



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCLC NO. E019 OF 2024

WANJIKU NGANGA.....1ST

PLAINTIFF/RESPONDENT

SAMUEL NJUE.....2ND

PLAINTIFF/RESPONDENT

VERSUS

PATRICK MUTHUI.....1ST

DEFENDANT/RESPONDENT

AGNER ORWARU.....2ND

DEFENDANT/RESPONDENT

AND

**FREDRICK MWANGI T.A KILIMANJARO HOUSING
DEVELOPMENT.....INTENDED INTERESTED
PARTY/APPLICANT**

RULING

1. The 1st Defendant/Applicant seeks to set aside a Court Order issued against the Defendants in default of appearance and defence and stay of execution of the order dated 11/03/2024 by Chamber Summons dated 8/05/2025 made under Article 50 and 159 of the Constitution of Kenya, Order 10 rule 11 of

the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Motion is supported by the Affidavit of Partrick Muthui the 1st Defendant/Applicant who has deposed that he has authority to swear the affidavit on behalf of the 2nd Defendant/Applicant sworn on the same day.

2. The Applicants seek the following:

- i. Spent
- ii. THAT there be stay of delivery of Judgment set to be delivered on 10th July 2025
- iii. THAT the Respondents be ordered to serve the Applicants with the plaint and all documentary evidence to enable them file a defense/response
- iv. THAT this Honorable Court be pleased to add FREDRICK MWANGI T/A Kilimambogo Housing Development to be enjoined as an interested party through this Application
- v. THAT the Honorable Court be pleased to grant leave to the Applicants/interested parties to fully participate in the proceedings herein and filed such pleadings, affidavits, submissions and other documents subsequent to joinder
- vi. THAT the costs of this Application be provided for.

3. The application is premised on the grounds on the face of it.

4. The application is opposed by the Plaintiffs through a joint Replying Affidavit sworn on 28/05/2025. Both parties were directed to file written submissions. The Defendants/Applicants filed their submissions dated 3/06/2025 while the

Plaintiffs/Respondents filed theirs dated 24/07/2025. I have considered both submissions.

Issues for Determination

5. The central issues for determination for me are the following:
 - a) Whether Defendants/Applicants were properly served with Summons;
 - b) Whether the Defendants/Applicants failed to appear in Court at the hearing due to sufficient cause.

a) Whether Defendants/Applicants were properly served with summons

6. The Defendants/Applicants were served with Hearing and Mention Notices throughout and they cannot claim lack of service on their part. The same notices are annexed in the Affidavit sworn by the Plaintiffs/Respondents in objection to the application to reopen the case.
7. The Court in **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR** made the following observation;

“The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups

will not deter the Court, ex debito justitiae, from setting aside such an order.”

8. Lady Justice Aburili in **Burhani Decorators & Contractors v Morning Foods Ltd & Another [2014] eKLR** held that where the Appellant argued that failure to attend Court with his Advocate was not intentional but inadvertent as it was neither notified of the hearing date nor was his Advocate made aware of the hearing date as fixed and diarized by his Clerk in the latter’s diary only, without transferring the date to the Advocate’s diary for that date. Consequently, the Learned Judge held that;

“Is the mistake excusable just because it is made by the Court? My answer is no. A mistake is a mistake, and as long as sufficient explanation is given showing good faith like in this case, it should be excused and a party given an opportunity to be heard on their grievances on merit.”

9. I have perused the Affidavits of Service which the Process Server swears that the Defendants/Applicants refused to sign. This led to the Plaintiffs/Respondents seeking the Court’s authority to serve via substituted service which was done via the Standard Newspaper dated 13/02/2025. My observation is that there is indeed a deliberate attempt to delay and obstruct the course of justice in this matter. The fact is that the Defendants/Applicants were served by a

Process Server and by substituted service and this cannot just be wished away.

10. I am persuaded that the Plaintiffs/Respondents served the Applicants and they all along were aware that the instant suit was progressing.

b) Whether Defendants/Applicants failed to appear in Court at the hearing due to sufficient cause.

11. The Defendants/Applicants aver that this Court issued an order on 13/03/2024 by Justice Kemei. The Applicants then aver that they did not know about this suit but that when they discovered, they decided to file the current application.
12. The Defendants/Applicants have not disclosed how they discovered the existence of this suit and more so at the time when a Judgment date had been reserved despite not participating in the hearing. They have also claimed that the Process Server did not serve them but they have failed to have the Process Server summoned for cross-examination.
13. Further the Defendants/Applicants have completely failed to acknowledge that they were also served via substituted service through the Daily Nation dated 13/02/2025. There is therefore a delay between the time of filing the instant application dated 8/05/2025 and when Justice Kemei issued orders dated 13/03/2024. No explanation has been given about this delay except for the

Defendants/Applicants alleging to be affected by the said order and to not knowing about the current suit.

14. Therefore, in light of the holding in **Express (K) Ltd vs Manju Patel (2001) eKLR** at page 5 that:

“In view of the fact, that the explanation as to why steps were delayed has not come from those who were responsible for the delay namely the insurers, it is impossible to say the hardship now faced by the Defendant in this respect is attributable to accident or inadvertency or mistake. As the Court’s discretion is not intended to assist a person who has sought to delay the cause of justice, I am not in the foregoing circumstances persuaded that the delay in question was not deliberate. ... and I dismiss the Defendant’s application with costs to the Plaintiff.”

15. It was recognized in **Egal Mohamed Osman v Inspector General of Police & 3 Others [2015] eKLR** at paragraph 50 that;

“In the case of S v Zuma & Others (1995) 2 SA 642 (CC) the South African Constitutional Court held that a party alleging a violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited.”

16. The Constitution of Kenya 2010, frowns upon technical justice. It loves and laconically advocates for substantial justice. That is why under Article 159 (2) (a), (b) & (d) it provides as follows:

“(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles -

a) Justice shall be done to all, irrespective of status;

b) Justice shall not be delayed.

c) Justice shall be admitted without undue regard to procedural technicalities.”

17. Therefore, it cannot be and it should not be let to lie in the mouth of the Defendants/Applicants or be implied that yes, the Defendants were served with the hearing notices but because they chose not to defend the suit, then the Court should turn back the clock to pre-hearing time. This will lead to delay of justice and against Article 159 (2) (b).

18. Consequently, no plausible reasons have been set up by the Defendants/Applicants and setting aside the scheduled Judgment herein to reopen this case would be merely postponing the day of reckoning while the Plaintiffs/Respondents are prejudiced with the unnecessary delay. Also, there has to be an end to litigation and parties should not be encouraged to take judicial time for granted.

19. The provisions contained in Order 12 of the Civil Procedure Rules are aimed at obviating situations where litigants hold Courts and opposite parties to ransom by ensuring that their absence will delay hearing and determination of suits.
20. I note that the Court on its own motion considering the Application filed on the CTS arrested the Judgment that was scheduled to be delivered on 10/07/2025 in an Order dated 03/06/2025. Thus, the prayer for arresting the Judgment is overtaken by events.
21. As stated, despite having denied being served by the Process Server, the Applicant did not seek to have the Process Server summoned for cross-examination. The Applicants were also served through substituted service which is usually engaged after all reasonable effort has been made to trace the parties and the Plaintiff is unsuccessful. In the instant case the Applicants were served via the Daily Nation dated 10/02/2025. Again, the Defendants/Applicants did not raise this issue in their application.
22. So, in this application the central issue raised by the Defendants/Applicants is that they were not served with the Summons and the matter proceeded without them being aware. They therefore sought to arrest not only the Judgment but to have the Plaintiffs serve them and for Court to have an intended Interested Party be enjoined to the suit.

23. In response to the issue of service, the Plaintiffs contended that whereas the Defendants/Applicants disputes the service, they have not applied to have the Process Server summoned for cross-examination. Further, that the Applicants were all along aware that the suit was proceeding because their application is about arresting a Judgment which they have not explained how they learned that the matter had progressed to the Judgment stage.

24. Also, the Plaintiffs/Respondents contend that the Defendants/Applicants have not told the Court where they were all along when the suit was listed for hearing.

25. Counsel for the Plaintiffs/Respondents submitted that the Court should consider the fact that Counsel for the Defendants/Applicants did not call for the Process Server to be cross-examined on the contents of the Affidavit of Service.

26. In the case of **Shadrack Arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR**, the Court of Appeal quoting **Chitaley and Annaji Rao**; The Code of Civil Procedure Volume II page 1670 stated 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. 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."

27. Under Order 10 rule 11 of the Civil Procedure Rules, the Court has unfettered discretion to set aside Judgment on such terms as it deems fit and just (see **Shah v Mbogo and Another [1967] EA 116**). Since the Court on its own motion noting the application to arrest the Judgment already did so vide the Chamber decision of 03/06/2025 there is no irregular Judgment on record but the matter can be reopened to allow the Defendants/Applicants to file their pleadings and to be heard.

28. I am aware that from the evidence before me the odds lean against the reopening of the case due to the laxity shown by the Defendants/Applicants towards defending this matter. However, I am of the view that it is important that I hear both sides of the case in order to arrive at a fair decision.

29. I also note that the Plaintiffs/Respondents did not indicate any prejudice they stand to suffer which cannot be compensated in monetary terms if the Defendants/Applicants case is heard. At the same time the Plaintiffs/Respondents did not address the issue of joinder and so I take the position that they are not opposed to it.

30. Having reached this conclusion, it is unnecessary to deal with the other grounds proffered in support of the application. I allow the Notice of Motion dated 8/05/2025 in the following terms:

- i. The Defendants/Applicants shall file and serve their Defence within 14 days from the date hereof.**
- ii. The prayer to allow joinder for Intended Interested Party is hereby granted. The Intended Interested Party shall thus have 14 days from the date hereof to file any pleadings they wish to rely on at trial.**
- iii. Upon expiry of 14 days the window of filing their Defence and or any pleadings shall lapse and no document filed after expiry of 14 days shall be admitted on record and shall stand automatically expunged from the Court record.**
- iv. The Defendants/Applicants shall pay thrown away costs of Kesh 40,000 to the Plaintiffs/Respondents before the next mention.**
- v. Next mention shall be on 23/02/2026.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF JANUARY, 2026 VIA MICROSOFT TEAMS.

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MOGENI J
JUDGE

In the presence of:

Mr. Mwaura for the 1st and 2nd Plaintiffs/Respondents

Mr. Munene for 1st and 2nd Defendants/Applicants

Mr. Melita - Court Assistant

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MOGENI J
JUDGE

ORIGINAL