



**Njue v Opiyo (Environment and Land Appeal E025 of 2024)  
[2025] KEELC 6009 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6009 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E025 OF 2024  
AK BOR, J  
SEPTEMBER 11, 2025**

**BETWEEN**

**BENSON NYAGA NJUE ..... APPELLANT**

**AND**

**DAVID ODERO OPIYO ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the ruling of Hon Njoki Kahara, Principal Magistrate delivered on 12/6/2024 in Siakago MC ELC Case No. E014 of 2022- David Odero Opiyo v Benson Nyaga Njue. The Respondent instituted that suit seeking an order for the eviction of the Appellant, his agents or servants from his parcel of land known as Makaima/Adjudication/475. The trial court entered interlocutory judgment on 23/8/2023 and the matter proceeded for formal proof on 19/9/2023. Judgment was delivered ex parte on 25/10/2023 in favour of the Respondent.
2. The Appellant filed an application dated 27/10/2023 seeking to have the ex parte judgment set aside and stay of execution of the judgment. Additionally, he sought to have orders of status quo pending hearing and determination of the main suit. He urged the court to deem the draft defence and preliminary objection attached to his application as duly filed upon payment of the requisite court fees. The trial court found no merit in the application and dismissed it with costs to the Respondent.
3. The Appellant challenges that decision on grounds that the trial court failed to exercise its discretion judiciously and denied him the right to a fair hearing; the Learned Magistrate wrongly held that service of the pleadings on him was properly effected; the trial court failed to appreciate that his draft defence raised triable issues; and that the trial court erred in holding that he had already been evicted from the suit premises despite him being on the land.
4. The issue for determination is whether the appeal has merit. The discretion of the court to set aside or vary ex-parte judgment entered in default of appearance or defence is intended to be exercised to avoid



injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. (See *Shah v Mbogo & Anor* (1967) EA 116). In *CMC Holdings Ltd v Nzioki* [2004] KLR 173 the court held that in an application for setting aside *ex parte* judgment, the court exercises its discretion in allowing or rejecting the same. That that discretion must be exercised upon reasons and must be exercised judiciously and that it was meant to ensure that a litigant does not suffer injustice or hardship as a result of excusable mistake or error. That it would not be proper use of such discretion if the court turned its back on a litigant who clearly demonstrated such an excusable mistake, inadvertence, accident or error. That such an exercise of discretion would be a wrong principle.

5. The suit was instituted on 10/12/2022. The Appellant denied having been served with pleadings. Several affidavits of service were filed by the Respondent. The affidavit sworn on 10/6/2022 indicated that the Respondent's advocate personally served the Appellant with the plaint, list of documents, and summons on 20/2/2022 at the Appellant's home in Kanyonga village. Another affidavit sworn on 15/8/2022 stated that the Respondent's advocate again served the Appellant, this time with a hearing notice dated 24/6/2022 at the same location.
6. A third affidavit of service, sworn on 2/5/2023 by a court process server, claimed that the Appellant had been served with an application filed under certificate of urgency for orders of inhibition and temporary injunction, along with the interim orders issued by the court. This time, the Appellant is indicated to have been served at his home in Ngecha village, Makima sub location within Mbeere Sub County.
7. The matter came up for inter partes hearing of the application on 10/5/2023, which is when the Appellant appeared before the court for the first time. The hearing was conducted virtually. The Appellant introduced himself and claimed to have an advocate on record, though the court noted that this was not the case. The court observed that the Appellant had neither entered appearance nor filed a replying affidavit and proceeded to allow the Respondent's application.
8. When the matter came up for mention on 26/7/2023, the Learned Magistrate noted that the Appellant had appointed the firm of E.C. Gitonga & Co. Advocates to act on his behalf, but that no defence had been filed by that date. The court entered interlocutory judgment on 23/8/2023 and set the matter down for formal proof hearing on 19/9/2023. On the hearing date, an advocate holding brief for the Appellant's advocate informed the court that the Appellant had not been served with the plaint and requested a further mention date. The trial court, however, noted that the plaintiff had served the plaint on the Appellant and that it was the Appellant's responsibility to pass on the documents to his advocate. The court took the Respondent's evidence, and delivered the *ex parte* judgment on 25/10/2023.
9. Had the trial court scrutinized the affidavits of service, it would have noted the discrepancies, which raise serious doubts as to whether the summons to enter appearance and the Respondent's pleadings were served on the Appellant. The affidavits gave two different locations as the Appellant's residence, that is Kanyonga village and Ngecha village casting doubt as to the propriety of the service said to have been effected. This court is satisfied that the Appellant was not served with the summons to enter appearance and the pleadings in the suit to enable him enter appearance and file a defence.
10. The appeal is allowed. The ruling of the Learned Magistrate delivered on 12/6/2023 is set aside together with the interlocutory judgment entered on 23/8/2023 and the *ex parte* judgment delivered on 25/10/2023.
11. The matter is remitted back to the trial court for hearing and determination on merit. The Respondent will serve the plaint and all other documents upon the Appellant within 7 days of the date of this judgment and the Appellant is to file and serve his defence and pleadings within 14 days of service of the plaint. The status quo on the land will be maintained pending hearing and determination of the suit.



12. The Respondent is awarded the costs of the appeal.

**DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Timothy Mwaura for the Respondent

No appearance for the Appellant

