



REPUBLIC OF KENYA



**Mason v Mutai & 2 others (Environment and Land Appeal E026 of 2025)
[2025] KEELC 6291 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E026 OF 2025
A OMBWAYO, J
SEPTEMBER 25, 2025**

BETWEEN

PHILIP KIPYEGON MASON APPELLANT

AND

EMILY CHERONO MUTAI 1ST RESPONDENT

JONAH KIPKURUI TESOT 2ND RESPONDENT

WYCLIFFE TORONGEI 3RD RESPONDENT

*(Being an appeal against the ruling of Hon. K. Kibelion Principal Magistrate
(PM) delivered on 29th April, 2025 in NAKURU MCELC NO E052 OF 2020)*

JUDGMENT

1. This is an appeal arising from the ruling of Honourable K. Kibelion Principal Magistrate, Nakuru delivered on 29th April, 2025 in Nakuru MCELC E052 of 2020. The Appellant filed a Memorandum of Appeal dated 7th May, 2025 appealing against the said ruling on the following grounds: -
 1. The Honourable Magistrate erred in law and fact in finding that Service of Summons on the matter before him was proper and within the province of the law.
 2. The Honourable Magistrate erred in law and fact when he specifically found that he could not find any fault on service of pleadings and Summons by the Respondents.
 3. The Honourable Magistrate erred in law and in fact when he found that in view of the fact that Subordinate Courts have no jurisdiction to determine claims on adverse possession, he had no jurisdiction to determine whether the Appellant's response raises triable issues.
2. The Honourable Magistrate erred in law and fact when he found that by operation of law, he could not offer any remedies and therefore the Appellant's recourse lay on the Environment and Land Court.



3. The Honourable Magistrate erred in law and fact by carefully failing to consider the application before him, the supporting affidavit and the annexures thereto and therefore arrived at a wrong conclusion.
4. The Honourable Magistrate erred in law and fact by failing to consider fully the principles applicable in the setting aside of orders obtained in similar circumstances and therefore arrived at a wrong conclusion.
5. The Honourable Magistrate erred in law and fact by completely failing to take into consideration the submissions by the Appellant and thereby failed to apportion due weight to the said submissions.
6. The Honourable Magistrate erred in law and fact by striking out the Appellant's application.
7. The Appellant seeks orders setting aside the trial court's ruling and the same be substituted with orders allowing the Appellant's application dated 1st February, 2023. She also prays for costs of the appeal.

Brief Facts

8. Counsel for the Appellant vide an application dated 1st February, 2023 sought for orders that the judgment dated 7th March, 2022 where the court had found that the Respondents had adversely acquired the suit parcel be set aside. The Appellant prayed that subsequent to setting aside of the above judgment, that the court directs cancellation of the Certificate of Lease in the Respondents name and it be registered in the Appellant's name. The trial magistrate in his ruling struck out the application on the grounds that it lacked jurisdiction to determine claims on adverse possession.
9. The above ruling now forms the basis of the present appeal.

Submissions

10. Counsel for the Appellant filed his submissions dated 21st July, 2025. On grounds 1 and 2, on whether there was proper service of the summons upon the Appellant, he submits in the negative. He submits that the Respondents were allowed to effect service of the summons by way of substituted service. He further submits that the hearing proceeded ex parte and judgment and decree issued in favour of the Respondents. He submits that the proceedings and orders issued were done ex parte hence there was no service upon the Appellant. It was his submission that the lower court suit proceeded before the time to enter appearance had expired or even before directions on the summons had been taken.
11. On ground 3, he submits that the trial court was only required to set aside the judgment and decree issued as a result of the Originating Summons that were never served. He submits that the trial court erred when it ventured into the issue that he lacked jurisdiction to determine whether the Appellant's response raised triable issues. It was his submission that the issue of triable issues was irrelevant once the court satisfied itself that the service was defective.
12. On ground 4, he submits that the trial court was only required to grant an order setting aside the orders and not determine the remedies to issue. It was his submission that the issue of remedies ought to have been left to for trial once the orders have been set aside. He submits that failure to set aside the orders would mean that there would be two Lease Certificates in circulation. Counsel submits that the court had full jurisdiction to issue the orders sought by the Appellant.
13. On grounds 5, 6, 7 and 8, he submits that the court failed to consider that the Respondents had filed similar suit in 2021 over the same suit parcel by way of plaint. He submits that the Respondents claim the suit land as beneficiaries of the estate of Stanley Kiprono Mutai (deceased) thus contradicting the earlier filed originating summons. It was his submission that had the trial magistrate considered the above, it would be clear that the originating summons were never served and thus the subsequent orders



were irregular. He added that the court would for good order harmonize the two suits so as to avoid conflicting outcomes. He submits that if the said orders are not set aside, the Appellant's right to his property will be prejudiced and his defence in ELC 210 of 2021 will be greatly prejudiced.

14. In conclusion, he urged the court to allow the appeal as prayed.

Analysis and Determination

15. This court has carefully considered the record of appeal and the submissions and finds that the main issue for determination is whether the appeal is merited.

16. In considering the present appeal, this court appreciates the duty of the first appellate court to re-consider and re-analyze the evidence presented before the trial court in order to arrive at its own conclusions.

17. Being a first appeal, the court relies on a number of principles as set out in *Selle and another V Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

18. Further, in the case of *Mwangi V Wambugu* [1984] KLR 453 it was held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

19. I have carefully perused the record of appeal and it is my view that the claim majorly revolves around the issue of service of the originating summons dated 18th December, 2020 culminating to the ex-parte judgment dated 7th March, 2022. This is court shall determine whether there was proper service to warrant setting aside of the judgment delivered on 7th March, 2022.

20. The guiding provision of the law with regards to setting aside of an ex-parte judgment is found in Order 10 Rule 11 of the Civil Procedure Rules which provides as follows:

21. Setting aside judgment [Order 10, rule 11.] Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

22. It is noteworthy that there are two types of ex parte judgments, regular and irregular. In the case of *James Kanyita Nderitu & another V Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) the court held that:

23. 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...”

24. In the instant case, the Appellant argues that there was no proper service of the originating summons dated 16th December, 2020 by the Respondents. I have taken the liberty to peruse the court proceedings and it is not in dispute that on 22nd March, 2021, the Respondents counsel sought for leave to serve the summons by substituted service vide application dated 1st March, 2021. The court went ahead and granted counsel for the Respondent leave to serve the Originating Summons by substituted service. I have also confirmed from the record that the Summons were indeed served to the Appellants vide substituted service in the local dailies. It is therefore this court’s view that service of the summons was indeed proper and the judgment delivered on 7th March, 2022 was regular.
25. On the issue of jurisdiction, it is my opinion that the same did not form the substratum of the trial magistrate’s reasoning but was only an obiter dictum to the ruling dated 29th April, 2025. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF SEPTEMBER 2025.

A.O.OMBWAYO

JUDGE

