



**Odiango v Kamunde & 2 others (Environment and Land Case
137 of 2017) [2025] KEELC 6878 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 137 OF 2017**

BN OLAO, J

OCTOBER 9, 2025

BETWEEN

MOSES ONYANGO ODIANGO PLAINTIFF

AND

REBECCA KAMUNDE 1ST DEFENDANT

GERALD OTHIENO OLAIISA 2ND DEFENDANT

MARGARET AKOTSI 3RD DEFENDANT

RULING

1. Vide a Judgment delivered by Omollo J on 3rd June 2020 in favour of Moses Onyango Odinga (the Plaintiff) as against Rebecca Kamunde and Gerald Othieno Olaisa (the 1st and 2nd Defendants respectively) the Judge decreed as follows in paragraphs 9(v), (vi) and (vii).

9(v): “The Defendants to remove any of their structures built on the Plaintiff’s land within 90 days from the date of service of this decree upon them. In default of compliance within the time stated, an order be and is hereby issued for the eviction of the Defendants and their agents and family members from the land parcel No. Marachi/Esikoma/1201 and removal of any and all offending structures of the Defendants’ costs.”

9(vi): “An order of permanent injunction be and is hereby issued restraining the Defendants by themselves, their servants, agents or otherwise from howsoever entering, remaining on, cultivating, planting any crops, removing boundary features, erecting or maintaining structures thereon or continuing to be in occupation or use of the land parcel No. Marachi/Esikoma/1201.”

9(vii): “Costs of the suit awarded to the Plaintiff.”



2. No appeal was filed against the Judgment and on 13th January 2021, the 1st Defendant sought and was allowed 45 days to vacate the land. The 2nd Defendant and his sister-in-law one Margaret Akotsi did not vacate.
3. The Plaintiff then moved back to this Court this time vide his Notice of Motion dated 1st March 2024 seeking the substantive order that the 2nd Defendant and his sister-in-law Margaret Akotsi be arrested and committed to civil jail for a period of six (6) months. That application was not opposed and vide a ruling delivered on 7th November 2024, I issued the following orders:
 - 1: The 2nd Defendant is in contempt of the orders issued by this Court in its Judgment dated 3rd June 2020.”
 - 2: The 2nd Defendant be summoned to appear before this Court on 7th November 2024 for mitigation and sentencing.
 - 3: “Further directions shall be made with respect to prayer NO 2 on 7th November 2024.”
 - 4: “No order as to costs.”
4. On 7th November 2024, the 2nd Defendant though served did not attend Court and neither did Margaret Akotsi.
5. Vide a Notice of Motion dated 10th December 2024, the Plaintiff sought for the arrest and committal to civil jail of the 2nd Defendant and Margaret Akotsi for six (6) months and the Police to ensure that the 2nd Defendant and his associates are escorted out of the suit land. That Motion was not opposed and I allowed it on 20th March 2025. On 3rd June 2025 the 2nd Defendant and Margaret Akotsi appeared in Court and were taken before the Deputy Registrar who, pursuant to the orders of 20th March 2025, their warrant of commitment to six (6) months prison were signed and they are currently in prison for the contempt.
6. The 2nd Defendant and Margaret Akotsi have now moved this Court vide their Notice of Motion dated 14th June 2025 in which they seek the following remedies:
 1. Spent
 2. Spent
 3. Spent
 4. That the exparte Judgment and all consequential orders be set aside.
 5. That the 2nd Defendant and Margaret Akotsi be granted leave of this Court to file their joint defence out of time.
 6. That upon grant of prayer (4) above, the annexed defence and counter-claim be deemed as having been filed and served to the Plaintiff.
 7. That costs be paid by the Plaintiff.
7. The Motion is filed pursuant to the provisions of Sections 1, 1A, 3, 3A & 63E of the Civil Procedure Rules and Order 10 Rule 12 and Order 11 Rule 22 of the Civil Procedure Rules. It is premised on the grounds set out therein and is supported by the affidavit of the 2nd Defendant.
8. The gravamen of the application is that the 2nd Defendant and Margaret Akotsi (the Applicants for purposes of this Motion) are now serving a prison term of six (6) months for contempt yet they were



not served with summons to Enter Appearance [STEA] including the plaint and all pleadings nor with the decree in this case or entry of Judgment. That this Court's process server has lied on oath. This being a land case, the Applicants should have been given a chance to defend themselves and the interlocutory Judgment should not have been entered. The Applicants have a good defence and have even gone further to add that even Adam was given a chance by the Almighty God to defend themselves before being condemned. That the Deputy Registrar had no jurisdiction to commit the Applicants to prison and being elderly, old and sickly, they are likely to die in prison if not released. In any event putting them in prison is not an eviction.

9. In response to the Motion, the Plaintiff filed a replying affidavit date 1st July 2025 in which he described the application as misconceived, ill-advised and meant to mislead this Court. That he obtained Judgment on 3rd June 2020 in which the Applicants were ordered to remove their structures from the suit land and notices were served on them but they ignored the service leading to their arrest. That there has been an inordinate delay in filing this application and their defence raises no triable issues. The Applicants have not explained why they did not obey this Court's order. The fact that the 1st Defendant moved out of the suit land after the Judgment herein speaks to the Applicants' lack of respect of the Court's orders. Having failed to comply with the said orders, the Applicants cannot now move to this Court. This Motion should be struck out with costs.
10. The Applicants filed a further affidavit dated 4th July 2025 describing the replying affidavit as full of falsehoods and adding that they were never served with the pleadings herein. That they only became aware of this case when they were arrested and sentenced to the prison term. That their draft defence and counter-claim raises serious issues and this Court cannot ignore them.
11. The Motion was first placed before Nyakuri J on 18th June 2025 who did not certify it as urgent nor issue any ex parte orders. The Judge nonetheless directed that the same be canvassed by way of written submissions. The same were subsequently filed by MR R. Wamalwa instructed by the firm of Robert Wamalwa & Company Advocates for the Applicant and by MS Lumalas instructed by the firm of Maclaw Advocates for the Plaintiff.
12. I have considered the Motion, the rival affidavits and the submissions by counsel.
13. The Applicants seek the following substantive orders:
 - 1: The ex parte Judgment and all consequential orders be set aside.
 - 2: The Applicants be granted leave to file their joint defence and the annexed defence and counter-claim be deemed as having been filed and served.
 - 3: Costs.I shall consider them in that sequence.
 1. Setting Aside Of The Ex-parte Judgment
14. The Judgment herein was delivered by Omollo J on 3rd June 2020 following and ex parte hearing that took place on 20th January 2020. Before the trial commenced, the Judge must have been satisfied that the Applicants had been served with the pleadings. Indeed in paragraph 3 of the Judgment, Omollo J states as follows:
 - 3: "Having failed to enter appearance and file defence within the requisite period, interlocutory Judgment was entered against the Defendants. The matter proceeded for formal proof on 20th January 2020 with the Plaintiff testifying as the sole witness in support of his case."



Counsel for the Applicant has commenced his submission by stating that this being a land case, no interlocutory Judgment could be entered against them. This is what counsel has said in paragraph 7 of his submissions:

7: “This is a land case and interlocutory Judgment cannot be entered. That was irregular.”

Counsel then goes on to cite the case of Peter Karanja Kimani -V- Isaac Mwangi Kimani 2018 eKLR.

15. Although Omollo J stated in paragraph 3 of her Judgment that “interlocutory Judgment was entered against the Defendants,” I have checked the record and in fact no such interlocutory Judgment was entered. For avoidance of doubt, I shall reproduce the record from 20th July 2017 when the Plaintiff filed the plaint.

- 1: 19.10.17 Suit was mentioned in the registry and listed for mention on 20.11.20217.
- 2: 17.6.2019 - Suit was mentioned before Kaniaru J where the Plaintiff's application for security was considered.
- 3: 20.11.2017- suit was mentioned before Kaniaru J. and the parties were absent. The Judge made an order that fresh date be taken in the registry.
- 4: 18.1.2018 - the Plaintiff went to the registry with his counsel Mr. Wanyama and took a date for directions on 6.2.2018 before the Judge.
- 5: 6.2.2018 - Mr. Wanyama appeared before Kaniaru J and informed him that the Applicants had not entered appearance nor filed a defence. He sought a hearing date and Kaniaru J listed the suit for hearing on 30.4.2018.
- 6: On 30.4.2018 - the Judge did not sit and the suit was listed for hearing on 28.5.2018 by the registry.
- 7: 28.5.2018 - The matter did not proceed to hearing since Mr. Wanyama informed Kaniaru J that the Plaintiff had not attended the Court. It was listed for hearing on 18th July 2018.
- 8: 18.7.2018 - Mr. Wanyama informed Kaniaru J that he intended to apply for the surveyor to visit the suit land. The Judge advised counsel to take another date in the registry.
- 9: 7.9.2018 - Mr. Wanyama went to the registry and listed his application dated 31/8/2018 for hearing on 8.10.2018. That application sought orders that the Land Registrar and County Surveyor visit the suit land to establish the boundary.
- 10: 8.10.2018 - Kaniaru J granted the application dated 31.8.2018.
- 11: 9.7.19 - Mr. Wanyama appeared before Kaniaru J and argued an application dated 13.6.2019 seeking security. That application was allowed.
- 12: 8.11.2019 - The Registry listed the matter for formal proof before Omollo J on 20.1.2020.
- 13: 20.1.2020 - Omollo J heard the suit by way of formal proof and subsequently delivered her Judgment on 3rd June 2020.

It is therefore clear from the record above that at no time was any interlocutory Judgment entered against the Applicants by the Deputy Registrar. Indeed, the Applicants' counsel has not stated on what date such interlocutory Judgment was entered. And even if it was, that flaw would not have been fatal because the suit was subsequently heard through viva voce evidence



before Omollo J arrived at the Judgment which she did. The case of Peter Karanja Kimani v Isaac Mwangi Kimani (supra) does not aid the Applicants in the circumstances of this case. There was a regular Judgment in this case.

16. As to whether that Judgment should be set aside, there is an affidavit of service by one Joseph Orata Kweyu filed on 19th October 2017. Therein, the said process server has deposed as to how on 22nd July 2017 while directed by the Plaintiff he travelled to Bukalama village and served the 1st Defendant with the plaint and summons to enter appearance. On the same day, the Plaintiff directed him to the 2nd Defendant's home next to that of the 1st Defendant where she found the 1st Defendant's wife one Francisca Othieno whom he served with the plaint and summons to Enter Appearance. This being a regular default Judgment, this Court will be guided by the case of James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another 2016 KECA 470 KLR [C.A Civil Appeal No 6 of 2015]. Therein, the Court Appeal stated thus:

“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 a 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 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 others. See Mbogo & Another v Shah (supra), Patel v E.A. Cargo Handling Services Ltd 1975 E.A, Chemwolo & Another v Kubend eKLR 492 and CMC Holdings v Nzioki 2004 1 KLR 73”.

While disputing service upon him the 2nd Defendant deposed as follows is paragraph 10 of his supporting affidavit;

- 10: “That the affidavit of service by Joseph Orata Kweyu sworn on 11.11.2020, 12.1.2021 and any other affidavit to that effect are false. (Hereto annexed and marked GOO1 are copies of the affidavit of service).”

This Court has looked at the first affidavit by Josephat Orata Kweyu which though un-dated, was filed on 19th October 2017. In paragraph 3, he has deposed how on 22nd July 2017 he travelled to Bukalama village and served the 1st Defendant with the plaint and Summons to Enter Appearance. Then in paragraphs 4 and 5 of the same affidavit, he has deposed thus:

- 4: “That thereafter on the same date the Plaintiff led me to the 2nd Defendant's home next to the 1st Defendant's home in which I found one who introduced herself as Francisca Othieno and a wife to Gerald Othieno Olaisathe 2nd Defendant herein and I enquired from her the whereabouts of the 2nd Defendant so that I could effect service on him and she informed me that the 2nd Defendant had left home and would be back by 11.00am.”
- 5: “That on the same date of 22.7.2017 I came back to the 2nd Defendant's home to serve summons upon him but I found out from the said FRANSISCA OTHIENO that the 2nd Defendant had not come back and at this time I



introduced myself as a Court process server who had come to effect service upon her husband. I then presented to her at 12.00 noon the copy of Summons to Enter Appearance, plaint, Plaintiff's list of witnesses and their statements and the Plaintiff's list of documents and required that she accepts service on behalf of her husband which service she accepted but declined to sign on the service copy of Summons to Enter Appearance which I attached and return herewith as duly served."

While the 2nd Defendant is content to claim that the above averments and all the other averments in the process server's affidavit are false, I have not heard him claim that Francisca Othieno is not his wife or that his home is not in Bukalama Village. And it is this same Josephat Orata Kweyuwho was serving him and the 1st Defendant with all the relevant processes including Notices to show cause. There is no evidence to suggest that the said process server would have any reason to swear a false affidavit of service. The 2nd Defendant cannot also feign ignorance about these proceedings because the record shows that he and the 1st Defendant appeared before the Land Registrar Busia where the Plaintiff's case regarding a boundary dispute against them was heard and determined and a report was filed in this Court on 14th October 2019. That was some three (3) months before the suit came up for hearing before Omollo J on 20th January 2020 and even prior to the hearing, the Court observed that the Defendants had been serviced but were absent and no reason was given for their absence.

17. The Applicants' counsel has also invoked the Bible in his submissions stating that even Adam was given a chance by God to be heard. In the circumstances of this case, the Applicants cannot justify their complaint that they were condemned un-heard. The truth of the matter is that they were duly served as I have already found above. They chose to ignore the Court process until the inevitable had happened. Of course, Article 50 of *the Constitution* provides for the right to be heard. So too do the rules of Natural justice. However, where the opportunity is availed to a party to be heard and that opportunity is squandered, the aggrieved party cannot come back to Court and allege that there has been a denial of the right to be heard. In the case of Union Insurance Company Of Kenya Ltd v Ramazan Abdul Dhanji C.A. Civil Appeal 179 of 1998, it was held that:

"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

Even in the Bible which counsel for the Applicants has cited, it is clear from the Book of Genesis 3:8-10 that Adam and Eve having eaten the forbidden fruit hid out of fear when they heard God walking in the Garden of Eden. But God called out to them asking "where are you" to which Adam replied that he was afraid. In this case, the Defendants were visited at their home and served by the process server and not once. They cannot claim to have been condemned un-heard when they themselves decided to hid and ignore Court processes. Unlike the 2nd Defendant who ignored the Court processes, the 1st Defendant who was also served at the same time chose to obey them and vacated the suit land. This is a further illustration that the 2nd Defendant was simply being obstinate. And at no point did the Applicants seek to cross-examine the process server.



18. Counsel has also taken issue with the fact that there was no notice of entry of Judgment against the 2nd Defendant. That cannot be correct because as far back at 23rd October 2020 the 1st – 2nd Defendants were already aware about the Judgment against them and moved the Court through their previous counsel MR OMBOKO and admitted to having been served with the Decree for their eviction from the suit land. They did not prosecute that Motion dated 19th October 2020 in which they sought an order staying their eviction from the suit land. I do not see how the Applicants were prejudiced when all along they were made aware about what was expected of them. It is also worth remembering that the discretion to set aside an *ex parte* Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. It is no designed to assist a person who deliberately or otherwise, seeks to obstruct or delay the cause of justice – *Shah -V- MBOGO* 1967 E.A 116. There has clearly been lack of candour on the part of the 2nd Defendant in the manner in which he and the 1st Defendant responded to this suit when it was first filed. It is also noted from the record that the process server has filed an affidavit of service dated 1st February 2023 and filed on 2nd February 2023 in which in paragraph 3 and 4, he has deponed how on 16th January 2023 while at Bukalama village, he served both the 2nd Defendant and Margaret Akotsi with the Decree herein. Then on 1st March 2023, as per the affidavit of service filed on 20th March 2023, they were both served with the Notice of Motion dated 3rd February 2023 and seeking their committal to civil jail.
19. This court takes note of the fact that Margaret Akotsi was not a party to the Judgment herein. However, in the said Judgment, Omollo J was clear in paragraph 9(v) and which I shall again reproduce, that:
- 9(v): “The Defendants to remove any of their structures built on the Plaintiff’s land within 90 days from the date of service of this decree upon them. In default of compliance within the time stated, an order be and is hereby issued for the eviction of the Defendants and their agents and family members from the land parcel No. Marachi/Esikoma/1201 and removal of any and all offending structures of the Defendants’ costs.” Emphasis added.
- It is not disputed, indeed the 2nd Defendant has deposed in paragraph 2 of his supporting affidavit dated 14th March 2025 as follows:
- 2: “That I am named in this case as the 2nd defendant while my siter-in-law as 3rd defendant.”
- Therefore, as the 2nd Defendant’s sister-in-law, the said Margaret Akotsi is part of the Defendants’ “family members” and who, pursuant to the Decree and Judgment of Omollo J delivered on 3rd June 2020, ought to have vacated the suit land. The decree bound her too.
20. There is also the issue of delay. While the Applicants allege lack of service of the plaint, and which has now been discounted, there is also evidence of service upon them of the Decree on 16th January 2023. This application was filed in June 2025 some two (2) years and six (6) months later. That delay is not only inordinate but it has also not been explained. It is that explanation which would enable the court exercise it’s discretion one way or the other. In the circumstances of this case, I see no good reason to exercise such discretion in favour of the Applicants.
21. Counsel for the Applicants has also submitted that the Deputy Registrar had no jurisdiction to commit the Applicants to civil jail and that is the work of the Judge. It is this court which committed the Applicants to civil jail. The Deputy Registrar did not do so. By the Notice of Motion dated 1st March 2024, the Plaintiff sought the main order that the Applicants be committed to civil jail for a period of six (6) months. That Motion was served upon the Applicants on 12th April 2024 as per the affidavit of service by Joseph Orata Kweyu dated 15th April 2024. Notwithstanding that service, no reply was



filed to the Motion by the Applicants and MS Lumalas then appearing for the Plaintiff told the court that the Applicants never attend court. On 20th March 2024, I allowed the Plaintiff's Motion dated 10th December 2024 seeking the arrest and committal of the Applicants to civil jail for 6 months as the same was not opposed. That essentially meant that from 20th March 2025, the Applicants were prisoners. They were subsequently arrested and presented before the Deputy Registrar of this Court on 30th May 2025 who only signed the committal warrants as per the court orders issued on 20th March 2024. The committal warrants are not very legible. However, the Applicants counsel has stated in paragraph (1) of the grounds upon which the Motion dated 14th June 2025 is predicated that:

“The Applicants are now serving a term of 6 months in prison.”

This court must therefore conclude that indeed the Applicants are in prison serving a six (6) months sentence for contempt since 30th May 2025 when the Deputy Registrar signed the Committal Warrants following this court's order issued on 20th March 2025 that they be committed to civil jail. It is not therefore correct for the Applicants' counsel to submit, as he has done, that the Deputy Registrar had no jurisdiction to commit the Applicants to civil jail. The Deputy Registrar did no such thing. She only performed her Administrative function of signing the committal warrants. Judges do not ordinarily sign such warrants.

22. Having found that there are no good grounds upon which the Judgment delivered herein on 3rd June 2020 by Omollo J can be set aside, it follows that the prayers for leave to file a defence and counter-claim and also consider the annexed defence and counter-claim as duly filed and served does not fall for my consideration. Those prayers would have no foundation to stand on.
23. The up-shot of the above is that the Notice of Motion dated 14th June 2025 is devoid of merit. It is dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

9TH OCTOBER 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 9TH DAY OF OCTOBER 2025.

BOAZ N. OLAO

JUDGE

9TH OCTOBER 2025

