



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Adori v Ominde & 11 others (Environment & Land Case  
E050 of 2024) [2025] KEMC 124 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEMC 124 (KLR)

**REPUBLIC OF KENYA  
IN THE VIHIGA LAW COURTS  
ENVIRONMENT & LAND CASE E050 OF 2024**

**JA AGONDA, PM**

**MAY 22, 2025**

**BETWEEN**

**SHUAH AYAKO ADORI ..... PLAINTIFF**

**AND**

**EVERLYNE OMINDE ..... 1<sup>ST</sup> DEFENDANT**

**GUMBIHI JACKSON MUSUMBA ..... 2<sup>ND</sup> DEFENDANT**

**DAVID MURUKA LAW ..... 3<sup>RD</sup> DEFENDANT**

**DAVID LUMWAGI ..... 4<sup>TH</sup> DEFENDANT**

**ELIJAH LWENO ONZERE ..... 5<sup>TH</sup> DEFENDANT**

**JAMES ONYINO ONZERE ..... 6<sup>TH</sup> DEFENDANT**

**DAVID ONYINO ONZERE ..... 7<sup>TH</sup> DEFENDANT**

**LUGANDA ELVIS ISAGI ..... 8<sup>TH</sup> DEFENDANT**

**ROSE AMBOGO ROBERT ..... 9<sup>TH</sup> DEFENDANT**

**ARTHUR MUNZAZI EVOGE ..... 10<sup>TH</sup> DEFENDANT**

**JAMES OGOLA ..... 11<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, VIHIGA ..... 12<sup>TH</sup> DEFENDANT**

**RULING**

1. By way of notice of motion application dated 21<sup>st</sup> January, 2025 brought pursuant to Article 48, 50(1) of Constitution, Sections 3, 3A & 20 of *Civil Procedure Act*, Orders 5(8)(1), Order 5(15)(1) & (2), Order 5(16), Order 10(11), Order 40 (7) and Order 51 Rule 1 of the Civil Procedure Rules and all other



enabling provisions of the Law. By the application, the 1<sup>st</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> defendants/applicants sought the following orders:-

1. That the court be pleased to set aside the ruling issued on 31<sup>st</sup> October, 2024 and all the consequential orders therein.
2. That the costs of this application be in the cause.
2. The substance of the grounds on the face of the application and supported by affidavit of 1<sup>st</sup> defendant/applicant sworn on 21<sup>st</sup> January, 2025. She deposed that she was served with the copies of ruling dated 31<sup>st</sup> October, 2024 together with application filed under certificate of urgency and pleadings. She stated that the matter proceeded ex parte and injunctive orders were granted without their knowledge in relation to their various parcels of land. She averred that the defendants/applicants purchased various parcels of land on diverse dates between 2012- 2015 and they had been living and utilizing the same and constructed permanent residences and that for all those years they were issued with valid title deeds as per copies of titles annexed. She contended that on 25<sup>th</sup> November, 2024 they instructed their advocate who discovered the averments in the affidavit of service were not true as per a copy of return of service annexed. She averred that the defendants/applicants did not request to subject the process server to cross examination on his manner of effecting service upon them. She stated that the process served and herself did not know the defendants and the court process served made a call through area chief inviting the defendants/applicants. She stated that the area chief's and the process server's numbers were not indicated in the affidavit of service. They averred that they have been residing and using the suit parcels of land and prayed for the orders sought in the instant application.
3. On the other hand, the plaintiff/respondent filed her replying affidavit sworn on 4<sup>th</sup> February, 2025. She deposed that the application was incompetent, misplaced and ought to be dismissed with costs. She averred that the application dated 23<sup>rd</sup> August, 2024 was afterthought and that the same was filed and ex parte orders granted by the court upon being satisfied that the defendants were notified of the existence of the suit and application herein. She averred that the court went ahead to rule on the application for injunctive orders. She contended that she only knew the defendants through the area chief and the defendants/applicants did not call the court process server for cross examination to ascertain the credibility of service upon them. She stated that she did not know that the 3<sup>rd</sup> and 9<sup>th</sup> defendant/applicants had passed on and that the deceased would be substituted by their legal representatives as per the letter of the area chief annexed. She stated that the contention that the 1<sup>st</sup> to 11<sup>th</sup> defendants/applicants acquired title deeds yet the registered owners had already died. She averred that the interim orders were granted to preserve the subject matter and prayed that the application to set aside the ex parte orders be dismissed with costs.

### **Issues & Determination**

4. I have carefully considered the application and the affidavits filed in response and in opposition to the application and the submissions filed by counsel for both parties. The issue that I have to determine in this application is whether or not service as purportedly effected on 29<sup>th</sup> August, 2024 was proper or not and whether or not, I should grant to the defendants/applicants the orders of stay of execution. In deciding whether to grant the orders sought by the defendant/applicant.
5. On the first issue regarding the service of court documents upon the defendants. I have perused the affidavit of service sworn on 29<sup>th</sup> August, 2024 in paragraph 3 I quote verbatim "We later proceeded to Lunyerere area along Kisumu-Kakamega road within Vihiga County to serve 1<sup>st</sup> to 11<sup>th</sup> defendants where I engaged the area chief who called all the 1<sup>st</sup> to 11<sup>th</sup> defendants. Upon explaining to them the nature and purpose of my visit, I tendered the aforementioned copies of documents which they



acknowledged service stating that they will respond to the same.” Whether the service effected on 29<sup>th</sup> August, 2024 was proper or not, that is to say, whether it complied with order 5 of the Civil Procedure Rules. The importance of proper service of summons to enter appearance and hearing notices or other notices on parties cannot be gainsaid. Notification of a party of the proceedings likely to be taken against them is the basis of the principle of natural justice: that a person should not be condemned unheard.

6. I cite the case of Management of Committee of Mukono Primary School and Another v Uganda Examination Board, HC Civil Misc. Appl. No. 18 of 2010: the court held that “it is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and any law that contravenes or offends against any of the rule of natural justice, is null and void and of not effect”.
7. I also cite the case of Egal Mohammed Osman v Inspector General of Police & 3 others [2015] eKLR it was held that “the court observes firstly that the rules of natural justice “audi alteram partem”, hear the other party, on no man/woman may be condemned unheard are deeply rooted in the English Common Law have been transplanted by reason of colonization of the globe during the hey-days of the British Empire.”
8. Article 25 of *the Constitution*, 2010 provides for non-derogable fundamental rights and freedoms. One of them is the “right to unfair trial” as provided for under Article 25(c). This right has its sister “fair hearing” which is provided for under Article 50 (1) of which for civil matter. These two rights carry with them the rule of natural justice that a party cannot be condemned unheard. Article 159 of *the Constitution* cannot be interpreted and applied to mean and imply that a party who is not served with summons to enter appearance or a mention or hearing notice be denied the opportunity to be heard by being indirectly condemned unheard. In the contrary the Article 159 speaks to the fact and position in law and a party not served should be heard by first being served and that where there is a semblance of or any little doubt about lack of service, the said Article should be used to cure the technicality in favour of the party being given chance to be heard by being served with process, enter summons or enter appearance or a mention or hearing notice. That is why whenever courts are faced with applications for setting aside irregular judgments or orders, they have been clear on the way forward, and been firm at that: such judgments or orders are set aside ex debito justitiae, which means as a matter of right. What that means is that all the applicants need to show is that they were not served. Failure of service on a party immediately restricts the discretion of a court to nil. Thus, no court or party can justify the continued existence of a judgment or order obtained by a party or situations where it is clear that service was not effected prior to that. In this present case, the 1<sup>st</sup> defendant had confirmed that two of the defendants were deceased and ascertained that they were also not served with summons and pleadings as required by the law.
9. On the second issue of irregular judgments or orders are defined as those which are made absent of service of process. It means that the threshold of setting aside such a judgement or order is quite low, so low to the extent of it being a mandatory duty of the court to do so. This is because the rules of natural justice are so weighty or heavy upon mankind that it is impossible to wriggle out of them unless dignity and reason have been thrown out of the window. Even when that happens it destroys the very basis of the rule of law, and also sets the one in breach on a trajectory of acting against the divine will of the creator of the universe.
10. I cite the case of James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR, it was held that if there is no proper service of summons to enter appearance the resulting judgment



entered in default is set aside ex-debito justitiae and that means the court is under a duty to do so in order to uphold the integrity of the judicial process.

11. I also cite the case of Patrick Omondi Opiyo T/A Dallas Pub v Sliaban Keah & Another [2018] eKLR, the Court of Appeal held that service of summons accords the sued party an opportunity to be heard before any orders are issued against him/her. It held further that that is the essence of the rules of natural justice and if judgment is entered against a party who is not served, the said judgment ought to be set aside ex-debito justitiae and that differs from where a party is served but does not appear.
12. Now, as regards the instant case, I hold that the 1<sup>st</sup> defendant's advocate has demonstrated on how his clients were not served with summons and that was the reason they never entered appearance nor filed their statement of defence and replying affidavit to the instant application. Thus, this court cannot ignore the clear rules as to service. Order 5 Rule 6 provides for the mode of delivery of service of summons to enter appearance, and it is that it is done in duplicate form. Order 5 rule 7 is on service of summons on several defendants (as in the instant case). The rule is that except where it is prescribed otherwise, and this may be for instance, through advertisement, service ought to be on each of the defendants. Order 5 Rule 8 provides further that the service be in person or through an agent who is empowered to accept service. On service to individuals is that Order 5 Rule 12 provides for service on an adult member of the family of the defendant in that behalf. But the plaintiff must show that she made several reasonable attempts to serve the defendants or their authorized agent but failed. This goes also for service of hearing or mention notices.
13. In the instant case, the plaintiff has not brought himself within the exceptions the above Rules provide for in terms of service. The plaintiff's advocate confirmed that two of the defendants sued had passed on, a fact that the area chief or the court process server did not capture in his affidavit of service sworn on 29<sup>th</sup> August, 2024. I note that upon the 1<sup>st</sup> defendant's advocate bringing to the court's attention, that is the time, the plaintiff in her replying affidavit annexed the area chief letter ascertaining that the two defendants were deceased but there were representatives. For the substitution to be effected, that has to be through a court process but an area chief cannot purport to suggest to this court that there are the defendants' legal representative yet at the time this court was issuing ex parte orders, this fact was not brought to the court's attention. The court assumed that all the defendants were alive. I find that there was material non disclosure by the plaintiff. Thus, the plaintiff did not come to court with clean hands. A court cannot sit and see an injustice being perpetrated through it. It is the duty of the court to do justice. While the court, should not descend into the arena of the parties and actively lead them in the manner they conduct their matter, they should, under duty and law, ensure that the rules of the "game" are level and even. This court cannot close its eyes to technicalities being used to perpetrate an injustice. This is not a technicality that can be cured under Article 159 of *the Constitution* as the defendants had been on the suit property since 2012-2015 to date before this court issued ex parte orders, this critical facts were not disclosed by the plaintiff. I find that there were irregular orders that were issued by this court and the same must be set aside for all parties to be granted chance to ventilate on their cases before this court makes a fair decision. This court finds that there were triable issues that need to be resolved in a full trial thus necessitating the interlocutory judgment herein being set aside.
14. In the foregoing premises and based on the reasons stated hereinabove, the upshot of this court's ruling is that the notice of motion dated 21<sup>st</sup> January, 2025 is merited and I proceed to make the following orders:-
  1. An order is issued setting aside the ruling delivered on 31<sup>st</sup> October, 2024 and all consequential orders therein.



2. An order is issued that status quo be maintained as before the ruling was delivered until the matter is heard and determined.
3. The costs shall be in the cause.
4. Parties to comply with Order 11 of the Civil Procedure Rules, 2010. Mention on 10<sup>th</sup> July, 2025 for pre trial directions with a view of taking suitable date for main suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN THE OPEN COURT THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

**J.A.AGONDA**

**PRINCIPAL MAGISTRATE**

**On 22.05.2025**

**BEFORE: J.A. AGONDA PM**

**C/A: Busuku**

Parties:-

Plaintiff/Respondent in person: Present

1<sup>st</sup> , 4<sup>th</sup> , 8<sup>th</sup> ,10<sup>th</sup> & 11<sup>th</sup> Defendants/Applicants: Mr.Bagada

**Court:** Ruling delivered in the open court.

**J.A.AGONDA**

**PRINCIPAL MAGISTRATE**

