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR), which was relied upon by both counsels, which stated:-

“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 a 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.”
 20. Having glanced at the draft defence and annexures, it would appear the bone of contention is on dealings between the plaintiff and the 1st defendant over the sale of the suit property, and it would seem that the 2nd and 3rd defendants have been caught up in the melee as the 1st defendant does not seem to point an accusing finger at the 2nd and 3rd defendants but the plaintiff. Nevertheless, since they are parties to the proceedings, a setting aside of the judgment will undoubtedly affect them.
 21. Ultimately, this court finds the notice of motion dated 5/03/2024 is justified. Given the circumstances of this case, each party shall bear their own costs of the motion. As a result, the motion is granted on the following terms: -
 - a. The judgment delivered on 8/03/2023 is hereby set aside, with each party bearing their respective costs of the suit and of the notice of motion.



- b. The 1st defendant has 21 days from today to file and serve his pleadings and all relevant documents.
- c. A mention date shall be given for pre-trial directions.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

16. 09.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform.

In the presence of;

Ms Kanja- Court Assistant.

Miss Kimani holding brief for Mr Odhiambo for plaintiff/respondent.

Miss Wanjira holding brief for Mr Nderitu for 1st defendant/applicant

Mr Njomo for 2nd and 3rd defendants.

