



**Meritei v Oduor & 61 others & 2 others (Environment & Land Case E002 of 2021) [2025] KEELC 4843 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4843 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E002 OF 2021  
LC KOMINGOI, J  
JUNE 26, 2025**

**BETWEEN**

**GEORGE NDULA MERITEI ..... PLAINTIFF**

**AND**

**MAURICE OUNDO ODUOR & 61 OTHERS ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KAJIADO ..... 2<sup>ND</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of the Notice of Motion dated 2<sup>nd</sup> December 2024 by the 1<sup>st</sup> to the 61<sup>st</sup> Defendants [herein after referred to as the Applicants]. The same is brought under; Order 10 Rule 11, Order 22 Rule 25 and Order 51 Rule 3 of the Civil Procedure Rules. It seeks:
  - i. Spent;
  - ii. That stay of execution of the judgement of this Hon. Court entered on 14<sup>th</sup> November 2024 and all consequential orders be and is hereby granted pending the hearing and determination of this application.
  - iii. That the Judgement of this Court entered on 14<sup>th</sup> November 2024 together with all consequential orders be and is hereby set aside.
  - iv. That the 1<sup>st</sup> to the 62<sup>nd</sup> Defendants be and are hereby granted leave to enter appearance and file defence out of time.
  - v. That leave be granted to the firm of Okeyo Ochiel and Co. Advocates to come on record for the 1<sup>st</sup> to 62<sup>nd</sup> Defendants
  - vi. Costs of this Application be provided for.



2. The grounds are on the face of the application, and are set out in paragraphs 1 to 16. The same is supported by the Affidavit of Jacktone Ouma Odunga's sworn on the 2<sup>nd</sup> December 2024.
3. He claims that they learnt about the judgement delivered in this case on the 18<sup>th</sup> November 2024, when the Land Registrar Kajiado called asking them to return the original title deeds for their parcels for purposes of cancellation as per the Judgement. They then perused the court file and sought stay of execution of the decree because they were not aware of these proceedings. They claimed that they had never been served with the pleadings whether physically, electronically or through substituted service.
4. He pointed out that the Plaintiff/Respondent was the complainant in Nairobi Milimani CMCR No. 1471 of 2012 which was still ongoing, and they had never missed a Court session in the said case. He avers that, the Respondent never served them with any court documents or notices in respect of this suit. Therefore, it was surprising that the Respondent would opt to serve them through substituted service while he was aware of their whereabouts owing to the ongoing criminal case.
5. They were therefore condemned unheard which was against the rules of natural justice. He also noted that Nairobi Milimani CMCR No. 1471 of 2012 and the instant suit were heard concurrently which was sub judice. As such, the judgement in this suit should be set aside and be allowed to file their defence.
6. The Plaintiff/Respondent in his Replying Affidavit dated 4<sup>th</sup> February 2025 contested the application on grounds that the Applicants were duly served pursuant to Order 5 Rule 17 of the Civil Procedure Rules. This is after leave to serve by substituted service was granted by this Court after several attempts to serve them physically. Service was thus effected through a newspaper advertisement. He denied that he knew the 61 defendants as he only got their details from the Land Registry records.
7. On the issue of the ongoing criminal case, and that he should have served the Applicants in person during those proceedings, he stated that he was neither familiar nor could he recognise them and he only attended the criminal proceedings only when required by prosecution.
8. On the claim that this suit was sub judice, he stated that the existence of a criminal case did not preclude civil proceedings as per Section 193A of the *Criminal Procedure Code*. He added that the Applicants had not produced a draft statement of defence to help the Court determine that their application was merited and the agreement produced were not signed by him. He did not know the alleged buyers.
9. He urged that the application be dismissed.
10. This application was canvassed by way of written submissions.

#### **Submissions for the Defendants/Applicants**

11. Counsel submitted that the Applicants had never been served the court documents/proceedings over this suit despite them being parties in Nairobi [Milimani] CMCR NO. 1471 of 2012 where the Respondent was the complainant. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were charged for conspiracy to defraud contrary to Section 394 of the *Penal Code*. And the second count against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants was a charge of forgery contrary to Section 245 as read with section 348 of the *Penal Code*. Counsel submitted that on the 14<sup>th</sup> November 2024 when this Court was delivering its judgement, there was a mention for Nairobi [Milimani] CMCR NO. 1471 of 2012 on the same date and the Applicants were present in court with no information of this suit. Counsel added that the Applicants were always present in the criminal case and the Respondent was also present in most days. Therefore, the claim that the Respondent could not serve them was untruthful. Counsel pointed out that the judgement in the criminal case against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants had since been delivered and they



were found not guilty of the respective charges and accordingly acquitted under Section 215 of the *Criminal Procedure Code*.

12. The relief to review the judgement was therefore merited as provided under Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.
13. While making reference to *Esther Ngonyo Gitara v Dominic Chege Gitari*, counsel submitted that the judgement in Nairobi [Milimani] CMCN NO. 1471 of 2012 was new information which could not be produced at the time of the judgement in this Court. Counsel also argued that the claim that they could not be traced to be served with Court documents was false and an error apparent on the face of the record because they were always present in the criminal case and the Respondent was aware of this. It was only until the Applicants were informed of the imminent cancellation of their titles that they learnt about this suit, perused the file and filed this application timeously. As such, the application was merited and should be allowed.

### **Submissions for the Plaintiff/Respondent**

14. Counsel for the respondent highlighted the following as the issues for determination: Whether the Defendants were duly served and failed to enter appearance? Whether the Judgment delivered on 14<sup>th</sup> November 2024 should be set aside? And whether the Defendants are entitled to the orders sought?
15. On whether the Defendants were duly served and failed to enter appearance, it was submitted that the Respondent duly served the Applicants through substituted service under the Court's order as per Order 5 Rule 17 Civil Procedure Rules, and an advertisement put up in the Daily Newspaper. To support this, reference was made to the case of *Wachira & another v Ngaruiya & another* which held: "...The service of the Originating Summons on the Respondent was regularly done by way of substituted service after leave was granted by the Court. The hearing also proceeded regularly and a regular Judgment was delivered by the Court..."
16. Whether the Judgment delivered on the 14<sup>th</sup> November 2024 should be set aside, counsel submitted that this Court had discretion to set aside judgement in default of appearance of Defence as stipulated under Order 10 Rule 11 of the Civil Procedure Rules. However, the discretion must be exercised judiciously should the reasons be sufficient with reference to *Shah v Mbogo & Another* [1967] EA 116, *Kitamaiyu Limited v China Gansu International Corporation for Economic Technical Corporation Company Limited* [2020] eKLR, and *Mwaro & Anor v Charo & 5 others* [2022] KEELC 1547 [KLR]. Counsel submitted that the Applicants had not given satisfactory reasons for setting aside the judgement because they did not file a draft defence for the court to consider whether they had a prima facie case. Additionally, the Sale Agreement dated 19<sup>th</sup> February 2002 produced by the Applicants had already been produced in trial and the document examiner at the Directorate of Criminal Investigations, Gideon Osundwa, confirmed that the Plaintiff did not sign the Agreement. Counsel also submitted that the Respondent produced the original Title deed during his testimony, and Rosemary Mwangi, the Land Registrar Kajiado confirmed that the Title deed produced was authentic and that the Respondent would not have the original Title if the same had been surrendered at the Land Registry. Therefore, the documents, arguments and evidence relied on by the Applicants had already been evaluated by the Court and there was no new evidence to justify setting aside of the Judgement.
17. On whether the Applicants were entitled to the reliefs sought, it was submitted that they had not produced evidence that met the threshold to warrant the setting aside of the judgement and the application should be dismissed with costs.



## Analysis and Determination

18. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and the authorities cited. I find that the issues for determination are;
- i. Whether judgement entered on 14<sup>th</sup> November 2024 and all consequential orders should be set aside;
  - ii. Whether the 1<sup>st</sup> to 61<sup>st</sup> Defendants should be granted to leave to file a defence out of time;
  - iii. Who should bear costs of the application?
19. The Applicants seek that the judgement delivered on 14<sup>th</sup> November 2024 together with all consequential orders be set aside on grounds that they were not served with pleadings and this suit. It is their case that, their right to a fair trial was contravened. They claim that the Respondent's resort to substituted service on grounds that they could not be traced was deceitful. This is because, the Plaintiff/Respondent was the complainant in Nairobi Milimani CMCR NO. 1471 of 2012 where the 1<sup>st</sup> – 3<sup>rd</sup> Applicants [were the accused persons] were always present in Court during the mention dates. Therefore, the Plaintiff/Respondent had an opportunity to serve them but failed to do so and opted to serve them through substituted service.
20. The Plaintiff/ Respondent maintained that the Defendants /Applicants were duly served by way of substituted service as provided by law by an advertisement put on the Standard Newspaper. In the case of Wachira & Another v. Ngaruiya & Another the court held "The service of the Originating Summons on the Respondent was regularly done by way of substituted service after leave was granted by the Court. The hearing also proceeded regularly and a regular Judgment was delivered by the Court..."
21. I am not satisfied that the Defendants/Applicants have good grounds to warrant the Judgement which was regularly obtained to be set aside. DW 2 Inspector Gedion Osundwa, a Document Examiner, told the court that the signatures on the Sale agreement and the transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not those of the Plaintiff/Respondent.
22. It is not in dispute that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants/Applicants admits that are the accused persons in the ongoing criminal case being Nairobi [Milimani] CM CR. No. 1471 of 2012. This means investigations were conducted before their arraignment in court.
23. I am of the view that no purpose will be served if the Judgement which was regularly obtained is set aside.

If indeed the Defendants/Respondents were serious, they ought to have annexed a draft defence for the court to have a glimpse.

In the case of Patel v. E.A Cargo Handling Services Ltd. [1974] EA 75 William Dreyffus P. at page 76 stated;

"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 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, a defence on merits does not in my view, mean 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."



As stated earlier, the court has not had a glimpse of the Defendants/Applicants' defence.

24. In the case *Shah v. Mbogo* [1967] EA 116 Harris J stated thus;

“I have considered, in relation to present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained *ex parte*. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of Justice.”

25. I am not convinced that the Defendants/Applicants were not aware of this suit.

26. In conclusion I find no merit in the Notice of Motion and the same is dismissed with costs to the Plaintiff/Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**L. KOMINGOI.**

**JUDGE.**

In The Presence Of:

Ms. Khafafa for the Plaintiff.

Mr. Aburili for Mr. Ochiel for the 1<sup>st</sup> – 61<sup>st</sup> Defendants.

N/A for the 62<sup>nd</sup>, 63<sup>rd</sup> Defendants.

Court Assistant – Mateli.

