



**Gakuha v Embakasi Ranching Company & 4 others (Environment and Land  
Case 708 of 2017) [2024] KEELC 580 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 580 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 708 OF 2017  
OA ANGOTE, J  
FEBRUARY 8, 2024**

**BETWEEN**

**JAMES MBURU GAKUHA ..... PLAINTIFF**

**AND**

**EMBAKASI RANCHING COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL MWANGI THUITA ..... 2<sup>ND</sup> DEFENDANT**

**JAMES KARANJA MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**NDUBAI NGEERA ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR NAIROBI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this court are two similar applications, which seek to set aside the Judgement of this court delivered on 4<sup>th</sup> November 2021. The first application dated 15<sup>th</sup> December 2022 was filed by the 4<sup>th</sup> Defendant, who seeks the following orders:
  - a. That the Honourable court be pleased to issue an order of stay of execution of the ex parte judgement entered on 4<sup>th</sup> November 2021 and all consequential orders arising therefrom.
  - b. That the Honourable court be pleased to set aside the ex parte judgement and decree in this case entered on 4<sup>th</sup> November 2021 and all consequential orders arising therefrom.
  - c. That the Applicant be granted unconditional leave to file its Defence out of time.
  - d. That this Honourable Court be pleased to grant such orders as may be equitable in the circumstances of this case.
  - e. That costs of this application be provided for.



2. The application is supported by the affidavit sworn by Ndubai Ngeera, the 4<sup>th</sup> Defendant, who deposed that he was neither served with the summons to enter appearance nor any pleadings.
3. According to the 4<sup>th</sup> Defendant, the Plaintiff served him with the Judgement of this court on 12<sup>th</sup> December 2022, in which the court cancelled the certificates of leases granted to him in respect of title numbers Nairobi Block 105/6491 and 6492.
4. Mr. Ngeera deponed that he has a good Defence which raises triable issues that should be ventilated during hearing; that his failure to enter appearance was not intentional; that he has moved this court at the earliest opportunity upon learning of the court's judgement on 12<sup>th</sup> December 2022, and that he is apprehensive that the Plaintiff will cause the cancellation of his titles in execution of the Judgment.
5. The Plaintiff opposed the application vide a Replying Affidavit sworn on 13<sup>th</sup> February 2023. The Plaintiff deponed that all the Defendants were duly served with summons and pleadings herein; that pursuant to the order of this court dated 2<sup>nd</sup> December 2019, the 4<sup>th</sup> Defendant was served vide substituted service and that this was effected through a newspaper advertisement in the Standard Newspaper published on 17<sup>th</sup> February 2020.
6. The second application dated 28<sup>th</sup> February 2023 was filed by the 1<sup>st</sup> Defendant, in which it has sought for the following reliefs:
  - a. That leave be granted to the firm of Macharia Gakuo & Company Advocates to come on record for the 1<sup>st</sup> Defendant.
  - b. That this Honourable Court be pleased to set aside and or vary its judgement entered on the 4<sup>th</sup> day of November 2021 for the Plaintiff against the 1<sup>st</sup> Defendant only in default of entering appearance and filing a Defence together with any consequential decree and orders of the court as the Court may deem fit and just.
  - c. That the Honorable Court be pleased to grant the 1<sup>st</sup> Defendant herein leave to file its Defence and defend the suit albeit out of time.
  - d. That costs of this application be provided for.
7. The 1<sup>st</sup> Defendant's application is supported by the affidavits of Jack Kamau Wachira, a surveyor and employee of the 1<sup>st</sup> Defendant, sworn on 15<sup>th</sup> December 2022 and 31<sup>st</sup> May 2023. Mr. Wachira deponed that this court delivered a default judgement in this suit against the 1<sup>st</sup> Defendant on 4<sup>th</sup> November 2021 and that the judgement was irregular and ought to be set aside *ex debito justitiae*.
8. Mr. Wachira averred that the judgement is irregular as service of the pleadings and summons to enter appearance were never served upon the 1<sup>st</sup> Defendant as per the law; that the service purportedly effected upon the Defendants was flawed and essentially not effective in law and that the 1<sup>st</sup> Defendant will seek leave of the court to cross-examine the process server on the same.
9. It was deponed that no notice of entry of judgement was served upon the 1<sup>st</sup> Defendant to make it aware of the judgement ahead of any execution proceedings, denying it an opportunity to appeal the said judgement.
10. He deponed that the 1<sup>st</sup> Defendant only became aware of the conclusion of the suit when its directors were compelled to transfer the suit property herein in the Plaintiff's name and that the Applicant is apprehensive that it shall be grossly prejudiced should the execution be allowed to proceed since it will lead to an issue of double allocation.



11. The Plaintiff opposed this application and deposed that the application lacks merit, is misconceived and is meant to deny him the right to enjoy the fruits of judgement; that the same was regularly obtained and that all the Defendants were duly served with the summons and pleadings in this matter and the Affidavits of Service were duly filed.
12. According to the Plaintiff, the 1<sup>st</sup> Defendant accepted service of the summons and pleadings by affixing its stamp on 22<sup>nd</sup> November 2017 and that the summons to enter appearance being duly served and received, the judgement entered was a regular judgement and not an irregular one as claimed by the 1<sup>st</sup> Defendant.
13. It is the Plaintiff's case that the 1<sup>st</sup> Defendant was notified of proceedings in this matter at all intervals through mention notices, which were received and stamped upon receipt and that the 1<sup>st</sup> Defendant was equally notified of the judgement.
14. The Plaintiff averred that the 1<sup>st</sup> Defendant has failed to provide this court with a valuable reason why it did not enter appearance or file a Defence and that the 1<sup>st</sup> Defendant has not annexed a draft Defence to enable the court determine if it raises triable issues or not.
15. The Plaintiff deposed that although the judgement was issued on 4<sup>th</sup> November 2021, the 1<sup>st</sup> Defendant filed this application on 28<sup>th</sup> February 2023, a year and three months later and that the application was aimed at prejudicing the Plaintiff's rights. All the parties filed submissions and a list of authorities which I have considered.

### **Analysis and Determination**

16. This court entered judgement in this suit on 4<sup>th</sup> November 2021. The court proceeded with hearing the Plaintiff's evidence ex parte on the basis that despite the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants being served with summons, they neither entered appearance nor filed Defences.
17. The first relief sought by the 1<sup>st</sup> and 4<sup>th</sup> Defendants is that the judgement dated 4<sup>th</sup> November 2021 should be set aside on the grounds that it was an irregular ex parte judgement as the Plaintiff had failed to lawfully serve them with summons.
18. The Court's jurisdiction to set aside judgement in default of appearance or defence is found in Order 10 Rule 11 of the [Civil Procedure Rules](#) which provides as follows:

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
19. The principles for setting aside a default judgment were spelt out in the case of *Patel vs East Africa Cargo Handling Services Ltd* (1974) EA 75 thus;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”



20. The authority of a court to set aside an *ex-parte* judgement is discretionary in nature. This was affirmed by the Court of Appeal in *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede* (1982-1988) KAR, where the Court held:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.”

21. However, the exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This was held by Harris J in *Shah vs Mbogo and Another* [1967] EA 116 at 123 BC]:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”

22. A similar finding was made by the Court of Appeal in *CMC Holdings Ltd vs James Mumo Nzioki* [2004] eKLR, where it stated that a court ought to consider whether a litigant raises an excusable mistake and whether their defence raises a triable issue:

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle...

The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues”

23. A distinction is to be drawn between a regular default judgement and one that is irregular, with the Court of Appeal in *James Kanyita Nderitu vs Maries Philotas Ghika & Another* [2016] eKLR, finding that the court may exercise its discretion to set such a judgement aside. It stated:

“...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 appearances 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 (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).



In an irregular 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.”

24. The 1<sup>st</sup> and 4<sup>th</sup> Defendants have averred that they were not served with summons to enter appearance or pleadings in this case. The Plaintiff however asserts that the said summons and pleadings were indeed served upon the Defendants. He asserts that he executed direct service upon the 1<sup>st</sup> Defendant and substituted service upon the 4<sup>th</sup> Defendant through an advertisement in the newspaper.
25. In his Replying Affidavit to the 1<sup>st</sup> Defendant’s application, the Plaintiff annexed the Affidavit of Service sworn on 15<sup>th</sup> February 2018 by the Plaintiff’s Advocate, Calistus Nyegenye. Counsel deponed that he personally effected service of the Summons to Enter Appearance together with the Plaintiff’s pleadings on the 1<sup>st</sup> Defendant at their offices. Counsel attached a copy of the Summons to Enter Appearance, which was stamped “received” by the 1<sup>st</sup> Defendant.
26. The Plaintiff also exhibited a mention notice which was served to the 1<sup>st</sup> Defendant, which was stamped as received on 22<sup>nd</sup> November 2017, as well as a letter dated 11<sup>th</sup> November 2022 to the 1<sup>st</sup> Defendant’s chairperson, notifying them of the judgement of this court entered on 4<sup>th</sup> November 2022.
27. Where a party asserts that they were not duly served despite a process server swearing that they issued service, the Court of Appeal in *Shadrack Arap Baiywo vs Bodi Bach* [1987] eKLR stated that there is a presumption of service in favour of a process server.
28. The Appellate Court quoted with approval Chitale and Annaji Rao’s, *The Code of Civil Procedure* Volume II page 1670, where the learned commentators say:
  - “ 3. Presumption as to service – There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”
29. In this case, there arose a presumption of service in accordance with the Affidavit of Service sworn by the Plaintiff’s Counsel. The burden of proof was thus upon the 1<sup>st</sup> Defendant to show that the same was incorrect. The 1<sup>st</sup> Defendant has however failed to challenge the deponent of the Affidavit of Service through cross-examination. The 1<sup>st</sup> Defendant has further not refuted that the stamp and signature affixed on the Summons, Mention Notice and letter dated 11<sup>th</sup> November 2022 belongs to itself.
30. The 1<sup>st</sup> Defendant has therefore failed to discharge the burden of proof. The court therefore finds that service was properly effected upon the 1<sup>st</sup> Defendant, who thereafter failed to enter appearance or a Defence. Therefore, the judgement entered against the 1<sup>st</sup> Defendant was a regular default judgement.
31. With respect to the 4<sup>th</sup> Defendant’s application to set aside judgement, the Plaintiff annexed an Affidavit of Service dated 16<sup>th</sup> January 2021, sworn by Job Isaac Juma. Mr. Juma deponed that the summons to enter appearance was served upon the 4<sup>th</sup> Defendant by way of advertisement in the Standard newspaper which was published on 17<sup>th</sup> February 2020.



32. It is clear from the record of the court that the Plaintiff attempted to effect direct service of the summons to enter appearance upon the 4<sup>th</sup> Defendant without success. It thereafter sought leave to effect substituted service in accordance with Order 5 Rule 17 of the *Civil Procedure Rules*. The Deputy Registrar of this court granted the said leave vide an order dated 2<sup>nd</sup> December 2019. The Plaintiff returned the Affidavit of Service as proof of service.
33. With respect to substituted service, there is a rebuttable presumption that the Defendant will be able to see the advertisement in the newspaper. The 4<sup>th</sup> Defendant however asserts that he did not see the advertisement with respect to these proceedings.
34. In similar circumstances, the court in *Phillip Mutiso Mulalya vs Samuel Dominic Muathe & 2 Others* [2022] eKLR persuasively argued that if substituted service does not result in the notification of the Defendant of the suit pending against them, then the resultant proceedings will not result in substantive justice:

“The applicants have stated that they did not see the advertisement herein. In my view, it is possible that indeed the applicants failed to see the said advertisement, considering that not everyone in Kenya reads all the newspapers daily. In addition, it is possible that a person may read only a section of a newspaper and fail to read other sections like the classified/advertisement section, depending on what they deem relevant to them. Therefore, substituted service is based on the rebuttable presumption that the defendant shall be able to see the advertisement. The purpose of effecting service, in whichever form, is to notify the defendant of the pendency of a suit against them and to give them opportunity to defend themselves. The provision for substituted service is allowed as an alternative where personal service is not possible. The most desirable and effective mode of service being personal service. However, the bottom-line and the expected outcome of any mode of service is to make the defendant aware of the suit pending against them. If that outcome is not achieved, then subsequent proceedings will not result in substantive justice.”

35. Taking into consideration that the judgement entered into by this court invalidated the 4<sup>th</sup> Defendant’s titles without an opportunity to defend himself, there is indeed legitimate grounds for this court to exercise its discretion and set aside the judgement dated 4<sup>th</sup> November 2021. This court will grant to the 4<sup>th</sup> Defendant the benefit of doubt that it did not see the advertisement in the newspaper.
36. There then arises the question of whether the Defendants’ Defences raises triable issues. The Court of Appeal case of *Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR in defining what a triable issue is, observed that:

“A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

37. In this matter, the 4<sup>th</sup> Defendant has pleaded in his Statement of Defence that he legally acquired the suit properties from the 1<sup>st</sup> Defendant and that he holds valid certificates of lease for the same. He claims that the Plaintiff has no right to such properties. This court is satisfied that the 4<sup>th</sup> Defendant has raised triable issues that require to be adjudicated through hearing.



38. This court finds that the 4<sup>th</sup> Defendant has established sufficient grounds to set aside its judgement dated 4<sup>th</sup> November 2021. However, considering that the Plaintiff incurred costs in serving by advertisement, he is entitled to thrown away costs of Kshs. 100,000.
39. This court therefore issues the following orders:
- a. The judgement and decree entered in this case on 4<sup>th</sup> November 2021 and all consequential orders be and are hereby set aside.
  - b. The Defendants are granted conditional leave to defend the suit and shall file the Defences within twenty one (21) days from the date of this Ruling.
  - c. The above orders are granted on condition that the 4<sup>th</sup> Defendant pays to the Plaintiff's thrown away costs of Kshs. 100,000 within 21 days from the date of this Ruling.
  - d. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Ms. Wako for Kirimi for 1<sup>st</sup> Defendant

Mr. Odhiambo for Plaintiff/Respondent

Court Assistant - Tracy

