



Opala v Hurlingham Squatters Development & another (Environment and Land Case 1482 of 2016) [2025] KEELC 6888 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 1482 OF 2016
TW MURIGI, J
OCTOBER 3, 2025**

BETWEEN

DIANA AMOLO OPALA PLAINTIFF

AND

HURLINGHAM SQUATTERS DEVELOPMENT 1ST DEFENDANT

TALLAM ABRAHAM 2ND DEFENDANT

RULING

1. Before me are two applications for determination. The first application is a Notice of Motion dated 9th September 2024, brought under Sections 1, 1A, 3, 3A, and 63(e) of the *Civil Procedure Act*, Order 10 Rules 1, 4-11, and Order 51 of the Civil Procedure Rules, in which the Applicant seeks the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That the entire judgment herein and all the consequential orders be set aside unconditionally and the matter be heard de novo.
 - d. That the Applicant be allowed to file a defence for the matter to be heard in consonance with the rules of natural justice.
 - e. That In the alternative, this court be pleased to review the judgment in the matter and all orders and decrees arising therefrom.
 - f. That the costs of this application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Tallam Abraham sworn on even date.



The Applicant's Case

3. The Applicant averred that on 9th January, 2021, an ex parte judgment was entered against him. He denied having been served that with the pleadings in this case. He averred that he only became aware of this suit on 6th September, 2024, when a police officer from Kayole Police Station informed him of the decree and the intention to execute it.
4. He also stated that the decree indicates the case was initially filed against the 1st Defendant, with the second Defendant added later.
5. He contended that he was improperly sued because his wife, Joseline Jelimo Butia, acquired the suit property from the first Defendant in 2014, where they have established their residence.
6. He expressed his intention to defend the suit, and therefore, the ex parte judgment should be set aside. He further asserted that the Respondent would not suffer any prejudice if the orders sought are granted. The Applicant is apprehensive that he would suffer irreparable harm if the sought orders are not granted, as he might lose his home.
7. He further stated that the annexed defence raises triable issues which should be determined on merit.

The Respondent's Case

8. The Respondent filed a replying affidavit in opposition to the application. She averred that the pleadings were served on 7th May 2021 to the Applicant's wife, Josline Tallamat at her residence in Amboseli Court in Choka Ward by Felix Omondi Owino, a licensed process server. However, she declined to acknowledge the service.
9. She argued that the failure to file a defense was due to inaction by the Applicant, not lack of service. She maintained that she is the legal owner of the suit property and urged the court to dismiss the application because the Applicant has not met the requirements for the grant of the orders sought.
10. The second application is a Notice of Motion dated 10th December 2024, brought under Section 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules, in which the Applicant seeks the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to vary its order dated 17th January 202 directing the Officer in charge of Kayole Police station to supervise the implementation of the court judgment concerning the eviction of the Respondent and instead direct the Officer in Charge of Mihango Police Station to supervise the said implementation.
 - C. That the cost of this application be provided for.
11. The application is premised on the grounds appearing on its face together with the supporting affidavit of Diana Amolo Opala, sworn on even date.

The Applicant's Case

12. The Applicant contended that Officer in Charge Kayole Police Station lacks jurisdiction to enforce the eviction order issued following the judgment delivered on 9th November 2021, because the suit property falls under the jurisdiction of Mihango Police Station. The Applicant urged the court to grant the application as prayed.



The 2nd Defendant's Case

13. The 2nd Defendant filed a replying affidavit in opposition to the application. He argued that his application to set aside the ex parte judgment has not been determined.
14. He further contended that the Applicant has failed to adhere to the eviction procedure outlined in Section 152E of the Land Laws (Amendment) Act No. 28 of 2016 and Regulation 65 of Legal Notice 280 of 2017 (Land Regulations). He maintained that the court, having rendered its judgment, is functus officio and consequently, the application cannot suffice.
15. Both applications were canvassed by way of written submissions

The Applicant's Submissions

16. The Applicant filed his submissions dated 2nd February 2024.
On behalf of the Applicant, Counsel outlined the following issues for the court's determination:-
 - a. Whether the summons to enter an appearance was served upon the Applicant?
 - b. Whether the Applicant is entitled to the orders sought?
17. On the first issue, Counsel relied on the case of Law Society of Kenya v Martin Day & 3 others and on the case of Giro Commercial Bank to argue that the Applicant was not served with a summons to enter appearance. Counsel further submitted that the judgment entered was irregular because the service effected on the Applicant's wife was not proper, and was denied.
18. Based on the foregoing, Counsel submitted that the Applicant is entitled to the orders sought.

The Plaintiff/respondent Submissions

19. The Respondent filed her submissions dated 9th September 2024 in respect to the application.
On behalf of the Respondent, Counsel identified the following issues for the court's determination:-
 - a. Whether the Defendants were properly served?
 - b. Whether the judgment should be set aside?
20. On the first issue, Counsel submitted that the Defendants were served with the summons to enter an appearance on 1st February 2017, which they received and stamped.
21. Counsel further submitted that the Defendants Advocate entered appearance on their behalf and filed a defence on 28th March 2017. Counsel further submitted that the pleadings herein were served upon the Applicant's Counsel. It was argued that the Applicant was not interested in prosecuting this matter despite being served with all the pleadings and therefore, this application ought to be dismissed with costs. To support this argument, Counsel relied on the case of Moses Kimaiyo Kipsang v Geoffrey Kirui & 2 others (2022) eKLR.
22. Regarding the second issue, Counsel submitted that the Defendants have not met the threshold for the grant of the orders sought. To support this argument, Counsel relied on the list of authorities dated 3rd March 2025.



Analysis And Determination

23. Having considered the application, the affidavits, and the rival submissions, the only issue for determination is whether the judgment should be set aside.
24. Order 10 Rule 11 of the Civil Procedure Rules states that ex parte interlocutory judgments entered in default of appearance or defence may be set aside. It states as follows:
- “Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree, or upon such terms as are just.”
25. The court’s power to set aside its judgment is discretionary, which must be exercised judiciously.
26. The well-established principles of setting aside interlocutory judgment were outlined in the case of *Patel v East Africa Cargo Handling Services Ltd (1974) EA 75*, where the court held that:-
- “There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules”.
27. In the case of *James Kanyita Nderitu & another v Marios Philotas Ghika & another (2016) eKLR*, the Court of Appeal set out the criteria to be adopted when exercising jurisdiction to set aside a regular and an irregular ex parte judgment as follows:
- “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 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 justitiae as a matter of right. The court does not even have to be moved by the party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on it’s own motion. In addition, the court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons 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.”
28. In *Shah v Mbogo & Another (1967) E. A 116*, the Court of Appeal stated that the discretion to set aside an ex parte judgment is meant to prevent injustice or hardship caused by accident, inadvertence,



or excusable error, but not to help a party who has intentionally tried to obstruct or delay the course of justice (whether through evasion or other means).

29. This court is called upon to determine whether the 2nd Defendant was properly served with the summons to enter an appearance. The 2nd Defendant denied having been served with the summons to enter an appearance and the Plaintiff.
30. The record shows that the Plaintiff instituted this suit against the Defendants vide an amended Plaintiff dated 7th May 2023.
31. In its judgment, the court observed that the Defendants neither entered an appearance nor filed a defence, despite being duly served with the summons to do so. The matter proceeded for hearing and ultimately, judgment was delivered on 25th May 2023.
32. The Plaintiff averred that the 1st Defendant's wife received the pleadings but refused to sign the acknowledgement of service.
33. I have carefully perused the affidavit of service sworn on 10th May 2021 by Felix Omondi Owino, a court process server. At paragraph 4 of his affidavit, he deposed that he served Joseline Tallam, the 2nd Defendant's wife, with copies of the amended plaintiff and a supplementary list of documents, but she declined to acknowledge service.
34. The 2nd Defendant disputed service and insisted that he only became aware of these proceedings when he was informed by a police officer based at Kayole Police Station of the decree and the intention to execute it.
35. It is evident from the affidavit of service of Felix Omondi that he served the pleadings herein on the 2nd Defendant's wife. The Applicant denied the allegations that service was effected on his wife. It is crystal clear that the 2nd Defendant was not personally served with the pleadings herein.
36. Based on the foregoing, I am persuaded that the judgment herein was irregular.
37. The next issue for determination is whether the defence raises triable issues. I have carefully perused the supporting affidavit and the annexures thereto and I note that the draft defence has not been annexed as deposed.
38. The court has inherent discretion to give orders which are necessary to meet the ends of justice. Section 3A of the [Civil Procedure Act](#) provides that"-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
39. Sections 1A and 1B of the [Civil Procedure Act](#) provide for the objective of the Act, which is to ensure the just, expeditious, proportionate, and affordable disposal of cases.
40. Article 50 of [the Constitution](#) entitles every person to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard. Halsbury Laws of England, 5th edition 2010, vl 61 at para 639 states that;

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice.”



41. It would be unjust and indeed a miscarriage of justice to deny the Applicant an opportunity to be heard.
42. Having found that the judgment is irregular. I find that the application dated 10th December 2024 has been overtaken by events.
43. In the end, I find that the application dated 9th September 2024 is merited and the same is hereby allowed in the following terms: -
 - a. The judgment delivered on 25th May 2023 is hereby set aside.
 - b. The 1st Defendant shall file and serve his defence within 14 days from the date of this ruling.
 - c. The 1st Defendant shall comply with Order 11 of the Civil Procedure Act within 14 days from the date of this ruling.
 - d. Each party to bear its own costs.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF OCTOBER, 2025.

IN THE PRESENCE OF:- __

In the absence of the parties. Ahmed – Court assistant

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T. MURIGI JUDGE

