



**Mohamed & 10 others (Suing Thro' and Attorney and/or Administrator of  
Bdulrehman Abdillahi Omar) v Hamisi & 11 others (Environment and Land  
Case E016 of 2024) [2025] KEELC 6502 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6502 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE E016 OF 2024  
FM NJOROGE, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**OMAR ABDALLA MOHAMED ..... 1<sup>ST</sup> PLAINTIFF  
FATMA ABDALLA MOHAMED ..... 2<sup>ND</sup> PLAINTIFF  
AISHA ABDALLA MOHAMED ..... 3<sup>RD</sup> PLAINTIFF  
ASMA ABDALLA MOHAMED ..... 4<sup>TH</sup> PLAINTIFF  
REHEMA ABDALLA MOHAMED ..... 5<sup>TH</sup> PLAINTIFF  
ATHMAN ABDALLA MOHAMED ..... 6<sup>TH</sup> PLAINTIFF  
MOHAMED ABDALLA MOHAMED ..... 7<sup>TH</sup> PLAINTIFF  
JAHU ABDALLA MOHAMED ..... 8<sup>TH</sup> PLAINTIFF  
KHADIJA ABDALLA MOHAMED ..... 9<sup>TH</sup> PLAINTIFF  
AMINA ABDALLA MOHAMED ..... 10<sup>TH</sup> PLAINTIFF  
SHEIKHA ABDALLA MOHAMED ..... 11<sup>TH</sup> PLAINTIFF  
SUING THRO' AND ATTORNEY AND/OR ADMINISTRATOR OF  
BDULREHMAN ABDILLAHI OMAR**

**AND**

**ABDALLA HAMISI ..... 1<sup>ST</sup> DEFENDANT  
ALI SAHAL ..... 2<sup>ND</sup> DEFENDANT  
KHALID HASSAN ..... 3<sup>RD</sup> DEFENDANT  
KASSIM BALAGHA ..... 4<sup>TH</sup> DEFENDANT  
FAIZ AHMAD SHEE ..... 5<sup>TH</sup> DEFENDANT**



ALI ABDALLA .....	6 <sup>TH</sup> DEFENDANT
ALI OMAR .....	7 <sup>TH</sup> DEFENDANT
OMAR KOFA .....	8 <sup>TH</sup> DEFENDANT
HAMIS OMAR .....	9 <sup>TH</sup> DEFENDANT
BALAN MOHAMED .....	10 <sup>TH</sup> DEFENDANT
RICHARD MOHAMED .....	11 <sup>TH</sup> DEFENDANT
ADASSAM KAI .....	12 <sup>TH</sup> DEFENDANT

## RULING

1. The application placed before this court for determination is dated 7/4/2025 and is brought under the provisions of Articles 48, 50, and 159(2)(d) of the *Constitution*, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, and Order 12 Rule 7 of the *Civil Procedure Rules*. It is filed by the Defendants, and it seeks the following substantive order:-
  1. ....Spent;
  2. ....Spent;
  3. This honourable Court do set aside its ex parte judgment delivered on 18<sup>th</sup> March, 2025 and make an order that this suit be heard afresh;
  4. Spent.
2. The application is premised on the grounds on the body of the Notice of Motion and in the sworn supporting affidavit of Yusuf M. Aboubakar advocate of even date. He deposes that the Defendants were never served with the Summons to Enter Appearance and pleadings in this matter. He further states that, according to the Defendants, the only incident they recall regarding the suit property was being summoned by the area Chief and being asked to vacate the suit land.
3. At the Chief's office, the Defendants demanded to be shown a certified copy of the Title Deed, asserting that the land they occupy belongs to one Asgharali Sadakali Noorbhai. It is deponed that the said land is the subject of a pending suit before this Court, being ELC No. 13 of 2021 – *Alfan Mohamed Buya & Others v. Asgharali Sadakali Noorbhai*. Counsel contends that it is in the interest of justice that the Defendants be duly served with the pleadings in order to respond to the issues raised and to allow for a fair hearing of the matter, given that it concerns land rights.
4. The application is opposed through a replying affidavit sworn by Abdurehman Abdillahi Omar on 9/6/2025, the Plaintiffs' representative, who states that he is duly authorized to swear the affidavit on behalf of the Plaintiffs.
5. The deponent avers that the application is misconceived, lacks merit, and is fatally defective. He takes issue with the fact that the Defendants' counsel has sworn an affidavit on contentious matters of fact, thereby rendering himself a potential witness and undermining his role as an advocate in the matter.
6. He asserts that the Defendants were duly served with Summons to Enter Appearance on 11<sup>th</sup> and 12<sup>th</sup> April 2024, and supporting affidavits of service have been annexed to confirm this (as per the exhibit marked as AAO-1). Additionally, the deponent states that the Defendants were served with the Court's



directions dated 6/2/2024, as well as the Plaintiff's application dated 30/1/2024, on 7/2/2024 (as per the exhibit marked as AAO-2).

7. The deponent further avers that service was effected with the assistance of the local administration, including area Headmen provided by the Chief, and that the Applicants were also furnished with ownership documents, including the Title Deed. He disputes the Defendants' claims of lack of service, terming them false and an abuse of court process.
8. He asserts that the Defendants deliberately chose not to participate in the proceedings despite being properly served and should not now be allowed to benefit from their own indolence. He states that the application is brought in bad faith, is frivolous, and should be dismissed with costs, or in the alternative, that the Defendants be condemned to pay throwaway costs if the application is allowed. He concludes that the Plaintiff stands to suffer prejudice if the application is granted, and that no sufficient grounds have been laid to warrant the setting aside of the judgment.
9. The court directed that the application be canvassed by way of written submissions. The defendants/applicants filed submissions on 1/8/2025. The plaintiffs/respondents filed submissions on 2/9/2025. I have considered the said submissions in the preparation of the present ruling.

### **Analysis And Determination**

10. The only issue for determination is whether the Defendants have laid sufficient grounds to warrant the setting aside of the *ex parte* judgment delivered on 18/3/2025.
11. The discretion to set aside *ex parte* judgment is unfettered but must be exercised judiciously. Under Order 12 Rule 7 of the [Civil Procedure Rules](#), the Court may set aside or vary a judgment entered in default upon such terms as may be just.
12. It is now settled that there are two type of *ex-parte* judgments: regular and irregular. The difference between the two was highlighted by the Court of Appeal in [James Kanyita Nderitu & Another –v- Marios Philotas Ghikas & Another](#) [2016] eKLR where the learned Judges of Appeal explained: -

“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 the case. From the outset, it cannot be gainsaid that a distinction has always existed between a 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 appearance 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. EA. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986/ KLR 492 and *CMC Holdings v. Nzioki* [2004/ 1 KLR 173)



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...”

13. The Court’s power to set aside a judgment is exercised with a view of doing justice between the parties. In the case of *Kimani -v- MC Connell* (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in *Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal* (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”
14. Further, in the case of *John Mukuba Mburu -v- Charles Mwenga Mburu* [2019] eKLR, the Court held that: -

“It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of *Mohammed & another —versus Shoka* [1990] 1KLR 463”
15. The success or otherwise of an application for setting aside judgment often hinges on the affidavit evidence and the contents of the court record. In the record there is an affidavit of service dated 13/4/24 evidencing service of inter alia, summons to enter appearance. There is a request for interlocutory judgment for want of appearance and defence dated 25<sup>th</sup> June 2024, file long before the suit was heard on 24/2/2025.
16. The present case is one in which the plaintiffs prosecuted their case and called one witness. The main ground raised by the Defendants is lack of service. However, the record contains affidavits of service that indicate the Defendants were duly served with the Summons and court documents. The service appears to have been facilitated by local administration officials, and there is no credible rebuttal by the Defendants, save for bare denials through their counsel’s affidavit. It is trite that service once proved is deemed effective unless discredited through cogent evidence. even on a without prejudice to the findings that the applicants were served with summons and plaint, service is personal and I can not accept the evidence regarding service from the applicant’s counsel. I see no reason why the applicants could not each swear the affidavits themselves to depone to what they know about service. Granting an application of the nature before this court would be tantamount to acting on hearsay.
17. Further, the Defendants have not filed any draft defence or disclosed what defence, if any, they intend to raise in response to the Plaintiffs’ claim. The Court cannot exercise its discretion in a vacuum; it must be persuaded that the Defendants have an arguable defence or triable issue. Mere general references to another suit (ELC 13 of 2021) are insufficient, especially when it is not demonstrated that the same is related to the named Plaintiffs or the subject matter herein.
18. In the totality, the Court finds that the Defendants have failed to demonstrate that they were not served, or that they have a plausible defence to the suit. The application lacks merit. It is hereby dismissed with costs to the Plaintiffs. This file shall be closed.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2025.**



**MWANGI NJOROGE**  
**JUDGE, ELC, MALINDI.**

