



**Catholic Diocese of Eldoret Registered Trustees v Kimutai & another (Land Case E014 of 2024) [2025] KEHC 15764 (KLR) (4 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15764 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
LAND CASE E014 OF 2024  
GMA ONGONDO, J  
NOVEMBER 4, 2025**

**BETWEEN**

**CATHOLIC DIOCESE OF ELDORET REGISTERED TRUSTEES ..... PLAINTIFF**

**AND**

**BETHWEL KIMUTAI ..... 1<sup>ST</sup> DEFENDANT**

**PHYLLIS KIMUTAI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The present ruling pertains to an application by way of a Notice of Motion dated 29<sup>th</sup> October 2024 by the Defendants (The Applicants herein) through Oduor Munyua & Gerald Attorneys at Law LLP for the orders infra;
  - a. Moot
  - b. Moot
  - c. The process server who served the pleadings be cross examined.
  - b. The default judgment entered against the Applicants on 24/10/2024 and all other consequential orders arising therefrom be set aside.
  - c. Upon prayer (b), (c) and (d) above being granted, the Applicants be allowed to file their statement of defence upon payment of the requisite fees.
  - e. Cost of this application be in the cause.
2. The anchorage of the application is the 1<sup>st</sup> Applicant's affidavit of fourteen paragraphs sworn on even date with the annexed documents including a copy of plaint marked 'A' as well as the order marked 'B' and the eight grounds, inter alia;



- a. The Applicants were not served with the pleadings herein.
  - c. The application has been brought without undue delay.
  - d. The Applicants' right to fair hearing as enshrined under Article 50 of *the Constitution* of Kenya 2010 will be curtailed.
  - e. The Applicants have a good and triable defence.
3. By the replying affidavit of fifteen paragraphs sworn on 8<sup>th</sup> October 2024 by Right Rev. John Arap Lelei, the Auxiliary Bishop of the plaintiff (The Respondent herein) with the accompanying documents inclusive of a copy of resolution (JAL-1), a copy of judgment (JAL-2) and a copy of affidavit of service (JAL-3), the respondent opposed the application. The respondent averred in part that the application is unmerited, made in bad faith and constitutes an abuse of the court process, that proper service of the summons and pleadings was duly effected on the applicants who elected not to participate in the proceedings and that the matter proceeded lawfully to judgment.
  4. Also, the respondent averred that fair hearing under Order 50 (1) (supra), must be balanced against the need for procedural efficiency and the plaintiff's right to finality in litigation. That the judgment entered on 24<sup>th</sup> October 2024, is valid and based on substantive evidence presented during the formal proof hearing. That the applicants have not demonstrated the existence of a good and triable defence.
  5. Hearing of the application was by written submissions further to the directions of the Court given on 20<sup>th</sup> May 2025 in consonant with Order 51 Rule 16 of the Civil Procedure Rules 2010.
  6. By the submissions dated 6<sup>th</sup> October 2025, Learned Counsel for the applicants made reference to the orders sought in the application, the default judgment, among other things, and identified three issues for determination inclusive of whether the applicants were duly served in the suit. Counsel submitted that the applicants were not served thereof and that the orders sought in the application be granted in the spirit of Natural Justice. To buttress the submissions, counsel relied on Order 5 rule 8 and Order 6 Rule 1 of the Civil Procedure Rules 2010, the case of *Makena-vs-Naiwa* {2025} KKHC1583 (KLR), the case of *James Kanyiiita Nderitu & another-vs-Marios Philotas Ghikas & another* (2016) eKLR and other authoritative pronouncements.
  7. In the submissions dated 9<sup>th</sup> October 2025, learned counsel for the respondent referred to, inter alia, the prayers in the application, the judgment entered herein, the replying affidavit and framed four issues for determination including whether the application is defective and whether the applicants were served herein. In the analysis of the issues, counsel cited section 5 of the *Oaths and Statutory Declarations Act* Chapter 15 of the Laws of Kenya, Order 5 Rule 15 of the Civil Procedure Rules 2010, the case of *Re MWO 9Minor* {2021} eKLR and *Justus Achinga Keburi & 25 others-vs-Attorney General* (2013) eKLR, among others and termed the application defective, lacks merit and should be dismissed with costs to respondent.
  8. In the foregone, the issues for determination are as delineated in the parties' respective submissions and are condensed to whether;
    - a. the application is defective and
    - b. the Applicants deserve the order to cross examine the process server in the first instance.
  9. On the first issue, Learned Counsel urged this Honourable Court to strike out the Applicant's application for being non-compliant with the law. That the affidavit in support of the application lacked a jurat and has not been executed by the Applicant nor duly commissioned by a Commissioner



- of Oaths. That the Applicants' failure to adhere to the statutory requirements governing affidavits demonstrates a lack of diligence and undermines the integrity of the Court process, rendering the application defective.
10. Section 5 of the *Oaths and Statutory Declarations Act* (Cap 15) relied upon in the Respondent's submissions, provides for Commissioner for Oaths before whom any oath or affidavit is taken shall state what place and on what date the oath or affidavit is taken or made.
  11. Notably, the 1<sup>st</sup> Applicant's name, the place and date it was taken before a Commissioner for Oaths, are revealed in the affidavit. The stamp of the said Commissioner thereon captures the name, place and the date thereof. Therefore, the application is in conformity with MWO and Keburi cases (supra) and the said statutory provision hence, not defective.
  12. It is the lamentation of the Applicants that they were not duly served with the pleadings and summons in this suit. The Respondent stated otherwise and relied on the (JAL-3) being an affidavit of service annexed to the replying affidavit sworn by Pella Amugune Isisaga, an authorized Process Server.
  13. The affidavit of service of seven paragraphs was sworn at Eldoret by the said Process Server on 3<sup>rd</sup> August 2024 (JAL-3) and the same was made before Masai C. Jane Commissioner for Oaths.
  14. Order 5 (Supra) in entirety sets out the process of issuing and serving summons inclusive of personal service through an agent. A cross examination of the Process Server to establish whether correct service was done herein, is sought by the Applicants. It is in line with Order 5 Rule 16 of the Civil Procedure Rules 2010.
  15. Furthermore, I bear in mind the ends of justice under Articles 50 (1), 159 (2) (a) (b) and (d) of *the Constitution* of Kenya 2010, James Nderitu case (supra), sections 3 and 3A of the *Civil Procedure Act* (Cap 21) and sections 3 and 19 of the *Environment and Land Court Act* 2015 (2011). So, it is the considered view of this Court is that the Applicants deserve the order to cross examine the process server who served the summons and pleadings as sought in the application.
  16. Thus, the application dated 29<sup>th</sup> October 2024 is hereby partially allowed in terms of prayer number (c) therein as stated in paragraph 1 (c) hereinabove.
  17. The other orders sought in the application shall await the outcome the cross examination of the Process Server, Pella Amugune Isisaga on 1<sup>st</sup> December 2025 as regards the affidavit sworn on 3<sup>rd</sup> March 2024 herein. Summons to issue through the applicants' counsel accordingly.
  18. It is so ordered.

**DATED AND DELIVERED AT KAPSABET THIS 4TH DAY OF NOVEMBER 2025**

**HON. G M A ONGONDO**

**JUDGE**

In the presence of;

Oscar Oduor Learned Counsel for the Defendants/Applicants

Ms. Chirchir instructed by Chesoo Learned Counsel for the Plaintiff/Respondent

Walter, Court Assistant

