M'Iburi & 4 others v Iburi (Environment and Land Case E004 of 2024) [2026] KEELC 140 (KLR) (19 January 2026) (Ruling)

Neutral citation: [2026] KEELC 140 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE E004 OF 2024

JO MBOYA, J

JANUARY 19, 2026

BETWEEN

SAMSON MUREGA M'IBURI ..... 1ST PLAINTIFF

PAUL MBUTHIA M'IBURI ..... 2ND PLAINTIFF

SUSAN KATHURE ..... 3RD PLAINTIFF

CHARLES KIRIGIA M'IBURI ..... 4TH PLAINTIFF

DAVID NKUMBO M'IBURI ..... 5TH PLAINTIFF

AND

DANIEL RUKARIA IBURI ..... DEFENDANT

RULING

1. What is before is the Notice of Motion Application dated 13/11/2025 brought pursuant to the Provisions of Sections 1A, 1B, 3A and 63e of the *Civil Procedure Act* and order 10 Rule 11; Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules and wherein the Defendant/Applicant [herein after referred to as the Applicant], has sought the following reliefs:

    i. That the Honourable Court be pleased to certify this application of utmost urgency and to hear it exparte and on a priority basis in the 1st instance.

    ii. That the Honourable Court be pleased to issue an order for the stay of execution of the judgement/decree rendered on 30th October, 2025 and all consequential orders herein pending interpreters hearing and the determination of this application.

    iii. That the Honourable court be pleased to set aside the Judgment/Decree rendered on 30th October, 2025 and all consequential orders herein and grant the Defendant/Applicant unconditional leave to defend the suit.

iv. That the Honourable court be pleased to allow the firm of G M Wanjohi Mutuma & Co. Advocates to come on record in place of the Firm of Kabuthi Mootian Nyaga & Co. Advocates on behalf of the Defendant/Applicant herein.

v. That the costs of the application be provided for.

2. The subject application is premised on the various grounds which have been enumerated at the foot thereof and in particular: that the Applicant herein instructed and retained Counsel to apply for setting aside of a previous Judgment which had been entered against the Applicant; that the previous counsel duly filed an application, which application was heard and allowed vide ruling rendered on the 24.06.2025. Furthermore, the Applicant has contended that following the delivery of the said ruling, the court set aside the default judgement and thereafter granted liberty to the Applicant to enter appearance and file a statement of defence within set timelines.

3. Additionally, it has been contended that despite being aware of the terms of the ruling, the Applicant's previous counsel failed to comply with the directions of the court, including filing the statement of defence. To this end, it has been posited that the Applicant's previous counsel misconducted himself and has therefore denied the Applicant the opportunity to canvass his case before the court.

4. Moreover, the Applicant has also contended that the failure to file the statement of defence and the attendant documents is a mistake of his counsel. In this respect, the Applicant avers that the mistake of the counsel ought not to be visited upon him [Applicant]. In addition, it has been contended that the Applicant has a triable defence worthy of being canvassed before the court.

5. The subject application is supported by the affidavit of Daniel Rukaria Iburi [the Applicant] sworn on even date and wherein the deponent has reiterated the contents of the grounds contained in the body of the application. Besides, the deponent has annexed assorted documents, including a copy of the ruling which was delivered on 24/06/2025.

6. The application under reference was opposed by the Plaintiffs/Respondents by a Replying Affidavit sworn on the 16.01.2026 and wherein the deponent has averred that the Applicant herein was afforded due opportunity to file and serve the requisite statement of defence and attendant document. Nevertheless, it has been contended that the Applicant failed to comply with/or adhere to the terms of the ruling of the court. Moreover, it has also been posited that the Applicant herein is merely intent on delaying, obstructing or defeating the due process of the court.

7. The Plaintiffs/Respondents have averred that the conduct of the Applicant constitute[s] a pattern and a scheme that is orchestrated to defraud the cause of justice. To this end, it has been posited that the conduct of the Applicant does not meet the threshold to warrant invocation of the discretionary powers of the court. The Respondent has therefore implored the court to dismiss the application with costs.

8. The instant application came up for hearing on 19.01.2026 and where upon the advocates for the parties agreed to canvass and dispose the application by way of oral submissions. The court thereafter issued directions and the application was canvassed. For good measure, the submissions ventilated by/ on behalf of the respective parties are on record.

9. Having reviewed the application, the supporting affidavit sworn by the Applicant; the replying affidavit in opposition thereto and an upon consideration of the submissions by the parties, I come to the conclusion that the determination of the subject application turns on two [2] key issues, namely; whether the applicant herein is entitled to partake of and benefit from the equitable discretion of the

court; and whether the respondent shall be disposed to suffer prejudice [if any] should the subject application be granted.

10. Regarding this first issue, it is common ground that this court is seized of the requisite discretion to vary, review and/or set aside an exparte/default judgment; or ruling, in an endeavor to afford the parties an opportunity to canvass their case[s]. The discretion of the court is unfettered. Nevertheless, even though the discretion is unfettered, the said discretion must be exercised judiciously and not whimsically or arbitrarily. {See the decision in the case of Patel Versus East African Cargo Handlers Limited [1974] E A Shah Versus Mbogo [1967] E and Philip Kiptoo Chemwolo & Another Versus Augustine Kubende & Another [1986] eKLR.

11. Having appraised myself of the relevant principles, it is now apposite to revert to the facts of this case and to discern whether the Applicant herein is deserving of the equitable discretion of the court. Firstly, it is worthy to recall that the Applicant herein had mounted a previous application seeking to set aside a default judgment and which application was heard and disposed of vide a ruling rendered on the 24.06.2025. For good measure, the court allowed the application and indeed set aside the default judgment that had been delivered against the Applicant.

12. Moreover, the court ventured forward and issued assorted directions and circumscribed timelines for inter allia: the filing of the statement of defence; the list and bundle of documents and the attendant documents. In addition, the court also directed that the matter be mentioned on the 24.07.2025 for further directions. Notably, the ruling of the court was delivered in the presence of the learned counsel for the Applicant.

13. Be that as it may, the Applicant herein failed to comply with or adhere to the terms of the ruling. Instructively, the Applicant failed to file a statement of defence.

14. On the 17/09/2025, the matter came up for further directions, whereupon learned counsel for the Defendant admitted non-compliance with directions of the court and thereafter sought further indulgence. The court heard the oral application by the counsel for the Applicant and thereafter issued further directions.

15. In particular the court, made the following directions:

    i. The defendant herein was granted leave to file and serve a statement of defence but the same has failed/neglected to do so.

    ii. Furthermore, no valid ground has been offered/proffered.

    iii. Consequently, the leave/liberty to file the statement of defence be and is hereby deemed to have lapsed.

    iv. The matter shall now proceed on the basis of formal proof.

    v. Formal proof shall be taken on the 8/10/2025.

    vi. Costs shall be in the cause.

16. It is important to highlight and underscore that the orders in terms of the preceding paragraphs have neither been varied nor set aside. Nevertheless, the Applicant is now back before the court seeking the setting aside of the judgment and liberty to file a statement of defence. I am afraid that the current application by and on behalf of the Applicant is not only mis-conceiving, but same is also prohibited by the doctrine of res judicata, particularly, as far as the Filing of the Statement of Defence is concerned. [see Section 7 of the *Civil Procedure Act*]. [See also the holding of the court in the case of I E B C

& Others Versus Maina Kiai & Others 2017 eKLR, where the Court of Appeal expounded on the ingredients underpinning the doctrine of res judicata.

17. Other than the foregoing, it is also worthy to recall that a litigant seeking to benefit from discretionary powers of the court or condonation, is obligated to tender and place before the court plausible, cogent, compelling and credible explanation explaining the circumstance leading to the default. In an endeavor to partake of equitable discretion, the applicant must not attempt to mislead the court. However, in respect of the instant matter, the applicant herein has not only attempted to mislead the court but has also been economical with the truth.

18. Additionally, even though the Applicant contends that the failure to comply with the court directions was a mistake of the counsel, the Applicant himself has not demonstrated the diligent efforts [if any] that he deployed in an endeavor to ensure that the directions of the court were complied with.

19. It is not lost on me that the cases belong to the parties and hence, even where a party has retained counsel, it behooves the party to make follow ups. Sadly, in respect of the instant matter the Applicant has not documented any effort that was undertaken. [See the holding in the case of HABO Agencies Limited Versus Wilfred Odhiambo Musingo [2015] eKRL, where the court of appeal underscored the obligation of a party to ensure follow ups and to exercise due diligence.

20. In the case Tana Teachers' Cooperative And Credit Society Limited Versus Andriano Muchiri [2018] KECA 192 (KLR) the court of appeal dealt with a scenario where a party had disregarded and ignored the orders of the court.

21. The court stated thus:

> " ...Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late state in the proceedings..."
>
> As rightly submitted by Mr. Kimani, that leisure age when a litigant could simply attribute his shortcomings to mistake of counsel is over.

19. Furthermore, the court ventured forward and stated as hereunder: 'Therefore, as rightly held by the ELC, the Aappellant was bound to observe and comply with the Civil Procedure Rules as well as the directions of the court. Consequently, the argument that the Respondent's Applications had served to clog or fetter the appellant's efforts to have the matter listed for directions is neither here nor there. As per the record, the only interlocutory application filed by the respondent after the directions of 18th September, 2015 is the application seeking dismissal of the appeal for noncompliance with those very directions. In other words, the said application was necessitated by the appellant's failure to take steps to have the matter listed for hearing. At the time the said applications were lodged, the 45 day window the appellant had been given by court had already lapsed."

22. In my humble view, the conduct of the Applicant and failure to abide by the directions of the court demonstrate a scheme to delay, obstruct or defeat the due process of the court. Such conduct, does not augur well with the cause of justice. Moreover, that conduct is contra the provisions of sections 1A, and 1B of the *Civil Procedure Act*,Chapter 21, Laws of Kenya; which espouse the overriding objectives of the court and the obligation of parties to assist the court to realize the overriding objective.

23. Finally, it is important to underscore that the discretion[s] of the court to set aside or vary a default judgment must not be exercised so as to assist a party who has demonstrated a concerted effort to delay,

or defeat the due process of the court. In respect of this matter, the conduct of the Applicant has been less than equitable.

24. In the case of Maina Vs. Mugiria (1983) KLR the Court of Appeal re-visited, the legal principles that underpin exercise of discretion while engaging with an application for setting aside a judgment.

25. The court stated thus;

> "(a) Firstly, there are no limits or restrictions on the Judge's discretion Except that it should be based on such terms as may be just because the main concerns of the court is to do justice to parties.
>
> (b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.
>
> (c) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically.
>
> (d) The power to set aside does not cease to apply because a decree has been issued."

22. Turning to the second issue namely; whether the respondent shall suffer prejudice or otherwise, it is important to highlight that the dispute before hand touches on and concerns a claim that the suit property was registered in the name of the Applicant albeit to hold on trust for himself and the Respondents. The Applicant has failed to discharge his obligation as a trustee and has subjected the Respondents to undue anxieties. The delay in finalizing the subject matter does therefore expose the Respondents to denial and deprivation .

23. In a nutshell, I find and hold that the Respondents shall no doubt suffer prejudice. Moreover, there is no gainsaying that the matters before court ought to be heard and disposed of expeditiously. This is the import and tenor of the provisions of the Article 159 2 [b) of *the constitution* 2010.

24. Before concluding on this matter it is instructive to reference the observation of the Court of Appeal in the case of Said Swelen Ghethan Saanun Versus the Commission of Lands. [2015] ekLR where the court of appeal stated as hereunder:

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them."

Final Disposition

25. Flowing from the foregoing, it is evident that the applicant herein has not demonstrated the requisite ingredients to warrant the exercise of discretion in his favor. On the contrary, the antecedent conduct of the applicant is such that same must not benefit from equity.

26. In the upshot, the final orders that commend themselves to the court are as hereunder:

    i. The Application dated 13.11.2025 be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Plaintiffs/Respondents.

    iii. The Cost in terms of clause [ii] above shall be agreed upon and in default be taxed by Deputy Registrar.

27. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU ON THE 19TH DAY OF JANUARY, 2026.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein Court Assistant

Miss. Nyokabi holding brief for Mr. Mutuma for the Defendant/Applicant

Miss Mwenesi for the Plaintiffs/Respondents.