Moronge v County Government of Homabay & 3 others (Environment & Land Petition 1 of 2023) [2025] KEELC 5042 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5042 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT & LAND PETITION 1 OF 2023

FO NYAGAKA, J

JUNE 18, 2025

BETWEEN

EDITH KERUBO MORONGE ..... PETITIONER

AND

COUNTY GOVERNMENT OF HOMABAY ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. This ruling determines the application dated 14th February 2025 which was brought under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 10 Rule 11 and Order 50 Rule 4 of the Civil Procedure Rules 2010. The applicant seeks to have the judgement entered herein and proceedings set aside and he be allowed to defend the suit unconditionally by entering appearance out if time and filing his replying affidavit.

2. The application is based on the grounds therein as well as the supporting affidavit of Fredrick Orego, the County Attorney Homabay County.

3. The applicant avers that the Petitioner obtained judgement in this matter and has already obtained a decree and begun the process of execution against; that the matter came to his attention when he stumbled upon a copy of the Warrant of Attachment dated 12th February 2025 and Proclamation Notice dated 14th February 2025 from Kerati Auctioneers and that it was never served the Summons or Petition.

4. The applicant averred further that the petitioner failed to follow the prescribed procedures when executing against County Governments as provided under Section 21 (1) of the *Government Proceedings Act* 2012.

5. That the petitioner's documents do not form a basis to support her claim for an alleged trespass as her claim was neither supported by surveyor's report nor any other evidence. As such the Petitioner never established a prima facie case with any probability of success consequently it was desirous of the opportunity to defend or safeguard public funds against misappropriation.

6. The applicant averred further that the application has been made without any unreasonable delay and the same will not occasion any prejudice to the petitioner.

7. In response, the Petitioner filed a Replying Affidavit sworn on the 20th February 2025 by her advocate Japhet Osoro Kaosa.

8. Mr. Kaosa deposed that the applicant's office and the 4th respondent were served with the filed petition on the 6th October 2023 through their respective email address and subsequently with the mention and hearing notices in accordance with Order 5 Rule 22B of the 'Maraga Rules'; that subsequently the applicant was served but refused to sign acknowledging service and thus the auctioneer proceeded to proclaim for the items listed in the proclamation notice.

9. Mr. Kaosa further deposed that it was clear that the Respondents slept on their rights of being heard by the court instead of waiting until when orders of the court are implemented and as such it is just that the orders sought for the application be dismissed.

10. I have considered the application, grounds thereof, supporting affidavit, annextures and the law as well as his submissions. I have also considered the Replying affidavit and submissions together with case law cited by the petitioner's counsel in their submissions.

11. The applicant seeks the setting aside of the judgment entered against the respondents on the 15th May 2024, and leave to file defences out of time, on the basis that it was not served with the summons and petition and that the petitioner has proceeded with execution of the default judgement without obtaining Certificate of Costs and Certificate of Order contrary to Section 21 (1) and Section 21 (3) of the Government Proceeding Act.

12. With regard to setting aside of judgments entered in default generally, the court, in James Kanyita Nderitu v Maries Philotas Ghika & Another [2016] eKLR said:

> " We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. 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 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 vs. Shah (supra); Patel vs. EA Cargo Handling Services Ltd [1975] EA

75, Chemwolo & Another vs. Kubende [1986] KLR 492 and CMC Holdings vs. Nzioki [2004]1 KLR 173).

13. 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 justiciae, that is to say, as a matter of right. In such a case, 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 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.

14. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. This was clearly enunciated in the case of Onyango Oloo v Attorney General [1986 – 1989] EA 456.

15. In Elizabeth Kavere & another v Lilian Atho & Another [2020] eKLR, the court observed that:

> 7. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The discretion of the court to set aside ex parte default judgment is conceded and both parties cited the Court of Appeal for Kenya Pithon Waweru Maina v Thuka Mugiria [1983] eKLR, where Kneller JA observed as follows:
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> > " The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran v Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118.
> >
> > The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC."

16. This 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: Shah v Mbogo [1969] EA 116,123 BC Harris J.

17. The applicant claimed that it was not served with the summons or petition. In my humble view, this assertion was unsuccessfully rebutted by the petitioner when he adduced evidence showing that the applicant's office and the 4th respondent were served with the filed petition on the 6th October 2023 through their respective email address and subsequently with the mention and hearing notices in accordance with Order 5 Rule 22B. I state so because, the sub rule 2 of the provision or Rule are clear that where service is carried out through electronic mail service (Email), the service is effected when the sender (of the email) receives a delivery note.

18. I have carefully examined the affidavits of service filed by the Petitioner in purported service of the process on the Respondents. To them are attached only copies of the emails sent to the parties and attachments of the notices. These indeed show that the emails were sent. However, there is no evidence

that it was every delivered. The practical situation in the current practice regarding service via emails is that an email may be sent to an email address which the owner or addressee may no have paid for enough storage hence the email never gets delivered but lies somewhere within the provider's system, just as mail that could lie in the postal rent box for unpaid rental fees. It could also be rejected or be returned as failed delivery but the sender chooses not to disclose that indeed the delivery failed. These do not constitute email delivery.

19. Further, notwithstanding the fact that there was no proper service on the applicant and other respondents as alleged, there is no further evidence whether there was compliance with Order 10 Rule 8 of the Civil Procedure Rules. The said provision states as follows:

> " No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return date."

20. From the record there is no evidence that the petitioner sought leave of the court prior to judgement being entered against the applicant and 4th respondent.

21. Further to the above, the applicant also asserted that the petitioner failed to follow the correct procedure once commencing execution proceedings against it.

22. At this juncture it worth examining the laid-out procedure in law with regards to executing decrees against the government. Section 21 of the *Government Proceedings Act* provides: -

(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney – General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs."

23. In the case of Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR the Court observed as follows:

> " In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues."

24. Guided by the foregoing, a party wishing to realize fruits of his or her judgment against the government must first get issued with a certificate of costs and a certificate order against the government. In the present case, from the evidence on record, the Petitioner did not furnish the Court with any Certificate of order against the Government.

25. Even assuming that the above process was met, the starting point is that the County Government just as the national government are subject to the provisions of the *Government Proceedings Act* and the Civil Procedure Rules regarding the steps to be taken when such entities do not enter appearance or if they do, they fail to file defences. There ought to be a formal application made to the Court for orders that the matter may proceed ex parte against the said party. This was not done in the instant case. Thus, the judgment obtained was clearly irregular and must be set aside.

26. I have also considered the applicant's draft replying affidavit to the petition. Is there a defence on merit? In its draft Replying Affidavit, the applicant asserts that from their records the petitioner has no interest in the suit parcel. This in my view is a triable issue which this court cannot gloss over. This court is satisfied that there is a (possible) defence on merit.

27. As to whether there would be any prejudice if the instant application is sought, I do note that in the circumstances, it is this Court's considered view that the Petitioner will not suffer any prejudice that cannot be compensated by way of costs.

28. In any case the petitioner herself failed to comply with the aforementioned provision of the Civil Procedure Rules i.e. Order 10 Rule 8 requiring leave prior to seeking interlocutory judgement against judgement as well as Section 21 of the *Government Proceedings Act* on Execution against Government Entities.

29. In exercise of the court's discretion the court, while acknowledging that it is satisfied by the reasons advanced by the Applicant are satisfactory; The upshot of the above is that from the material placed before it and in the interest of justice this court finds that this is a suitable case where it can exercise its discretion and grant the Applicant one last chance to set its house in order.

30. I hereby order as follows;

    i. The judgement dated and delivered on the 15th May 2024 is hereby set aside.

    ii. The Applicant is hereby granted 14 days to file and serve its replying affidavit to the Petition herein.

    iii. The Petitioner has the usual 14 days to file a Supplementary Affidavit if any.

    iv. Each Party to bear own costs.

    v. Mention on 29th July 2025.

31. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAM PLATFORM THIS 18TH JUNE 2025

HON. DR. IUR NYAGAKA

JUDGE

In the presence of

Osoro Advocate for Petitioner/Respondent

Odhiambo Advocate for Akello