M'Iburi & 3 others v Iburi (Enviromental and Land Originating Summons E004 of 2024) [2025] KEELC 5180 (KLR) (24 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5180 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2024

JO MBOYA, J

JUNE 24, 2025

BETWEEN

PAUL MPUTHIA M'IBURI ..... 1ST PLAINTIFF

SUSAN KATHURE ..... 2ND PLAINTIFF

CHARLES KIRIGIA M'IBURI ..... 3RD PLAINTIFF

SAMSON MUREGA M'IBURI ..... 4TH PLAINTIFF

AND

DANIEL RUKARIA IBURI ..... DEFENDANT

RULING

1. What is before me is the Notice of Motion Application dated 2nd April 2025; brought pursuant to the provisions of sections 1A 1B 3A and 63 e of the *Civil Procedure Act*; Section 68 of the *Land Registration Act* 2012; Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules 2010 and wherein the applicant has sought the following reliefs:

    i. That this Honourable court be pleased to certify this application be as of utmost urgency and be heard on priority basis and service thereof be dispensed with in the first instance.

    ii. That this Honourable court be pleased to set aside and or vary its interlocutory judgment entered on the 13th day of November 2024 for the Plaintiffs against the defendant and allow the defendant to defend the suit.

    iii. That this Honourable court be pleased to grant stay of execution of the Judgment and decree entered on the 13th day of November 2024 and or any further proceedings or any subsequent orders therefrom pending the hearing and final determination of this application

iv. That this Honourable court be pleased to issue an order restraining the respondents their assigns, agents or anybody else whatsoever claiming through them from entering trespassing or in any other way interfering with the appellant/ applicants' occupation and use of the land parcel No. Abothuguchi/Gaitu/41 pending the hearing and determination of this application.

v. That this Honourable Court be pleased to issue an order of inhibition against any dealings on the parcel of land No. Abothuguchi/Gaitu/41 pending the hearing and determination of this application.

vi. That status quo be maintained pending the hearing and determination of this application.

vii. That the defendant/ applicant be granted leave to enter appearance and defend the suit as he has a defence that raises cogent triable issues.

viii. That the cost of this application be borne by the respondents.

2. The instant application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of the applicant, namely; Daniel Rukaria Iburi sworn on even date; and wherein the deponent has averred inter alia that same is the registered proprietor of the suit property; that the suit herein was filed but same was neither served with the summons to enter appearance nor pleadings; same only got to know of the suit long after the Judgment had been entered and execution was threatened.

3. The Plaintiffs/respondents opposed the application by way of a replying affidavit sworn by the 1st Plaintiff/respondent and wherein the deponent has averred that the applicant herein was duly served with summons to enter appearance and the pleadings underpinning the instant suit.

4. The application came up for hearing on 24th June 2025, when the advocates for the parties covenanted to canvass the application by way of submissions. Suffice it to state that the matter thereafter proceeded for hearing. Furthermore, the submissions ventilated by the parties are on record.

5. Learned counsel for the Applicant adopted the grounds at the foot of the application as well as the averments contained in the body of the supporting affidavit. Moreover, learned counsel ventured forward and highlighted three salient issues for consideration by the court.

6. Firstly, learned counsel for the applicant submitted that the applicant herein was neither served with summons to enter appearance nor the pleadings underpinning the instant suit. To this end, counsel referenced the content[s] of paragraph four [4] of the supporting affidavit.

7. It was the further submissions by learned counsel of the applicant that the applicant herein only got to know of the existence of the suit and the subject proceeding[s] long after the judgment had been delivered and execution commenced by the respondents.

8. Secondly, learned counsel for the applicant has submitted that the applicant herein is the lawful and legitimate proprietor of the suit property and in this regard, the applicant is therefore entitled to the protection of the court in accordance with the provisions of Article 40 of *the Constitution*.

9. Thirdly, learned counsel for the applicant has submitted that the applicant herein was entitled to service and not notice of the institution of the suit. However, it was posited that in so far as the applicant was not served with the pleadings and summons to enter appearance, the applicant's rights to fair hearing, fair trial, and due process of the law were violated, breached and or infringed upon.

10. Arising from the foregoing, learned counsel for the applicant has therefore implored the court to find and hold that the applicant is entitled to an opportunity to be heard in respect of this matter. To this end, counsel also invited the court to find and hold that the application beforehand is meritorious.

11. On the other hand, learned counsel for the respondent adopted the replying affidavit sworn by Samson Murega Iburi and thereafter highlighted three [3] issues, namely; that the applicant herein was duly served with summons to enter appearance and the pleadings; that the application is misconceived in so far as same is seeking to set aside the interlocutory judgment and not the final judgment of the court; and that the judgment of the court has since been executed and or implemented.

12. Regarding the first issue, learned counsel for the respondents submitted that following the institution of the suit, the deputy registrar of the court processed and issued the summons to enter appearance. Furthermore, it was submitted that upon issuance of the summons to enter appearance, same were duly served upon the applicant. To this end, learned counsel submitted that the affidavit of service sworn on the 19th April 2024 confirms that the applicant was duly served.

13. As pertains to the second issue, learned counsel for the respondent submitted that the application before the court is premature and misconceived in so far as the application seeks to set aside the interlocutory judgment, yet the subject matter proceeded for hearing culminating to a final judgment. In this regard, it was posited that the setting aside of the interlocutory judgment would therefore serve no good purpose. For good measure, it was contended that the application herein is an act of futility.

14. In respect of the third issue, learned counsel for the respondent submitted that following the entry of the final judgment in respect of the instant matter, the respondents proceeded to and extracted the decree of the court. In addition, it was contended that the decree under reference has been executed and implemented. In this regard, learned counsel submitted that the conveyance documents were indeed submitted to the court and same were executed/ signed by the deputy registrar of the court.

15. Premised on the foregoing, learned counsel therefore contended that the setting aside of the judgment shall therefore serve no meaningful purpose. To this end, it was contended that the application is devoid of merit[s] and same ought to be dismissed with costs.

16. Suffice it to state that in the course of the submissions by learned counsel for the respondents the court brought to the attention of counsel that the affidavit of service sworn on the 19th April 2024; and which was being referenced as the basis of service of summons to enter appearance did not form part of the court record. Moreover, it was brought to the attention of learned counsel of the respondent that the said affidavit of service was never uploaded onto the court's e-platform.

17. Other than the foregoing, it is also worthy to highlight that the case tracking system was also reviewed by the court assistant in open court and in the presence of learned counsel for the respondents and it became evident that other than the filings that were undertaken in March 2024, the subsequent filing/ uploading were done in October 2024. In particular, it was confirmed that the uploading in October 2024 related to the affidavit of service sworn on 9th October 2024 and not otherwise.

18. Despite the foregoing, learned counsel for the respondents maintained her position that the applicant was served. Furthermore, learned counsel pulled out a copy of an affidavit of service from her own records in an endeavour to persuade the court that service was [sic] effected.

19. Having reviewed the application as well as the response thereto; and having taken into account the oral submissions made on behalf of the respective parties and having considered the applicable law, I come to the conclusion that the determination of the subject application stands on three[3] key issues, namely; whether the judgment sought to be set aside was a regular judgment or otherwise; whether the

failure to enter appearance and file a statement of defence was intentional and deliberate or otherwise; whether the applicant has a defence on merit[s] or otherwise.

20. Regarding the first issue, it is important to recall and reiterate that whenever a civil suit and or court process is commenced against a person, it behoves the claimant to extract and serve the requisite summons to enter appearance or such other court process upon the adverse party. In this regard, it suffices to underscore that the respondents were obliged to serve the applicant with the summons to enter appearance and the pleadings.

21. Additionally, there is no gainsaying that upon service of the summons to enter appearance and the attendant pleadings, it behoves the claimant to file and or lodge the affidavit of service in accordance with the provisions of Order 5 Rule 15 of the Civil Procedure Rules 2010.

22. The question that falls for determination in an endeavour to discern whether the judgment beforehand was a regular or otherwise touches on whether the applicant was served. To start with, it is worthy to recall that the affidavit of service [if any] ought to have been filed in the court tracking system [Judiciary E portal] in the conventional manner.

23. Furthermore, it is also common ground that the subject suit bears the e-number which means that all the filing must be uploaded and not otherwise.

24. Be that as it may, the court had occasion to review the court tracking system [CTS] and there was no affidavit of service [sic] sworn on the 19th April 2024, in the manner posited by the learned counsel for the respondents.

25. In the absence of an affidavit of service, on the court tracking system [where all filed documents are traceable to], the connotation is that the affidavit of service was never filed and or uploaded. Moreover, the absence of the affidavit of service on the e-platform also precipitates the invocation and reliance on the doctrine of adverse inference as against the person chargeable with [sic] filing.

26. I am aware of the legal position pertaining to the presumption of service. In this respect, the position of the law is to the effect that where there is a valid and competent affidavit of service, a court of law is obliged to presume service unless the contents of the affidavit of service are impeached [See Harun Miruka v Jared Otieno Abok & another [1990] eKLR; Shadrack Arap Baiywo v Bodi Bach [1987] KECA 69 (KLR); Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR].

27. Be that as it may, I must point out that the doctrine of presumption of service can only apply and or be deployed where there is an affidavit of service filed and forming part of the court record. However, in the instant case, no such affidavit of service was ever filed. To this end, the presumption of service does not apply.

28. Furthermore, it is Important to underscore that in the absence of an affidavit of service, what becomes evident is that no service was effected. Nevertheless, it is pertinent to observe that service of court process is critical and essential.

29. Absent service of court processes, the proceedings and judgment [if any] become irregular, illegal and invalid. To this end, I come to the conclusion that the court process and the subsequent judgment rendered on the 13th November 2024 were irregular and thus unlawful.

30. The Court of Appeal in the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR) discussed the distinction between a regular judgment and an irregular judgment and expounded the principles underpinning same.

31. For coherence, the court observed and stated thus,

> " In an irregular default 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. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been an inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.
>
> The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456)."

32. Regarding the second issue, it is worthy to recall that the applicant contended that same was not aware of the civil proceedings and or the matter beforehand. Furthermore, the applicant posited that same only became aware of the matter long after judgment had been delivered and execution commenced.

33. There may appear to be some evidence of delay. Nevertheless, the delay of any form can only be reckoned from the time when the applicant came to know of the judgment and not otherwise.

34. Notwithstanding the foregoing, it is not lost on me that the moment a court of law comes to the conclusion that there was no service, then the question of delay and the length of such delay (if any) becomes immaterial.

35. Other than the foregoing, I also beg to underscore that there was no way the applicant herein could have been expected to enter an appearance and defend the suit without having been served in the first instance. In the premises, there is no gainsaying that the failure to enter an appearance and file a statement for defence was neither deliberate nor intentional. [See Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR).

36. Turning to the last issue, it is worthy to recall that the dispute beforehand touches on land. In particular, the respondents herein have posited that the suit property is held by the applicant, albeit on trust for them. Suffice it to underscore that the dispute concerns land, which is by itself emotive and sensitive.

37. In my considered view, disputes and matters touching on land require to be adequately addressed and determined. This is what the applicant is seeking before the court. Notably, it is my finding that claims touching on and concerning land therefore espouse triable issues and thus the Court is called upon to afford the parties opportunity to be heard on merit[s] unless there exists compelling reason[s] to the contrary.

38. Before concluding on this issue, it is instructive to cite and reference the holding in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, where the court observed [Per Ouko J A] as hereunder:

> "In Kenya, the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the

disputes degenerate into bloodshed and death. This Court in Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others Civil Appeal No. 84 of 2013, explained why land is such an important asset thus;

"Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities."

39. With the foregoing in mind, there is no gainsaying that the applicant's desire to be heard on matters/ issues affecting his property rights deserves due consideration. To this end, the applicant's defence aimed at protecting his rights to Land deserves an opportunity to be canvassed before the court, before a determination can be made.

Final Disposition:

40. Flowing from the analysis highlighted in the body of the ruling, it must have become crystal clear that the application beforehand is meritorious. In any event, the application beforehand constitute a cry and or clamour by the applicant to partake of his right to fair hearing; fair trial; due process of the law and natural justice.

41. In the premises, the final orders that commend themselves to me are as hereunder:-

    i. The Application dated 2nd April 2025 be and is hereby allowed.

    ii. The Final Judgment rendered on the 13th November 2024 [but which is erroneously stated to be interlocutory judgment] be and is hereby set aside together with the consequential orders arising therefrom.

    iii. Furthermore, the subdivision of the suit property [if any] undertaken on the basis of the impugned judgment be and are hereby reversed.

    iv. The Defendant/ Applicant be and is hereby granted liberty to enter appearance and file statement of Defence [if any].

    v. The appearance and statement of defence in terms of clause [iii] shall be entered/filed within 14 days from the date hereof.

    vi. The Plaintiff shall be at liberty to file a reply to the statement of defence [if any] and same to be filed and served within 14 days from the date of service.

    vii. The parties herein shall thereafter file and exchange list and bundle of documents, list of witnesses and witness statement within 14 days from the date of service of the reply to defence or from the date of service of the last pleading.

    viii. The matter shall be mentioned on the July 28, 2025 to discern compliance and to issue further directions.

    ix. Each party shall bear its own costs of the Application.

42. It's so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 24 TH DAY OF JUNE 2025

OGUTTU MBOYA, FCIArb;CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma- Court Assistant

Ms Bundi for the Defendant/ Applicant

Ms Nyamu for Plaintiffs/ Respondents