



Matiliku v Makau; Kiio & another (Interested Parties) (Environment and Land Case 71 of 2019) [2025] KEELC 7413 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 71 OF 2019
EO OBAGA, J
OCTOBER 30, 2025**

BETWEEN

JANE MUTHINI MATILIKU PLAINTIFF

AND

VERONICAH MAKAU DEFENDANT

AND

DENNIS MUTUKU KIIO INTERESTED PARTY

KYALO MUTAITI MBONOKA INTERESTED PARTY

RULING

1. Before this Court for determination is the Notice of Motion dated 4th February, 2025 brought under the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 10 Rule 10, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
2. The Defendant/Applicant seeks the following orders: -
 1. [Spent]
 2. [Spent]
 3. An order of stay of execution be issued regarding the judgment dated 23/03/2022, the decree herein, eviction orders issued on 23/03/2022 and 7/11/2024 and all the consequential orders thereto pending the hearing and determination of the main suit.
 4. This judgment dated 23/03/2022, the decree herein, the eviction orders issued on 23/03/2022 and 7/11/2024 and all the consequential orders thereto be set aside.
 5. The 1st and 2nd Interested Parties be joined in this suit as the 2nd and 3rd Defendants respectively.



6. The Applicants be granted leave to file their defence(s) and all the accompanying pleadings therewith in terms of the draft defence annexed hereto.
 7. The said draft defence be deemed as duly filed and served upon the Plaintiff.
 8. The court process server be availed for purposes of cross-examination.
 9. Costs of this application be provided for.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Veronicah Wausi Makau of even date.
 4. The Applicant averred judgement was delivered against her by this Court on 23/03/2022. She further averred that that the judgment was obtained irregularly and/or unlawfully because no service was effected upon her preceding the judgment. She contended that the eviction order issued on 7/11/2024 was served upon her by the Area Chief and Assistant Chief on 23/01/2025 and that on 3/2/2025 the OCS Mukuyuni Police Station informed her that the eviction order would be enforced on 5/2/2025.
 5. The Applicant averred that she is not the owner of the offending structures as alleged by the Plaintiff but rather they belong to the 3rd Applicant. She further averred that the said offending structures are in land Parcel No. Ukia/Utaati/152 and not Parcel No. Ukia/Utaati/159 as alleged by the Plaintiff. She added that land Parcel No. Ukia/Utaati/152 belongs to the Estate of Kiio Mbonoka and hence it is the Plaintiff who has encroached into neighbouring land.
 6. The Applicant averred that the together with the 1st and 2nd Interested Parties, they have annexed a draft defence which raises plausible and/or triable issues. She urged that if the orders sought are not granted, then she stands to suffer substantial loss.
 7. Opposing the application, the Plaintiff filed a replying affidavit sworn by herself on 5th March, 2025. She averred that the Applicant has previously been served physically by a licensed court process server but she has always been very hostile towards him. She further averred that the application herein is a waste of the court's time since the case was heard and determined on merit. The deponent insisted that the Applicant utterly ignored the opportunity to defend herself and that the attempt to introduce other parties as defendants is unprocedural.
 8. The Plaintiff contended that if the intended interested parties have any claim against her, then they ought to file their own separate suit. She further contended that the intended interested parties do not have any proprietary rights over his parcel of land. The Plaintiff insisted that she is the registered proprietor of land Parcel No. Ukia/Utaati/159 and no documentary evidence to the contrary has been provided. She averred that the application herein is frivolous, vexatious and an abuse of court process and therefore should be dismissed.
 9. In a further affidavit sworn by the Applicant on 25th April, 2025, she contended that the replying affidavit is premised on conjecture and falsehoods. It was also contended that the Plaintiff's advocates are not properly on record.
 10. The application was canvassed by way of written submissions.
 11. In the Applicant's submissions dated 30th April, 2025, Counsel identified five issues for determination:
 - a. Whether stay orders should be granted?
 - b. Whether the judgment, decree and orders herein should be set aside?



- c. Whether the Interested Parties should be joined in the matter?
 - d. Whether the Plaintiff's advocates are properly on record?
 - e. Whether the Applicants are entitled to costs?
12. Submitting on the first issue, Counsel contended that unless the orders of stay of execution are granted, the Applicants stand to suffer immense substantial loss. On the next issue, Counsel submitted that that the Applicant had annexed a good defence which raises triable issues. Counsel further contended that the Applicant had demonstrated that the service of court process was irregular hence the ensuing judgment is unlawful.
 13. Submitting on the third issue, Counsel contended that the 1st and 2nd Interested parties had demonstrated an identifiable interest in land Parcel No. Ukia/Utaati/152 which is one of the suit properties herein. Counsel further contended that no party should be condemned unheard citing the provisions of Articles 25 (c) and 50 (1) of *the Constitution*.
 14. Submitting on the fourth issue, Counsel contended that the Plaintiff's advocates are not properly on record having failed to file a Notice of Change of Advocates upon the predecessor M/S O.N. Makau & Mulei Advocates. Lastly, it was submitted that the Applicants had demonstrated sufficient cause and merit in the application to warrant an order for costs.
 15. The Plaintiff/Respondent filed her submissions dated 10th June, 2025. On her behalf, Counsel submitted that on two issues for determination: -
 - a. Whether there was an irregular judgment to justify it being set aside/
 - b. Whether the Defendant is entitled to enjoin parties in a suit?
 16. Counsel submitted that the provisions of the law in regards to setting aside ex-parte judgments are to be found in Order 12 Rule 7 of the Civil Procedure Rules. Counsel submitted that the court has unfettered discretion to issue orders for setting aside ex-parte judgments and such discretion should be exercised judiciously.
 17. Counsel opined that the court entered a regular judgment against the Defendant since there was proper physical service of court process upon the Defendant. Counsel made reference to the affidavits of service showing that the Defendant was personally served at her home in Kivivo Village in Utaati Sub-location home.
 18. Counsel argued that the draft defence annexed to the application contains mere denials with no triable issues. Counsel went ahead to submit that the Applicant had conceded that the offending structures in the suit property do not belong to her and hence, she does not stand to suffer any prejudice. Counsel submitted that there was unreasonable delay in the filing of the application three years after judgment was entered against the Defendant on 23/03/2022 and no explanation had been given.
 19. On the second issue, Counsel opined that it is only the plaintiff who can determine the parties to be sued as defendants. It was contended that the Defendant could only enjoin the intended interested parties as third parties where the party is not already a party to the suit. Counsel urged the court to dismiss the application with costs.
 20. After perusal of the application, the following issues for determination arise: -
 - a. Whether the judgment delivered on 23/03/2022 and decree ought to be set aside?
 - b. Whether the intended interested parties should be joined in the suit?



- c. Whether the Plaintiff's advocates are properly on record?
21. The court is vested with unfettered discretion to set aside *ex parte* judgment and such discretion must be exercised judiciously. The governing provisions on setting aside a judgment which has been entered in default of defence are spelt out under Order 10 Rule 11 of the Civil Procedure Rules, 2010 outlines 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.’
22. Being a discretionary power, the Court of Appeal observed as follows in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR with regard to the setting aside of *ex-parte* orders: -
- “Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order such as before us 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 in our mind not be a 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. Such an exercise of discretion would in our mind be wrong in principle.”
23. The Court of Appeal went on further to state as follows: -
- “The law is now well settled that in an application for setting aside *ex parte* judgment, the court must consider not only reasons why the defence was not filed or for that matter why the Applicant failed to turn up for hearing on the hearing date but also whether the Applicant has reasonable defence which is usually referred to as whether the defence is filed already or if a draft defence is annexed to the application, raises triable issues.
24. In *Shah v Mbogo* [1967] EA 116 at 123B Harris J, judiciously held as follows: -
- “This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
25. Similarly, in *Pindoria Construction Ltd v Ironmongers Sanytaryware Civil Appeal No. 16 of 1976* the Court of Appeal held that: -
- “It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellants were not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the *ex parte* judgement. The trial Judge’s exasperation at his behaviour was understandable.”



26. Both parties herein cited decision of the Court of Appeal in Patel v EA Cargo Handling Services Ltd [1974] 1 EA 75 (CAM) wherein Sir William Duffus P held thus: -

“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 it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

27. The record shows that the Defendant was personally served with summons to enter appearance together with the plaint and witness statements on 28/01/2021. The record further shows that Ali Simba Kalii, a duly licensed court process server filed an affidavit of service which the Plaintiff/ Respondent utilized in support of her application for interlocutory judgment. Interlocutory judgment was subsequently entered on 8/10/2021 as duly noted in the judgment upon satisfaction that there was proper service.

28. The court therefore finds that the interlocutory judgment and the subsequent proceedings were regularly obtained by the Plaintiff.

29. Upon a keen perusal of the annexed draft defence and counterclaim (Exhibit “VWM 7”), the Defendant/Applicant contends at paragraphs 7 and 8 that the offending structures are not in the suit property known land Parcel No. Ukia/Utaati/159 but rather within land Parcel No. Ukia/Utaati/152. That the latter parcel of land belongs to the 1st intended interested party and that the offending structures belong to the 2nd intended interested party.

30. Evidently, the Applicant has not demonstrated any prejudice to be suffered if the orders of eviction are carried out by the Plaintiff. In fact, if any substantial loss if any is to be suffered, then it will be borne by the intended interested parties and if the same is irregular, they will have a chance at filing his own separate suit.

31. Therefore, the Applicant does not have any arguable defence which can necessitate the court’s exercise of discretion for setting aside the judgment and decree in her favour.

32. On the second issue of joinder of parties to proceedings is governed by Order 1 of the Civil Procedure Rules. In respect of joinder of defendants to a suit, Order 1 Rule 3 of the Civil Procedure Rules 2010 outlines as follows: -

‘All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.’

33. Order 1 Rule 10 (2) goes on to provide as follows: -

‘(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.’



34. In the present application, the Applicant has made the application for joinder long after the suit was determined. The judgment was delivered on 23rd March, 2022 and the present application was made on 4th February, 2025. In view of the foregoing, there is no suit pending determination for which the intended interested parties may be joined as Defendants.
35. In the case of *Everton Coal Enterprises Limited v Karanja & 5 others* [2023] KESC 98 (KLR), the Supreme Court expressed itself at length on the stage at which a party may apply for joinder to proceedings in the following terms: -

“Strictly speaking, though joined, the applicant was not a party to “the proceedings” in the Court of Appeal having been joined post-judgment, yet a joinder contemplates a situation where proceedings are still pending before the court and in terms of rule 5(d)(ii) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) which is in pari materia with order 1 rule 10(2) of the Civil Procedure Rules, a party will only be added to on-going proceedings in order to enable the court adjudicate fully upon and settle all the questions involved in the particular proceedings before it.

Noting that the original dispute between the 1st to 4th respondents and the 5th and 6th respondents having been settled in a judgment rendered on July 29, 2016, there were no proceedings to which the applicant could properly join four years later on June 5, 2020, when the ruling by the first bench of the Court of Appeal was rendered. This question has been settled in a long thread of past decisions. For example, in *JMK v MWM & another* [2015] eKLR, the court stressed that;

“...an application for joinder of parties can be filed only in pending proceedings; that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings, either before, or during the trial; and that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable”.

See also the Court of Appeal judgment in *Kenya Airport Authority v Mitu- Bell Welfare Society & 2 others* [2016] eKLR on the finality of a judgment as a decision of a court resolving all the contested issues and settling the rights and liabilities of the parties before it...”

36. In the case of *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] KEHC 5507 (KLR), the Court observed as follows:-
- (23) Joinder is usually followed by amendment of pleadings so as to specifically make allegations and include prayers seeking relief against the joined party. For this reason alone joinder cannot obtain. Not only can the pleadings not re-open but also that judgment has already been entered herein. The suit is concluded. Joinder is not of any help to the Plaintiff. Perhaps the only course available to the Plaintiff is to file a fresh suit particularly since the proceedings it seeks to impugn are fresh Arbitral proceeding commenced after this suit and which are subsequent to the terminated proceeding.”
37. In light of the foregoing, it is manifestly clear that the application for joinder cannot issue since the suit has already been heard and finally determined on the merits.



38. On the issue of whether the Plaintiff's advocates are properly on record, the Applicant raised the said objection in a further affidavit. The issue does not arise from either the main application or the replying affidavit that was sworn by the Plaintiff/Respondent. The Plaintiff/Respondent did not have an opportunity to reply to the same.
39. It is an irrelevant consideration in light of the prayers sought by the Applicant and therefore the averments in paragraphs 6,7,8,9 and 10 of the further affidavit ought to be struck out in accordance with Order 19 Rule 6 of the Civil Procedure Rules, 2010.
40. In the end, the application herein is devoid of merit and accordingly it is dismissed.
- It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF OCTOBER, 2025.

In the Presence of:

Mr. Mukula for Applicants.

Ms. Kyalo for Respondent.

Court assistant – Steve Musyoki

