



REPUBLIC OF KENYA



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

**Anyenda v Simidi & 12 others (Environment and Land Appeal  
1 of 2023) [2025] KEELC 7980 (KLR) (19 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

**CK NZILI, J**

**NOVEMBER 19, 2025**

**BETWEEN**

**WILLIAM W. ANYENDA ..... APPELLANT**

**AND**

**ENOCK BULIMI SIMIDI & 12 OTHERS ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. S.K. Mutai (SPM)  
delivered on 03/07/2023, in Kitale CM Land Case No. 50 of 2002)*

**JUDGMENT**

1. Before the court is a memorandum of appeal dated 11/7/2023. The appellant, who was the defendant at the lower court, obtained a decree dated 7/11/2002 following adoption of the tribunal award on 5/11/2022, which decreed them 47 acres out of L.R. No. 7847/4, otherwise known as (Jasho Farm). As a result, the appellant's duty was to bring a government surveyor to survey, excise, and mark the boundaries, after which they would appear before the Land Control Board to obtain consents to facilitate the issuance of title deeds.
2. Aggrieved by the decree, the appellant unsuccessfully sought to have the decree quashed through Judicial Review No. 27 of 2003, which, unfortunately, was dismissed by the court on 15/6/2007 for want of prosecution. After the appellant neglected to implement the decree, the respondents sought vesting orders through an application dated 7/2/2012.
3. Another application dated 3/8/2021 was taken out by the respondents, seeking to cite the appellant for contempt of court and to restrain the County Land Registrar, Trans Nzoia from effecting registration and transfer of an irregular subdivision of L.R. No. 7847/4, which the appellant had undertaken through a private surveyor, instead of a government surveyor in July 2017, giving the respondents less acreage than what was decreed to them in the decree.



4. By an order issued on 27/4/2023, the appellant was not only sentenced to serve 6 months imprisonment sentence, but was also directed to procure a government surveyor to implement the decree; otherwise, the implementation of the private surveyor's report was stayed. To facilitate the implementation through an application dated 27/4/2023, the court on 8/7/2023 directed the OCS Kachibora Police Station to provide security during the exercise. Up to 6/5/2023, the court record shows that the appellant was represented by the firm of Eric Choge & Co. Advocates.
5. Aggrieved by the foregoing, the appellant, by an application dated 11/7/2023, sought to stay, review, and set aside the enforcement of orders issued on 16/5/2022. The application was supported by an affidavit sworn by William Ayenda on 11/5/2023. The reasons advanced were that the appellant had not been served with the application, he was condemned unheard, that he had complied with the decree of the court as per the County Surveyor's letter dated 7/2/2017, land control board consent dated 10/4/2019, area list, area map, and the forwarding of the completed file to the Director of Survey by the County Surveyor's letter dated 10/2/2020. He attached the same as annexures marked WWA-(1), (2), (3), (4), and (5).
6. In the supporting affidavit, the applicant deposed that the titling process had been fully undertaken and the 64 beneficiaries were only awaiting the issuance of their individual title deeds at the lands office. The appellant deposed that, had he been properly served with the application for contempt dated 3/8/2021, he would have responded to the same and explained to the court the status of the decree implementation.
7. The application was opposed through a replying affidavit of Enock Bulimo Simidi, sworn on 17/5/2023, and Wilson Nasamba, sworn on 9/6/2023. The court record shows that Jane Osinde Odanga, Stephen Wanjala, Charles Wafula, Timothy Poula, Stephen Khayanga, and Jane Nyachienga, being some of the respondents in this appeal, filed a notice dated 5/6/2023, dissociating themselves from the applications dated 3/8/2021 and 27/4/2023, since they were satisfied with the appellant's progress in the implementation of the decree.
8. Further, one Wilson Nasambu filed a supplementary affidavit sworn on 9/6/2023, denying that the appellant had honoured the decree as alleged or at all in his supporting affidavit, to his satisfaction of getting 5 acres of the land.
9. By a ruling dated 3/7/2023, the trial court found no merit in the application. The appellant, through this appeal, faults the order made on 3/7/2023, dismissing his application on seven main grounds of appeal.
10. The appeal was directed to be canvassed by way of written submissions. The appellant relies on written submissions dated 16/12/2024. It is submitted that the main ground of his application dated 3/8/2021 was for non-service of the impugned application and his substantial compliance with the implementation of the decree.
11. The appellant submits that service of court processes is governed by Order 5 Rule 8 of the Civil Procedure Rules. In this appeal it is submitted that there was contest as to proper service of the application dated 3/8/2021, upon him which the trial court failed to critically analyse as to whether the affidavit of service met the parameters of Order 5 Rules 8 and 15 of the Civil Procedure Rules, otherwise the affidavit of service of 10/5/2022 had glaring errors, leaving doubts as to whether there was proper service. Reliance is placed on National Bank of Kenya -vs- Peter Oloo Aringo [2004] eKLR.
12. The appellant submits that the trial court failed to consider his explanation for failing to file a response to the application dated 3/8/2021, or by considering the overwhelming evidence in his



- favour, and other evidence by the respondents, or the record showing that he had complied with the implementation of the decree.
13. The appellant submits that the trial court failed to find that under Order 10 Rule 11 of the Civil Procedure Rules, it had powers to set aside a judgment in default of appearance as held in *Mathew -vs- Masika* [2022] KEHC 12194.
  14. The respondents rely on written submissions dated 10/1/2025. It is submitted that after the appellant failed to implement the decree dated 7/11/2002, the respondents took out a notice of motion dated 3/8/2021 for contempt of court, which was properly served upon the appellant as per the affidavit of service on record, but the appellant failed to respond to it.
  15. It is submitted that the trial court's decision cannot be faulted on account of non-service under Order 5 Rules 6, 8, 15, and 16 of the Civil Procedure Rules. Reliance is placed on *Shadrack Arap Baiywo -vs- Bodi Bach KSM CA Civil Appeal No. 122 of 1986* [1987] eKLR.
  16. On setting aside, the respondents submit that Order 10 Rule 11 and Order 51 Rule 15 of the Civil Procedure Rules grant the court powers to set aside judgments under principles set out in *Yooshin Engineering Corporation -vs- Aia Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) (7 July 2023) (Judgment).
  17. The respondents submitted that the ruling by the trial court was a regular one since proper service of the application had been effected. Further, it is submitted that the application for setting aside was filed more than a year without any explanation for the inordinate delay, showing also that the appellant was least concerned with the status of the implementation of the decree. Other equity aids only the vigilant and not the indolent, and he who comes to equity must come with clean hands.
  18. The respondents submitted that the appellant has deliberately avoided implementing the decree, yet he wants to seek justice when he has been slow to abide by the court orders issued on 7/11/2003.
  19. Section 78 of the *Civil Procedure Act* grants this court powers to hear and determine appeals arising out of the decisions of the lower court. An appellate court of the first instance has to analyse, re-evaluate, and come up with its own findings and a conclusion. See *Selle -vs- Associated Motor Boat* [1968] EA 123.
  20. Having perused the lower court record of appeal and the original file, the grounds of appeal, and the written submissions, this appeal turns on two issues:
    1. If the appellant had been properly notified of the application dated 3/8/2021 and the orders issued on 16/5/2022.
    2. If the appellant was entitled to a review or the setting aside of the orders made on 16/5/2022, and leave to contest the application dated 3/8/2021.
  21. The trial court relied on an affidavit of David Osoro, sworn on 10/5/2022, who deposed that he had visited the homestead of the appellant on 26/4/2022, situated at Motosiet Sublocation, Jasho Farm, Trans Nzoia County, where he had met the appellant, who he had previously served with court processes, as per other affidavits on record sworn by the same process server on 28/4/2021 and 10/6/2021.
  22. The appellant faults the trial court for relying on the affidavit of the process server, yet it was contested or was not conclusive evidence on whether or not the appellant had been duly served with the application for contempt of court.



23. In *Kingsway Tyres & Automart Ltd -vs- Rafiki Enterprises Ltd* [1996] eKLR, the court observed that the onus is on he who disputes the facts of the service of court processes. In *Peter Gitahi Kamathi -vs- Nyeri Municipal Council* [2014] eKLR, the court held that the law is not mandatory for the court to cross-examine the process server under oath every time there is an allegation by a party that he was not properly served with court processes.
24. In *Shadrack Arap Baiywo -vs- Bodi Bach* [1987] eKLR, the court observed that there is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it to show that the return is incorrect; otherwise, an affidavit of service is admissible evidence, in the absence of contests on it.
25. Where an applicant disputes the authenticity of an affidavit of service, he should always be at liberty to request the court to issue summons to the process server for cross-examination on the authenticity of his affidavit. Further, and in the absence of the cross-examination, the court, in examining whether there was proper service or not, looks at the whole situation and sees to it that justice is done. See *Bouchard International (Services) Ltd -vs- Philip Nzioki M'mwereria* [1987] KECA 75 (KLR).
26. In this appeal, there is no evidence that the appellant sought and was denied an opportunity by the trial court to summon and cross-examine the process server under Order 5 Rule 16 of the Civil Procedure Rules. The failure to call for and examine the process server by the appellant was tantamount to admitting the version of his testimony. The trial court had recently relied on similar affidavits of service as indicated above, where the same process server had effected service upon the appellant, which he had not contested. Furthermore, the appellant did not explain how he became aware of the adverse orders.
27. Coming to whether the trial court's failure to allow the appellant to contest the application and if there was justification or satisfactory compliance with the decree as a basis for reviewing or setting aside the ruling, the burden was on the appellant to demonstrate that he had a plausible draft reply to the application dated 3/8/2021. The court has not come across any draft that was attached to the affidavit in support answering to the application dated 3/8/2021.
28. Even though the appellant relied on an affidavit of Ben Wanyama Situma, the deponent does not state whether he was a licensed surveyor or not. The alleged surveyor did not attach to his affidavit a surveyor report to support his assertions in paragraph 4 of his affidavit.
29. This obviously left doubts in the mind of the trial court and of this appellate court as to whether a proper survey had been conducted, when it was conducted, whether the survey exercise involved the government surveyor as decreed, or was surrendered to the government surveyor for approval and its implementation. Looking at the affidavit of Ben Wanyama Situma, whose credentials are lacking, it leaves more doubts than answers to me as to whether the appellant had, as alleged, implemented the decree of the trial court or not.
30. Courts have held that written submissions cannot replace pleadings or amount to evidence. What was before the trial court was the affidavit evidence of the appellant, sworn on 11/5/2023, against the replying affidavit of Enock Bulimo Simidi, sworn on 17/5/2023, supplementary affidavit of Wilson Nasambu, sworn on 9/6/2023, and an unsubstantiated letter dated 6/6/2023. The letter cannot amount to sworn testimony in support of the appellant's claim that he had implemented the decree of the trial court.
31. The law on setting aside a default order is that sufficient cause for non-attendance must be brought to the satisfaction of the court why the order should be upset. Sufficient cause means the cause for which the appellant could not be blamed for not only his absence during the hearing of the application for contempt of court, and for not implementing the decree.



32. Sufficient cause is a question of fact. It has no universal application as held in Wachira Karani -vs- Bildad Wachira [2016] eKLR. The appellant had to demonstrate what had prevented him from attending court or implementing the decree. In Parimal -vs- Veena, Supreme Court of India in Civil Appeal No. 1467 of 2011, held that sufficient cause means that the party had not acted negligently or there was a want of bona fide on its part in view of the circumstances of a case, such that a party cannot be alleged to have not acted diligently.
33. The authority relied upon by the appellant of National Bank of Kenya -vs- Peter Oloo Aringo (supra) and Mathews -vs- Masika are distinguishable. Triable issues had been raised in the draft defence.
34. The instant appeal is based on an affidavit of service of court processes, where the process server had previously served other documents upon the appellant, which he did not contest. The appellant had not attached a draft intended reply to the application; to rely upon if at all, he was to be given a second chance to contest the application.
35. The basis for seeking the stay of the enforcement orders issued on 16/5/2023 had to be laid. The decree of the trial court was to be implemented by a government surveyor and not a private surveyor. The private surveyor did not attach any surveyor's report duly submitted to the government surveyor in compliance with the decree of the trial court to show the efforts that the appellant had so far made to purge the contempt of court.
36. The review or setting aside of orders must have been based on tangible and cogent expert evidence of compliance with the decree and not on mere allegations. The inordinate delay of over 20 years without complying with court orders to put a stop to the endless litigation had not been sufficiently explained by the appellant. The upshot is I find the appeal lacking merits. It is dismissed with costs.
37. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT  
AT KITALE ON THIS 19<sup>TH</sup> DAY OF NOVEMBER 2025.**

In the presence of:

Court Assistant – Dennis

1<sup>st</sup> respondent

Kiarie for the appellant present

Mafumbo for the respondents present

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

