**Mucina & another v Mwaura (Environment and Land Case 1322 of 2014) [2025] KEELC 6246 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6246 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND CASE 1322 OF 2014**

**CA OCHIENG, J**

**SEPTEMBER 24, 2025**

**BETWEEN**

**RACHAEL NJOKI MUCINA ..... 1ST PLAINTIFF**

**NANCY WAMBOI ..... 2ND PLAINTIFF**

**AND**

**JOHN MWAURA ..... DEFENDANT**

**RULING**

1. On 11th May 2020, this Court issued Judgement in favour of the Plaintiffs, declaring them as the beneficial owners of unsurveyed Plot Number 1.7 and 1.7B, said to form LR No. 10904/02. Five [5] years later, the Defendant has filed the Notice of Motion dated the 10th April 2025, which is for determination. He seeks the following Orders:

    a. Spent.

    b. Spent.

    c. Spent.

    d. Pending the hearing and determination of the suit, a temporary order of injunction be issued restraining the Plaintiffs whether by themselves or their representatives, servants, agents from harassing, evicting and/or in any way threatening the Defendant with eviction.

    e. This Honourable court be pleased to issue an order to set aside the exparte judgement of this Honourable court delivered on 11th May 2020 and vacate all consequential orders thereto.

    f. This Honourable court be pleased to grant leave to the Defendant to file and serve his defence to defend the suit and have the same determined on merits.

    g. Costs of this application be provided for.

2. The application is premised on grounds on its face and on the Defendant's supporting affidavit. He avers that he is the registered owner of land parcel number Nairobi/Block 105/10581 which is also identified as Plot No. V. 19015 having been allocated by Embakasi Ranching Company Limited pursuant to his shareholding. Further, that since 1993, he has been in open, continuous and uninterrupted occupation of the said parcel. He claims that the OCS -Ruai Police Station has served him with a Decree and informed him that he has instructions from the Court to evict him, which was shocking as he had no dispute with anyone regarding his ownership and occupation of the said suit land. He claims to have subsequently contacted his advocates on record who informed him that the said Decree arises out of the ex parte judgment delivered on 11th May 2020.

3. He explains that he has never been personally served with summons to enter appearance herein or the aforementioned judgment. Further, that his advocates informed him that the Plaintiffs sought leave of this Court to serve summons through substituted means through the Standard Newspaper but he does not know how to read nor does he buy newspapers and is at a loss as to why the Plaintiffs chose not to personally serve him despite claiming that the land where he stays belongs to them.

4. He asserts that he has a meritorious defence and seeks the court to interrogate whether Plot Number 1.7 and 1.7B is the same as Plot Number V. 19015 and determine the rightful proprietor. Further, that if stay is not granted, he stands to suffer irreparable loss that cannot be compensated by way of damages.

5. The application is opposed by the Plaintiffs vide the 1st Plaintiff's supporting affidavit. She avers that the Plaintiffs' rights over the suit land has already crystallized in that they are now lawfully registered as joint proprietors thus they enjoy protection under Article 40 of *the Constitution*. She insists that the Defendant is dishonest as from the affidavit of Yvonne Jeruto-Advocate, sworn on 25th July 2017, he was personally served on 30th June 2017 with the amended Plaint, verifying affidavit, summons to enter appearance, and witness statements at his residence in Ruai, of which he accepted service but he refused to sign the acknowledgement copy. She contends that the Defendant's draft defence responds to specific averments in the amended Plaint, contradicting his claim of non-service.

6. Further, that the application essentially seeks to set aside a regular judgment yet no cogent grounds have been advanced as contemplated in law to warrant such an order. She points out that the Defendant is guilty of laches, having failed to explain the inordinate delay of nearly five [5] years between the delivery of judgment and the filing of the instant application.

7. She asserts that the Plaintiffs' Share documents dated 28th November 1982 and 31st December 1987 predate the Defendants documents, which are fabricated. She reiterates that Embakasi Ranching Company's letter dated 20th June 2016 confirmed that the Plaintiffs are the bona fide owners of the suit land. She argues that the purported defence does not raise triable issues as his claim that Plot No. V. 19015 is distinct from Plots No. 1.7 and 1.7B is unsupported by credible evidence, such as a survey report or title documents.

8. She contends that the Defendants occupation constitutes trespass and his alleged long-term occupation cannot override the Plaintiffs' rights. Further, that the Plaintiffs will be prejudiced if the orders sought are granted as they have been denied occupation for over a decade and they have incurred significant costs in prosecuting the suit while the Defendant's allegations of irreparable loss are unsupported by evidence.

9. The application was canvassed by way of written submissions but the Defendant failed to file his.

**Submissions**

10. The Plaintiffs submit that the Defendant failed to establish the principles governing setting aside of an ex parte judgment as set in the case of Shah v Mbogo [1967] EA 116. Further, that his inaction disentitles him to the discretionary relief sought as the default judgment entered herein is regular and lawful, as it was premised on proper service. They rely on the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, to submit that a party who evades service cannot challenge the validity of substituted service ordered by a Court. They reiterate that the Defendant's draft defence does not raise bona fide triable issues

11. They also cite the case of Wreck Motors Enterprises v Commissioner of Lands & Others [1997] eKLR, to submit that an earlier allocation takes precedence if supported by valid documentation and since the Defendant's documents are forgeries, they cannot override the Plaintiffs' superior claim. They also cite the case of Gitwany Investment Ltd v Tajmal Ltd [2006] eKLR to submit that possession without legal title amounts to trespass.

**Analysis and Determination**

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and Plaintiffs' submissions, at this juncture the only issue for determination is whether the default judgment entered on 11th May, 2020 should be set aside and the Defendant allowed to defend this suit.

13. The Defendant claims that the default judgement entered herein five [5] years ago, on 11th May 2020 is irregular for want of service. On their part, the Plaintiffs contend that the said judgment was lawfully obtained, premised on proper service and the Defendant has failed to demonstrate sufficient cause, a triable defence, or authentic documentation to warrant setting it aside.

14. In James Kanyiita Nderitu & Another [2016] eKLR, the Court of Appeal brought out the distinction between regular default judgment and irregular default judgment as follows:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. .....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 justiae, 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...."

15. It is trite that failure to serve summons to enter appearance would make a judgment irregular for want of invitation to the Defendant to defend suit. In Lee Mwathi Kimani v National Social Security Fund & Another [2014] eKLR it was held that:

> " .... Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the Defendant, the defendant has no valid invitation to defend the suit"

16. In Yooshin Engineering Corporation v Aia Architects Limited [Civil Appeal E074 of 2022] [2023] KECA 872 [KLR] [7 July 2023] [Judgment], the Court of Appeal stated that:

> " Whereas the nature of conditions to be imposed by the court in setting aside an ex parte judgement is an exercise of discretion, just like any other exercise of discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles....."

17. From perusal of the Court record, I note at paragraph 3 of the impugned judgment, Justice Eboso was satisfied that the Defendant was duly served with summons to enter appearance both physically and through a Notice in the Standard Newspaper but failed to appear.

18. I further note that in the affidavit of service sworn on 26th May, 2021 by one Kivisu Amos Mutambu, he confirms that he went to the Defendant's house at Ruai and served him with the Notice of Motion, Certificate of Urgency, supporting affidavit and hearing notice but he refused to sign. Further, I note the Defendant was served with Summons to enter appearance vide the Standard Newspaper of 31st August, 2017 as indicated in the annexure attached to the affidavit sworn by Yvonne Jeruto dated 7th September, 2017. I also note that in an affidavit of service sworn by Yvonne Jeruto sworn on 25th July, 2017, she confirms serving the Defendant with the Amended Plaint, verifying affidavit and summons to enter appearance including witness statement on 30th June, 2017. It has emerged that on 12th March, 2015, the Defendant was also served at his home in Ruai by one Elijah Onchuru Onsomu as per the averments in his supporting affidavit. From this analysis, I have no reason to doubt that the Defendant was indeed severally served but he ignored to file a response to oppose the instant suit.

19. On setting aside a judgment, in the case of Shah v Mbogo and Another [1967] EA 116 it was held that:

> " 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."

20. Further, in the case of Wachira Karani v Bildad Wachira [2016] eKLR Mativo J [as he then was] held that:

> " Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

21. While in the case of CMC Holdings Limited v Nzioki [2004] 1 KLR 173, it was held that:

> "In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

22. It is trite that setting aside of judgment is discretionary but the Court has to consider sufficient cause proffered by the Applicant, before proceeding to do so. However, based on the facts before me, I find that the Defendant was properly served but chose to ignore to defend this suit. In my view, the Defendant only realized the seriousness of this matter when eviction orders were served upon him and is now crying foul. To my mind, he has not demonstrated sufficient cause to warrant the setting aside of the impugned judgment. Further, insofar as he will be prejudiced, I opine that he built on someone else's parcel of land and cannot claim that his failure to defend the suit was due to his illiteracy. I hence find that the Defendant has not offered plausible reasons to warrant the setting aside of the impugned Judgement and will decline to do so.

23. In the circumstances, I find the instant Notice of Motion application unmerited and will dismiss it with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2025**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Langat holding brief for Ms Jeruto for Plaintiff

Court Assistant: Joan