



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoronge v Maingi & another (Environment and Land Case  
E069 of 2024) [2025] KEELC 4700 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4700 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE E069 OF 2024  
NA MATHEKA, J  
JUNE 25, 2025**

**BETWEEN**

**LORNA MUTHONI NJORONGE ..... PLAINTIFF**

**AND**

**JOHN MUSEMBI MAINGI ..... 1<sup>ST</sup> DEFENDANT**

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

**RULING**

1. The application is dated 10<sup>th</sup> December 2024 and is brought under Section 1A & 1B of the Civil Procedure Rules, Order 51 Rules 1 & 15, Order 10 Rule 7 of the Civil Procedure Rules seeking the following orders;
  1. That this Application be certified as urgent and be heard ex-parte on the first instance.
  2. That pending the hearing of this Application inter-partes, this Honourable Court be pleased to set aside the orders issued on the 17<sup>th</sup> October, 2024 on the Application dated 2<sup>nd</sup> September, 2024.
  3. That pending the hearing and determination of the main suit, this Honourable Court be pleased to set aside the orders issued on the 17<sup>th</sup> October, 2024 on the Application dated 2<sup>nd</sup> September, 2024 be set aside.
  4. the Application dated 2<sup>nd</sup> September, 2024 be heard afresh with both parties being given a fair opportunity to present their cases upon granting leave to the 1<sup>st</sup> Defendant/Applicant herein leave to respond to the said Application.
  5. That costs of this Application be provided for.



2. It is premised on the following grounds that the Respondent was served with the Application dated 2<sup>nd</sup> September, 2024 a day before the mention date (16<sup>th</sup> October, 2024) at night, thus not affording him adequate time to prepare and respond. The Respondent only saw the service the following day on the 17<sup>th</sup> October, 2024 after the court proceedings had concluded and the Application allowed. The orders issued adversely affect the Respondent's rights and interests in the property known as Mavoko Municipality Block 42/5, where he has constructed a house. The Respondent had made significant financial contributions towards the construction, including payments to the mason and the architect, as evidenced by Mpesa statements showing transactions to the Applicant for purchasing construction materials and payments for architectural services. That this Application has been brought without unreasonable delay. That it is within the interest of justice that this Application be allowed.
3. This court has considered the application and submissions therein. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
4. This provision is amplified by Order 51, rule 15 which provides that the Court may set aside an order made ex parte. In setting aside ex parte orders, the Court must be satisfied of one of two things, namely, either that the respondent was not properly served or that the respondent failed to appear in Court at the hearing due to sufficient cause. Essentially, setting aside an ex parte order is a matter of the discretion of the court.
5. In *Esther Wamaitha Njihia & two others vs Safaricom Ltd (2014) Eklr*, the court held inter alia that;

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali.*) It also goes without saying that the reason for failure to attend should be considered.”
6. It then follows that the decision whether or not to set aside an ex parte order is discretionary. The discretion is intended so to be exercised to avoid injustice and 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. See *Shah vs Mbogo & Another (1967 EA 116*.
7. The applicant's main contention was that the miscellaneous application was a day before the mention date (16<sup>th</sup> October, 2024) at night, thus not affording him adequate time to prepare and respond. The respondent only saw the service the following day on the 17<sup>th</sup> October, 2024 after the court proceedings had concluded and the Application allowed.
8. The respondent in this application stated that the 1<sup>st</sup> defendant was properly served on the 20<sup>th</sup> September 2024 with the said application and there is an affidavit of service sworn by David Kakungu



the process server. I have perused the said affidavit sworn by the said David Kakungu and dated 23<sup>rd</sup> September 2024 and paragraph 6 he states that;

“That on the same day I proceeded with my service upon the 2<sup>nd</sup> defendant by the name John Musembi. I tries to call him through his phone number but he did not pick my calls the and decided to serve him through email with the court documents which I now return to this hounourable court as duly served.”

9. No evidence of this email service on the 20<sup>th</sup> September 2024 has been adduced and it would be possible that the applicant was served one day before the mention date and only saw the service the following day on the 17<sup>th</sup> October, 2024 after the court proceedings. I find that service was improper in this case and the proceedings of that day cannot stand. I find that this application is merited and I grant the following orders;

1. That this Court be pleased to set aside the orders issued on the 17<sup>th</sup> October, 2024 on the Application dated 2<sup>nd</sup> September, 2024 be set aside.
2. That the Application dated 2<sup>nd</sup> September, 2024 be heard afresh with both parties being given a fair opportunity to present their cases upon granting leave to the 1<sup>st</sup> Defendant/Applicant herein leave to respond to the said Application.
3. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF JUNE 2025.**

**N.A. MATHEKA**

**JUDGE**

