



**Ndundo & another (Suing as the) v Mwangela (Environment and Land  
Case 107 of 2018) [2025] KEELC 8433 (KLR) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8433 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND CASE 107 OF 2018**

**EO OBAGA, J**

**DECEMBER 4, 2025**

**IN THE MATTER OF APPLICATION FOR REMOVAL OF CAUTION  
REGISTERED AGAINST TITLE NO. SULTAN HAMUD TOWNSHIP/93**

**BETWEEN**

**MICHAEL M NDUNDO ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN MUSYIMI MUTAKI (SUING AS THE OFFICE BEARER'S OF AUME NI  
MEKO SELF-HELP GROUP) ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE**

**AND**

**ANNUNCIATA N'THAMBI MWONGELA ..... DEFENDANT**

**RULING**

DIVISION - Introduction

1. This is a ruling in respect of a notice of motion dated 10<sup>th</sup> April, 2025 in which the Defendant/Applicant seeks the following orders:
  1. Spent
  2. That this honourable court may be pleased to review, vary, vacate, discharge and/or set aside its judgment/order issued on 13<sup>th</sup> November, 2024.
  3. That this honourable court be pleased to allow the applicant the opportunity to be heard and matter determined after fair hearing.
  4. That costs of this application be provided for.



## **Background**

2. The Plaintiffs/Respondents are officials of Aume Ni Meko Self Help Group (the group) who purchased two plots known as Sultan Hamud Township/91 and 93 measuring 0.0405 and 0.480 hectares respectively. The two plots were purchased on 24<sup>th</sup> October, 1997 from one German Pius Kaiba. The group later processed and obtained title in respect of Sultan Hamud Township/93 (Suit property) which was registered in the group name on 23<sup>rd</sup> August, 2016.
3. On 30<sup>th</sup> November, 2016, the Applicant and two others caused a caution to be registered against the title to the suit property. The Respondents were then forced to file an originating summons on 9<sup>th</sup> November, 2018 seeking removal of the caution. The originating summons was served upon the Applicant and the other two cautioners but they neither entered appearance nor appeared in court on 25<sup>th</sup> April, 2024 when directions were given as to the disposal of the originating summons by way of written submissions.
4. The court having been satisfied that the Applicant and her co-cautioners were duly served with court directions on filing of submissions proceeded to render a judgment on 13<sup>th</sup> November, 2024 wherein an order was given directing the Land Registrar to remove the caution. The caution was subsequently removed in compliance of the court order.

## **Applicant's Contention**

5. The Applicant contends that she was never served with summons to enter appearance and that as a result judgment was given in favour of the Respondents without affording her an opportunity to be heard. It is on this basis that she prays that the judgment of 13<sup>th</sup> November, 2024 be set aside and she be accorded an opportunity to be heard in her defence.

## **Respondents' Contention**

6. The Respondents contend that the Applicant was duly served with the originating summons together with summons to enter appearance but she ignored to defend the originating summons.
7. The Respondents contend that at some stage, their originating summons was dismissed. They made an application to court which reinstated the same. The Applicant and the two others were served with the application for reinstatement but they did not attend court. When the Applicant and the other two were served with mention notice for 25<sup>th</sup> April, 2024 where direction on hearing were given, the Applicant did not attend court.
8. The Respondents contend that the Applicant's application is an abuse of the court process which has been brought by a person intent on delaying the course of justice.

## **Parties submissions**

9. The parties were directed to file written submissions. The Applicant filed her submissions dated 25<sup>th</sup> July, 2025. The Respondent filed their submissions dated 17<sup>th</sup> July, 2025.



## **Applicant's submissions**

10. The Applicant submitted that this court has a wide discretion to set aside a default judgment. She relied on Order 10 Rule 11 of the Civil Procedure Rules and the case of James Kanyiita Nderitu –vs- Marie Philotas Ghika & Another (2016) eKLR where it was held as follows:

“In regular default judgment, the Defendant will have been duly served with summons to enter appearance but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such Defendant is entitled under Order 10 rule 11 of the Civil Procedure Rules to move the court to set aside the default judgment and grant him leave to defend the suit, in such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such as the reason for the failure of the Defendant to file his memorandum of appearance or defence as the case may be, the length of time that has elapsed since the default judgment was entered, whether the intended defence raises triable issues, the respondent prejudice such party likely to suffer”.

11. The Applicant also relied on the case of Kabutha –vs- Mucheru (2004) eKLR where Justice Musing (as he then was) stated as follows:

“With respect to the trial magistrate, she had no discretion to exercise in circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defense so as to persuade the court to set aside an exparte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process”.

## **Respondent's Submissions**

12. The Respondents submitted that this court should not exercise its discretion to assist the Applicant who has clearly demonstrated that she is out to delay the course of justice. They relied on the case of CMC Holdings Ltd –vs- James Mumo Nzioki (2004) eKLR where it was held as follows:

“Applying the principle that the courts discretion to set aside the exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

13. The Respondents also relied on the case of Hui Commercial Enterprises (Africa) Company Limited Aka Hui Commercial EPZ (K) Limited and where it was stated as follows:

“There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service”.



14. The Respondents also relied on the case of James Kanyiita (Supra) in urging the court not to exercise its discretion in favour of the Applicant.

### **Analysis and Determination**

15. I have carefully considered the Applicant’s application as well as the opposition to the same by the Respondents. I have also considered the submissions filed by the parties. The only issue for determination is whether the Applicant has demonstrated that she is entitled to the favourable discretion of this court.
16. Order 10 Rule 11 of the Civil Procedure Rules states 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”.
17. The Principles upon which a court should exercise its discretion were well set out in the case of James Kanyiita (Supra). Whereas the Applicant had denied ever being served with summons to enter appearance or any other pleadings in paragraph 4 of the supporting affidavit to her application, under paragraph 6 of her supplementary affidavit sworn on 10<sup>th</sup> May, 2025, she admitted that she had been served with the primary pleadings and that she made numerous attempts to the court registry in a bid to file her defence but was informed that the suit had been dismissed and therefore had nothing to defend.
18. As the Applicant has admitted that she was served with pleadings, what ensued was a regular judgment which can only be set aside if there is demonstration that she had sufficient reason why she did not file defence.
19. The Applicant’s reason for not filing a defence is that she was informed by the court registry staff that the suit had already been dismissed. The originating summons were filed on 9<sup>th</sup> November, 2018. The originating summons was dismissed on 17<sup>th</sup> June, 2021. An application for its reinstatement was made on 22<sup>nd</sup> March, 2023. This application was allowed on 1<sup>st</sup> February, 2024. It is following the reinstatement that the court finally gave directions on disposal of the originating summons. There are affidavits which show that the Applicant was served. There being no challenge by way of cross examination of the process server, as per the decision in Hui Commercial Enterprise (Africa) Africa Co. Ltd (Supra), there is a presumption that the Applicant was served.
20. Judgment was delivered on 13<sup>th</sup> November, 2024. This application was made 10<sup>th</sup> April, 2025. This is a period of five months later. The Applicant has not explained the delay. Apart from registration of caution which has already been removed, the Applicant has not demonstrated by way of affidavit that she is entitled to defend the suit. The basis for cautioning the suit property is that she had beneficial interest as a purchaser. This interest has not been demonstrated.

### **Disposition**

21. From the above analysis, it is clear that the Applicant’s application is devoid of any merit. The same is dismissed with costs to the Respondents.

It is so ordered.

.....

**HON. E. O. OBAGA**

**JUDGE**



**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF DECEMBER, 2025.**

In the presence of:

Applicant in person.

Ms. Mwangi for Mr. Muli for Respondents.

Court assistant – Steve Musyoki

