



**Njoroge & 31 others v Thuo Investments Company Limited & 7 others;  
Auckland Agencies Auctioneers (Interested Party) (Commercial Case 471 of 2015)  
[2025] KEHC 15056 (KLR) (Commercial and Tax) (22 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 471 OF 2015  
JWW MONG'ARE, J  
OCTOBER 22, 2025**

**BETWEEN**

**DAVID KARIUKI NJOROGE & 31 OTHERS ..... PLAINTIFF**

**AND**

**THUO INVESTMENTS COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THUO COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH NJOROGE THUO ..... 3<sup>RD</sup> DEFENDANT**

**JOSPHAT O. MAKORI ..... 4<sup>TH</sup> DEFENDANT**

**MORRIS MBUCHU GIKONYO ..... 5<sup>TH</sup> DEFENDANT**

**FRANCIS N. MWANGI ..... 6<sup>TH</sup> DEFENDANT**

**SAMWEL O. MAKORI ..... 7<sup>TH</sup> DEFENDANT**

**JEREMIAH KIEKE MAINA ..... 8<sup>TH</sup> DEFENDANT**

**AND**

**AUCKLAND AGENCIES AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

**Introduction & Background**

1. The 3<sup>rd</sup> Defendant (“the Applicant”) has filed the Notice of Motion dated 21<sup>st</sup> May 2024 seeking to set aside the interlocutory judgment entered against him on 1<sup>st</sup> November 2021 for Kshs.19, 298,979.55/=, that execution of the same should be stayed and the court should issue a temporary injunction to stop



the Plaintiffs from attaching or selling his property. The application is supported by the Applicant's affidavit sworn on 21<sup>st</sup> May 2024 and it is opposed by the Plaintiffs through the Grounds of Opposition dated 8<sup>th</sup> November 2024 and the replying affidavit of the 5<sup>th</sup> Plaintiff, Martin Karari Wahogo, sworn on 13<sup>th</sup> December 2024. The application was canvassed by way of written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

2. From the Defendant's application and the parties' submissions, the main issue for determination is whether the interlocutory judgment against him ought to be set aside. As submitted by the Applicant, Order 10 rule 11 of the Civil Procedure Rules empowers the court to set aside or vary such judgment and any consequential decree or Order upon terms that are just. This power is discretionary and is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice (See *Mbogo & Another v Shah* [1967] EA 116 and *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] KECA 282 (KLR))
3. The Applicant states that he was never served with any court documents, pleadings, or summons since the suit was filed in 2015 and that he was unaware of the interlocutory judgment entered against him and other Defendants on 1<sup>st</sup> November 2021, for Kshs.19,298,979.55/=. That the court granted the Plaintiffs leave on 29<sup>th</sup> February 2016 to serve the Defendants by publishing an advertisement in either the Daily Nation or the East African Standard but the Plaintiffs, however, published the advertisement in The Star newspaper on 22<sup>nd</sup> March 2017, on the classified section on pg. 41. The Applicant contends this was not proper service because The Star was not one of the newspapers ordered by the court, and it had a low circulation, making it unlikely for the Applicant to see the advertisement.
4. He submits that proper service is a prerequisite for a court to assume jurisdiction, and the lack of it renders the ensuing default judgment irregular. The Applicant states he only learned of the case on 20<sup>th</sup> May 2024, when he was "ambushed" at his home by the 1<sup>st</sup> Interested Party and that upon becoming aware of the execution proceedings, he acted promptly by filing the application without unreasonable delay, demonstrating diligence in protecting his rights.
5. The Applicant also maintains that he possesses a bona fide defence that raises triable issues and should therefore be granted leave to defend the case. The Applicant also submits that the court, on 19<sup>th</sup> June 2024, observed that the decree issued on 24<sup>th</sup> October 2022, was irregular and contrary to the law because no notice to show cause was issued and/or prosecuted as required by law. The court then exercised its inherent jurisdiction to set aside the warrant issued on 31<sup>st</sup> May 2024. As such, the Applicant urges the court to allow his application as prayed.
6. In response, the Plaintiffs state that they made several attempts to serve the Defendants with the plaint and summons in 2015, both physically and via registered post and when physical service failed, they obtained leave from the court to use substituted service. They contend that the Defendants were duly served via a public notice in the The Star Newspaper on 22<sup>nd</sup> March 2017 and that because the Defendants were served and failed to enter an appearance or file a defense, the interlocutory judgment entered on 1<sup>st</sup> November 2021, is argued to be valid and regular. The Plaintiffs contend that the Applicant was, or should have been, aware of the court proceedings and that his application is frivolous, vexatious and an abuse of the court process. They emphasize that the application has been made with unreasonable delay, nine years after the suit was filed and nearly three years after the judgment was entered.



7. The Plaintiffs also state that the Applicant has not attached a draft defence to his application and as such, he has not provided the court with any valid reason to believe he has a legitimate case to argue on the merits. Without prejudice to the foregoing, the Plaintiffs state that even if the court is inclined to grant the Applicant's application, the Plaintiffs urge that the same should be conditional with the Applicant depositing the entire decretal amount into a joint, interest-earning account as security and that he must be condemned to pay throw-away costs of Kshs. 200,000.00/= to compensate the Plaintiffs for the costs incurred due to this application.
8. I have gone through the record. It is clear from the Affidavits of Service that there were unsuccessful attempts to physically serve the Defendants hence the substituted service in The Star newspaper. However, I am inclined to agree with the Applicant that it is probable that he may not have seen the advertisement, considering that not everyone in Kenya reads all the newspapers daily. In addition, it is possible that a person may read only a section of a newspaper and fail to read other sections like the classified/advertisement section, depending on what they deem relevant to them. It is not lost to me that substituted service is based on the rebuttable presumption that the defendant shall be able to see the advertisement. The purpose of effecting service, in whichever form, is to notify the defendant of the pendency of a suit against them and to give them opportunity to defend themselves. The provision for substituted service is allowed as an alternative where personal service is not possible. The most desirable and effective mode of service being personal service. However, the bottom-line and the expected outcome of any mode of service is to make the defendant aware of the suit pending against them. If that outcome is not achieved, then subsequent proceedings will not result in substantive justice (see Phillip Mutiso Mulalya v Samuel Dominic Muathe & 2 others [2022] KEELC 1033 (KLR))
9. As such, I find that the reason given by the Applicant that he did not see the advertisement and was therefore not aware of this suit is a reasonable explanation to warrant setting aside the *ex parte* judgment *ex-debito justitiae*. Further, the Applicant's deposition raises a pertinent issue that affects all co-defendants. He avers that the 1<sup>st</sup> Defendant is a non-existent company and that most of its directors are deceased. This casts a shadow over whether the other individual Defendants were ever aware of this suit. In the exercise of this Court's wide discretionary powers, it is only just and equitable that the opportunity to be heard be extended to all the named Defendants.

### **Conclusion and Disposition**

10. For the reasons I have set out above, I allow the 3<sup>rd</sup> Defendant's application dated 21<sup>st</sup> May 2024 on the following terms:
  1. The Judgment dated 1<sup>st</sup> November 2021 be and is hereby set aside in respect of all the Defendants.
  2. The Defendants shall file and serve their Statements of Defence, if any, within 30 days from the date hereof.
  3. The Plaintiffs are directed to serve a copy of this ruling upon all other Defendants within 14 days from the date hereof and for case management purposes, this matter will be mentioned at a date to be fixed by the court for pre-trial directions and to confirm compliance.
  4. Costs shall be in the cause. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER 2025**

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**J.W.W. MONGARE**

**JUDGE**

In the Presence of

1. Ms. Tazita holding brief for Mr. Saende for the Plaintiff/Respondent.
2. N/A for the Defendant/Applicant.
3. Amos - Court Assistant

