



**Kagiri v Kagiri & another (Environment and Land Case  
71 of 2017) [2025] KEELC 5655 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5655 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND CASE 71 OF 2017**

**JO OLOLA, J  
JULY 31, 2025**

**BETWEEN**

**ISABELLA NYOKABI KAGIRI ..... PLAINTIFF**

**AND**

**DAVID KIONDORO KAGIRI ..... 1<sup>ST</sup> DEFENDANT**

**SAMWEL KAGIRI KONDORO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated 25<sup>th</sup> January, 2024, Samuel Kagiri Kondoro (the 2<sup>nd</sup> Defendant/Applicant) prays for the following orders:
  1. Spent;
  2. Spent;
  3. That the default Judgment entered against the 2<sup>nd</sup> Defendant on 20<sup>th</sup> December, 2023 in this suit and resultant decree be set aside;
  4. That the 2<sup>nd</sup> Defendant be granted leave to file his Defence out of time; and
  5. That the costs of this Application be provided for.
2. The application is supported by an Affidavit sworn by the Applicant and is premised on the grounds inter alia, that;
  - i. The matter proceeded ex parte and Judgment was passed against the 2<sup>nd</sup> Defendant;
  - ii. The 2<sup>nd</sup> Defendant was not made aware of this suit since he was not served with the Summons to Enter Appearance and the suit documents;



- iii. The Applicant's failure to attend Court was not deliberate, but arose out of an excusable mistake;
  - iv. The 2<sup>nd</sup> Defendant's Statement of Defence raises triable issues and it would be just to accord him a chance to be heard;
  - v. If the judgment is executed, the suit property is in danger of being wasted, damaged, and/or alienated rendering the 2<sup>nd</sup> Defendant homeless;
  - vi. No prejudice will be occasioned upon the Plaintiff, and if any, it can be adequately compensated by way of reasonable costs; and
  - vii. It is in the interest of justice that the application be allowed and the orders sought be granted.
3. Isabella Nyokabi Kagiri (the Plaintiff) is opposed to the application. In her Replying Affidavit sworn on 16<sup>th</sup> February, 2024, the Plaintiff asserts that on 3<sup>rd</sup> May, 2017, she personally did point out the 1<sup>st</sup> Defendant to the Process Server who then served him with summons. It is her case that on the same date, he pointed out the 2<sup>nd</sup> Defendant/Applicant's home to the Process Server who proceeded to effect service upon the Applicant.
  4. The Plaintiff further avers that the Applicant did not enter appearance as expected and that she thereafter applied and was allowed to effect service upon him by way of substituted service. On 29<sup>th</sup> June, 2018, she caused a notice to be placed in the Standard Newspaper inviting the Applicant to enter appearance.
  5. David Kiondoro Kagiri (the 1<sup>st</sup> Defendant) is equally opposed to the application. In his Replying Affidavit sworn on 7<sup>th</sup> March, 2024, the 1<sup>st</sup> Defendant avers that the Plaintiff who is his mother caused him to be served with the summons on 3<sup>rd</sup> May, 2017 and he recalls that both his mother and the process server thereafter went to the applicants' home and affixed the summons on his door. The 1<sup>st</sup> Defendant avers that the Applicant's shamba boy was present and that the Applicant was informed that court documents had been served upon him.
  6. The 1<sup>st</sup> Defendant further avers that the Applicant was thereafter served by way of advertisement in the newspaper as his whereabouts were unknown. The 1<sup>st</sup> Defendant further avers that the Applicant like everyone else in their family have been aware of the existence of this suit since 2017 but chose to ignore it and that the Applicant is now misleading the Court.
  7. I have carefully perused and considered the 2<sup>nd</sup> Defendant's application on the one hand as well as the respective responses thereto by both the Plaintiff and the 1<sup>st</sup> Defendant. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties.
  8. By his application before the court, the 2<sup>nd</sup> Defendant urges the court to set aside the judgment entered herein as against himself on 20<sup>th</sup> December, 2023 together with the resultant decree. It is further the 2<sup>nd</sup> Defendant's prayer that he be granted leave to file his defence out of time.
  9. It is the 2<sup>nd</sup> Defendant's case that this matter proceeded ex-parte and that he was not made aware of the same nor was he served with summons to enter appearance. He told the court he only came to learn about the existence of the suit from a friend on 15<sup>th</sup> January, 2024.



10. Order 10 Rule 11 of the Civil Procedure Rules provides as follows.

“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.”

11. As was held by the Court of Appeal in *CMC Holdings Ltd –vs- Nzioki* (2004) KLR 173

“In an application for setting aside ex-parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously .... In law, the discretion that a court of law has, in deciding whether or not to set aside an ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other things an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.”

12. Speaking to the same issue in *James Kanyiita Nderitu & Another –vs- Marios Philotas Ghikas & Another* (2016) KECA 470 (KLR), the Court of Appeal further held as follows:-

“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 others. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. 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. 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. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason 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. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456).”



13. In the matter before me, the 2<sup>nd</sup> Defendant avers that he was not aware of the existence of this suit since he was not served with the summons to enter appearance and the suit documents. That position is contested by both the Plaintiff as well as the 1<sup>st</sup> Defendant. It is the Plaintiff's case that the two Defendants were both served with the summons to enter appearance on the same date by the same process server.
14. In support of the contention that the Defendants were served, the said Process Server Stephen M. Kamanguya had on 14<sup>th</sup> May 2018 sworn an Affidavit of Service wherein he deposed as follows at paragraphs 2 and 3 thereof:
  - “2. That on 3<sup>rd</sup> May 2017 accompanied by the Plaintiff herein I went to serve summons to enter appearance verifying affidavit, statement list of witness and list documents (sic) upon the 1<sup>st</sup> Defendant herein at Mahiga in Othaya where on arrival at around 3.00 p.m. where on arrival the Plaintiff pointed out to me the 1<sup>st</sup> Defendant to whom I served with the said process which he accepted to retain and acknowledged service by signing on my copy which I return herewith duly served; and
  3. That thereafter the Plaintiff pointed out to me the 2<sup>nd</sup> Defendant's place of residence where I met a gentleman to whom I enquired from him the whereabouts of the 2<sup>nd</sup> Defendant and he identified himself as Omondi and a labourer employed by the 2<sup>nd</sup> Defendant and he informed me that the 2<sup>nd</sup> Defendant comes home at month end at night and leaves early the following day and at about 3.45 p.m. I affixed on the outer door of the 2<sup>nd</sup> Defendant house (sic) copies of summons to enter appearance plaintiff verifying affidavit statement list of witness and list of documents in the presence of the said labourer and I return herewith the original summons duly served.”
15. As it turned out, none of the Defendants entered any formal appearance in the matter. The 1<sup>st</sup> Defendant however started attending court and participated throughout in the proceedings leading to the judgment. Perhaps concerned that they had not found the 2<sup>nd</sup> Defendant and managed to serve him personally, the Plaintiff instituted a Notice of Motion dated 14<sup>th</sup> May, 2018 seeking leave to effect service of the summons upon the 2<sup>nd</sup> Defendant by way of substituted service.
16. From the court records, that application was heard and the same was allowed on 20<sup>th</sup> June, 2018. On 29<sup>th</sup> June, 2018, the Plaintiff caused notice of the suit to be advertised in the Standard Newspaper requiring the 2<sup>nd</sup> Defendant to enter appearance within 15 days from the date thereof. It was the 2<sup>nd</sup> Defendant's case that he could not have seen the notice in the newspaper since his work engagement at the alleged time of service was quite strenuous and that the same could not have allowed him access to newspapers.
17. While that may have been so, I was not persuaded that the 2<sup>nd</sup> Defendant had no notice of this suit for the six (6) years that it was in court before judgment was delivered herein. By his own admission, the 2<sup>nd</sup> Defendant, is a nephew of the Plaintiff's deceased husband. In his Supporting Affidavit he avers that he lived in Nairobi but would visit his home regularly.
18. It was indicative that while he denied that any summons were affixed on the outer door of his said home, he does not deny the assertion by the Process Server that he had a caretaker by the name Omondi in whose presence the Process Server states he affixed the summons. Indeed, the 2<sup>nd</sup> Defendant did not make any request to cross examine the Process Server about the contents of the Affidavit of Service.



19. In Support of the position that the summons were affixed at the 2<sup>nd</sup> Defendant's home, his Co-Defendant who had also claimed a portion of the suit property avers as follows at Paragraphs 3 to 7 of the Replying Affidavit sworn on 7<sup>th</sup> March, 2024:
- “ 3. That I was served with the pleadings of this case by a process server who was accompanied by the 1<sup>st</sup> Respondent who is my mother on the 3<sup>rd</sup> May 2017 and I recall seeing them visit the applicant's home and affix the court documents on the outer door of his home;
  4. That the Applicant's Shamba Boy was present and the Applicant was informed that court documents had been served upon him;
  5. That the Applicant was served through advertisement in the newspapers as he could not be served personally as his whereabouts were unknown;
  6. That the Applicant has been aware of the existence of this suit and chose to ignore it and it is only after he found out about the outcome after judgment that was delivered on 20<sup>th</sup> December, 2023 that he panicked and is now misleading the court; and
  7. That the existence of the suit was not a secret and everyone in the family knew about it as it has been ongoing since the year 2017.
20. Arising from the foregoing, it was evident to me that the 2<sup>nd</sup> Defendant had been properly served with the suit papers and that he was aware of the same. The property that the Plaintiff was claiming was originally known as Mahiga/Kamoko/41 before the Plaintiffs deceased husband sub-divided it into two giving one piece to the 1<sup>st</sup> Defendant and the other to the 2<sup>nd</sup> Defendant. That being the case, I was unable to see what would motivate the 1<sup>st</sup> Defendant to make up a story that the 2<sup>nd</sup> Defendant was served and knew about the existence of the case when the 2<sup>nd</sup> Defendant was not.
21. In his quest to have the Judgment set aside, the 2<sup>nd</sup> Defendant avers that his draft Statement of Defence raises a triable issue. As was stated by the Court of Appeal in *Ternic Enterprises Limited –vs- Waterfront Outlets Limited* (2018) eKLR:
- “ ... a “triable issue” is an issue which raises a prima facie defence and which should go to trial for adjudication ... The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend.”
22. From a perusal of the draft Statement of Defence attached to the 2<sup>nd</sup> Defendant's Supporting Affidavit, he pegs his claim over the property known as Mahiga/Kamoko/1201 on the basis that he purchased the same from the Plaintiff's husband and that he had paid the full purchase price. No sale agreement has however been exhibited in support of that claim.
23. The 2<sup>nd</sup> Defendant's own documents particularly the transfer dated 20<sup>th</sup> June, 2007 from the Plaintiff's husband to the 2<sup>nd</sup> Defendant indicates that it was a gift given to the 2<sup>nd</sup> Defendant. That supports the Plaintiff's case at the trial that the two parcels of land had been gifted to the two Defendants to hold in trust for her husband Joseph Kagiri Kiondoro.
24. In the premises I was persuaded that the 2<sup>nd</sup> Defendant was served with the summons and that the Draft Statement of Defence does not raise any triable issue.



25. The Notice of Motion dated 25<sup>th</sup> January 2024 is therefore devoid of merit. The same is hereby dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT  
MOMBASA THIS 31<sup>ST</sup> DAY OF JULY, 2025**

.....

**J.O. OLOLA**

**JUDGE**

In the presence of:

Ms. Firdaus Court Assistant.

Ms. Mwangi holding brief for Kiminda Advocate for the Plaintiff

Mr. David Kagiri the 1<sup>st</sup> Defendant in Person

Ms. Wangechi Advocate for the 2<sup>nd</sup> Defendant/ Applicant

