



Kibui & another v Kinunu & Njuguna (Being the Personal Representative of the Estate of Beth Watiri Kanja - Deceased) & 3 others (Environment and Land Case E069 of 2024) [2025] KEELC 7867 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE E069 OF 2024
JM ONYANGO, J
NOVEMBER 12, 2025**

BETWEEN

**NJERI KIBUI 1ST PLAINTIFF
MOSES KIMEMIA KIMANI (BEING PERSONAL REPRESENTATIVE OF THE
ESTATE OF PATRISIA WAIRIMU KIMANI ALIAS PATRICIA WAIRIMU
KIMANI) 2ND PLAINTIFF**

AND

**BETH MIRIGO KINUNU & PETER KIARIE NJUGUNA (BEING THE
PERSONAL REPRESENTATIVE OF THE ESTATE OF BETH WATIRI KANJA -
DECEASED) 1ST DEFENDANT
GEORGE NJUGUNA KINUNU 2ND DEFENDANT
NYAKINYUA INVESTMENTS LTD 3RD DEFENDANT
THE LAND REGISTRAR RUIRU 4TH DEFENDANT**

RULING

1. What is before me for determination is the 1st and 2nd Defendants/Applicants' Notice of Motion dated 3rd April 2025 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. Spent
 - iv. That the Judgment dated 17th January 2024 be stayed pending the hearing and determination of this suit.



- v. Spent.
 - vi. That there be stay of execution of the order issued on 17th January 2024, adopting the Lands Tribunal Award as a judgment of the court, pending the hearing and determination of the suit.
 - vii. That this honourable court be pleased to set aside the order of 17th January 2024, which adopted the Lands Tribunal award as a judgment of the court, together with any consequential orders and decree issued thereof.
 - viii. That the Defendants/Applicants be granted leave to file their pleadings.
 - ix. That this honourable court do grant such further orders as it deems fit and in the interest of justice.
 - x. That the costs of this Application be provided for.
2. The Application is anchored on the grounds set out on the face of the Notice of Motion and the Supporting affidavit of George Njuguna Kinunu sworn on 3rd April 2025.
 3. In the said Affidavit, he depones that the present matter originates from a dispute before the Thika Land Disputes Tribunal, being Claim No. TKA/LDT/55/2008/6, which concerned land parcel Ruiru/Ruiru East Block 2/799, and in which the Tribunal issued an award. He explains that neither he nor the 1st Defendant/Applicant was ever served with any notice, pleadings, or hearing dates relating to the application for adoption of the Tribunal's award.
 4. He contends that based on a false representation of service made by the Plaintiffs/Respondents, the court proceeded to adopt the Tribunal's award as a judgment of the court on 17th January 2024, and a decree was subsequently issued on the same date, all without the participation or knowledge of either him or the 1st Defendants/Applicants.
 5. The 2nd Applicant deposes that, had they been properly served, they would have opposed the application on various grounds, including that the Plaintiffs/Respondents had delayed for over 15 years before attempting to enforce the Tribunal's award. He asserts that this inordinate delay is unjustified and that the Respondents' sudden effort to enforce the award after such a long period is a malicious attempt to dispossess the Applicants of their land and homes.
 6. He further avers that the 1st and 2nd Defendants/Applicants have been in continuous occupation, possession, and development of the suit property for more than 15 years, and that setting aside the judgment will give them an opportunity to defend their ownership and occupation on merit. The deponent states that the present application was made promptly and without unreasonable delay, immediately after they became aware of the order adopting the Tribunal's award.
 7. Finally, he contends that it is in the interest of justice, that the judgment delivered on 17th January 2024 be set aside so that the matter can be heard afresh and determined on its merits.
 8. The Application was disposed of through written submissions. The Applicants filed written submissions dated 30th July 2025. The Respondents neither filed a response to the Application nor submissions.

Applicants' Submissions

9. Counsel for the Applicants identified two issues for determination, namely: (i) whether the order of 17th January 2024 adopting the Lands Tribunal award as a judgment of the court, together with any



- consequential orders and decree, ought to be stayed and set aside; and (ii) whether the 1st and 2nd Defendant/Applicants should be granted leave to file their pleadings.
10. Counsel submitted that the dispute originated from the Lands Tribunal at Thika under Claim No. TKA/LDT/55/2008/6, which concerned land parcel Ruiru/Ruiru East Block 2/799. She emphasized that the Tribunal delivered its award on 5th May 2009, but the Plaintiffs/Respondents took no action to enforce or adopt the award for over fifteen years, only moving the court in 2024 to have it adopted as a judgment.
 11. It was her submission that Article 50(1) of *the Constitution* guarantees every person the right to a fair hearing. The Applicants, she contended, were never served with the application to adopt the award or notified of any hearing date and were therefore condemned unheard, contrary to both constitutional and procedural guarantees. She argued that the Plaintiffs/Respondents misled the court into believing that proper service had been effected, thereby procuring judgment through fraud and procedural irregularity. She maintained that the right to be heard was fundamental and could not be compromised, relying on the Court of Appeal decision in Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] KECA 240 (KLR), where the court reiterated that no one should be condemned unheard.
 12. Counsel further submitted that the conduct of the Plaintiffs/Respondents amounted to fraudulent misrepresentation and abuse of the court process, warranting the setting aside of the judgment *ex debito justitiae*. She contended that the Respondents' delay of more than fifteen years in seeking to enforce the Tribunal's award was inordinate, unexplained, and contrary to the principles of equity, justice, and the finality of litigation. According to her, justice was intended for the vigilant and not for those who slept on their rights. She relied on the case of *Ivita vs Kyumbu* [1975] KLR, in which the court held that unexplained and inordinate delay was inexcusable and prejudicial.
 13. Counsel argued that during the long period of inaction, the Applicants had been in peaceful possession and development of the suit land and had established their homes thereon. She contended that allowing enforcement of a 2009 award would be highly prejudicial and unjust. She further stated that the Applicants' defence raised triable issues that deserved to be heard to achieve a just outcome and that failure to do so would subject them to grave prejudice.
 14. She invoked Order 10 Rule 11 of the Civil Procedure Rules, which grants the court discretion to set aside a judgment, and cited *Shah vs Mbogo & Another* [1967] EA, where it was held that the court's discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake.
 15. Counsel submitted that the process leading to the impugned judgment was fundamentally defective as there was no proper service, yet the Respondents had misled the court to believe otherwise. She argued that a judgment obtained through fraud could be challenged at any time, referring to Section 47 of the *Evidence Act*, which allows any party to demonstrate that a judgment was procured by fraud or collusion.
 16. She contended that if the judgment was not set aside, the Applicants stood to lose their homes, land, and developments without ever being heard, a loss that monetary compensation could not remedy. She argued that the balance of convenience favoured the Applicants, who risked being rendered homeless, and relied on *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR, where the court stated that the balance of convenience lies where the greater harm would be suffered if the application was not granted.



17. In conclusion, counsel submitted that the Applicants had demonstrated sufficient grounds for the court to exercise its discretion and inherent jurisdiction to set aside the judgment, stay execution, and allow them to participate in the proceedings on merit. She argued that the Applicants had shown a violation of their fundamental rights, serious procedural irregularities, and a real risk of injustice if the orders sought were denied.
18. She urged the court not to permit the Plaintiffs/Respondents to use its authority as a shield for their prolonged neglect and inaction, invoking the equitable maxims that “equity aids the vigilant, not the indolent” and “delay defeats equity.” She relied on the case of *Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited* [2014] eKLR, in support of her submission.
19. Counsel therefore prayed that the court grant the application as prayed, noting that failure to do so would result in substantial and irreparable prejudice to the Applicants.

Analysis and Determination

20. I have carefully considered the Notice of Motion dated 3rd April 2025, the Affidavit sworn in support and the written submissions of counsel. From the record, the following issues arise for determination: Whether this court has jurisdiction to stay or set aside the judgment and order dated 17th January 2024, adopting the Lands Tribunal award.

Whether this court has jurisdiction to stay or set aside the judgment and order of 17th January 2024

21. Before delving into the merits, this court must address an apparent procedural anomaly. The record shows that the present suit was instituted through a Plaint dated 7th May 2024 and filed on 9th May 2024. However, the judgment the Applicants seek to stay and set aside was delivered earlier, on 17th January 2024, before the institution of this suit.
22. It follows that the impugned order did not emanate from these proceedings but from a separate matter, which the court presumes the Plaintiffs/Respondents had moved the court to adopt the Lands Tribunal award as a judgment of the court. That order, and the decree that followed, therefore belong to a distinct case file and not to the present proceedings.
23. The Applicants, who are the Defendants in this suit, contend that they were never served in the earlier proceedings and that the adoption of the Tribunal award was obtained through misrepresentation and procedural irregularity. They have invoked this court’s inherent power to set aside the said order and to stay execution pending a hearing on the merits.
24. It is trite law that a court may, in exercise of its inherent jurisdiction under Section 3A of the *Civil Procedure Act*, set aside its own orders where it is demonstrated that the orders were obtained through fraud, misrepresentation, or want of service. However, such jurisdiction can only be properly invoked before the same court or within the same case in which the impugned order was made, unless the matter has been formally transferred or consolidated with a later suit.
25. The pleadings before me and the court record do not show that the earlier file in which the order of 17th January 2024 was issued has been transferred or consolidated with this suit. In the absence of such consolidation, this court may not purport to sit on appeal or review the decision of another court of concurrent jurisdiction. The proper procedure would ordinarily be to move the court that issued the order, either by an application for review, setting aside, or by appeal, as the case may be.
26. Nonetheless, the Applicants have raised weighty issues touching on the right to a fair hearing under Article 50(1) of *the Constitution* and the question of whether the adoption of the Tribunal award was



done without service or notice to them. These are issues that go to the root of due process and could justify the court's intervention, if properly brought before it.

27. Consequently, the court finds that this application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12TH DAY OF NOVEMBER 2025.

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J. M ONYANGO
JUDGE

In the presence of:

Miss Kiema for Ms Gichio for the 1st & 2nd Defendants/Applicants

No appearance for the Plaintiffs

Court Assistant: Hinga

