



**Mokaya & another v Omwenga (Environment & Land Case
E008 of 2022) [2025] KEELC 3827 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E008 OF 2022**

DO OHUNGO, J

MAY 15, 2025

BETWEEN

SAMUEL MOKAYA 1ST PLAINTIFF

JAIRUS E MOKAYA 2ND PLAINTIFF

AND

WALTER OMWENGA DEFENDANT

RULING

1. The Plaintiffs moved the Court through Plaint dated 12th October 2022. Based on affidavits of service which the Plaintiffs filed, and considering that the Defendant did not file any appearance or defence, hearing of the matter proceeded undefended and my brother Mugo Kamau, J. rendered judgment on 15th November 2023 in favour of the First Plaintiff as follows:
 - (a) That the Honourable court makes a declaration that the conduct of the Defendant is a breach of the sanctimonious property rights of the Plaintiff.
 - (b) A declaration that the 1st Plaintiff is the rightful owner of the suit property.
 - (c) That the Honourable court be pleased to issue a permanent mandatory injunctive order restraining the defendant by himself, servants, employees, agents or any other person acting under his instructions or his interests from entering, interfering with the plaintiff's occupation and possession, otherwise dealing, entering, using, cultivating, residing, alienating and or in any other manner interfering with or dealing with the suit property.
2. Additionally, the Court awarded KShs 100,000 being general damages for trespass, costs of the suit on the lower scale, as well as interest on the general damages and costs from the date of the judgment until full payment.



3. Aggrieved with the judgment, the Defendant filed Notice of Motion dated 4th June 2024, which is the subject of this ruling. Through the application, the Defendant is seeking setting aside of the judgment and leave to defend the suit.
4. The application is based on the grounds listed on its face and is supported by an affidavit sworn by the Defendant. He deposed that he was never served with summons to enter appearance, any hearing notice or mention notice. That he only got to know of the existence of the suit from a relative when he heard that warrants of arrest had been issued against him.
5. The Defendant further deposed that he has been residing in Texas in the USA throughout the pendency of this matter and that upon instructing an advocate and perusing the court file, he noted that the Plaintiffs have been sending notices to his Kenyan number 0711665608. He added that he has not had access to the Kenyan number while outside the country and that he has a strong defence to the Plaintiffs' case.
6. The Plaintiffs opposed the application through a replying affidavit sworn by the First Plaintiff on 18th June 2024. He deposed that the Defendant was served but failed to enter appearance and defend the suit and that the Defendant's allegation that he was in the USA is a falsehood aimed at obtaining sympathy from the Court. He further averred that the Defendant had filed a forged mutation form which needed to be scrutinised. He added that the supporting affidavit is full of falsehoods and that the Defendant had not demonstrated anything to warrant setting aside of the Court's orders.
7. The application was canvassed through written submissions. The Applicant filed submissions dated 11th March 2025 while the Respondents filed submissions dated 14th March 2025.
8. I have carefully considered the application, the affidavits and the submissions. The issue that arises for determination is whether the judgment herein should be set aside.
9. The Applicant does not dispute that the Kenyan mobile number 0711665608 is his. He however contends that he has been in the USA throughout the duration of this case and that he has not had access to the said number while outside the country.
10. I have perused the affidavits of service filed by the Plaintiffs and I note that in all of them, it is deposed that calls placed to the said Kenyan number were not successful either because there was no answer or because they did not go through. Invariably, all the service allegedly effected by the Plaintiffs were through WhatsApp messages after phone calls proved unsuccessful. I have also perused affidavits of service sworn by the Court Bailiff on 3rd February 2023 and 7th March 2023 in which she deposed the Defendant's said mobile number was no longer in service hence unreachable.
11. While service through mobile-enabled messaging applications is permitted pursuant to Order 5, rule 22C of the Civil Procedure Rules, it must be remembered that the purpose of service is to notify a litigant about proceedings in Court. Thus, the question must always be whether notice was indeed delivered, as opposed to being merely sent. In a case such as this where there is evidence from the Court Bailiff, an independent source, that the mobile number was no longer in service, the Court must not be quick to deprive a litigant of the sacrosanct right to a hearing. I do not see any prejudice which the Plaintiffs will suffer beyond that which can be remedied through an award of costs.
12. Even if it were deemed that the Defendant had been served, which I am not persuaded is the case, the Court would be at liberty to exercise discretion pursuant to the principles laid down in *Mbogoh & Another v. Shah* [1968] EA 93 and reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. In such a scenario, the Court has unfettered discretion which is to be exercised to avoid injustice.



13. I am persuaded that the Defendant has made a case for setting aside of the judgment herein. I find merit in Notice of Motion dated 4th June 2024 and I make the following orders:
- a. The judgment delivered herein on November 15, 2023, and the ensuing decree are hereby set aside.
 - b. The Defendant to file and serve Defence and compliance documents within 14 (Fourteen) days from the date of delivery of this ruling.
 - c. Costs of the application shall be in the cause.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 15TH DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Orangi for the Plaintiffs

Mr Ochoki for the Defendant

Court Assistant: B Kerubo

