



**Awuona v Muia & 6 others (Environment and Land Case  
200 of 2015) [2025] KEELC 5714 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5714 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 200 OF 2015**

**NA MATHEKA, J**

**JULY 29, 2025**

**BETWEEN**

**ASTON OKETCH AWUONA ..... PLAINTIFF**

**AND**

**NAOMI MITI MUIA ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIP MUSEMBI MUIA ..... 2<sup>ND</sup> DEFENDANT**

**CHARITY MUTHONI MACHAGA ..... 3<sup>RD</sup> DEFENDANT**

**BENJAMIN IRUNGU MWANGI ..... 4<sup>TH</sup> DEFENDANT**

**JOSEPH MUCHIRI KANGANGI ..... 5<sup>TH</sup> DEFENDANT**

**MUUNGANO SELF HELP GROUP ..... 6<sup>TH</sup> DEFENDANT**

**LAZARUS NMUIA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated 7<sup>th</sup> June 2024 and is brought under Order 10 Rule 11 of the Civil Procedure Rules, 2010, Sections 1A,1B and 3A of the Civil Produce Act seeking the following orders;
  1. That this application be certified as urgent, and be heard ex-parte at the first instance.
  2. That pending hearing and determination of this application, there be stay of execution of the Judgment of this court dated 30<sup>th</sup> April, 2024.
  3. That the Honourable Court be pleased to set aside, and/or quash the Judgment dated 30<sup>th</sup> April, 2024.
  4. That the 2<sup>nd</sup> Defendant/Applicant herein be granted unconditional leave to defend the suit herein.



5. Costs of this application be provided for.
2. It is based on the following grounds that by a written agreement dated 18<sup>th</sup> August, 2010 the 1<sup>st</sup> Defendant/Applicant sold to the 3<sup>rd</sup> to 6<sup>th</sup> Defendant the parcel of land known as LR. No. Donyo Sabuk/Komarock Block 1/20114. That the 2<sup>nd</sup> Defendant being the lawful Attorney of the 1<sup>st</sup> Defendant through Power of Attorney registered as P.A. No. 1111/010 and 1112/010 signed the Sale Agreement on behalf of the 1<sup>st</sup> Defendant. That upon payment of the total purchase price, the 1<sup>st</sup> Defendant/Applicant gave consent to the transfer of the subject land to the 3<sup>rd</sup> to 6<sup>th</sup> Defendants. That subsequently, the Certificate of Title to the said parcel of land was processed in the name of the 6<sup>th</sup> Defendant herein. That the 2<sup>nd</sup> Defendant/Applicant was not served with Summons to Enter Appearance on the suit herein or any other court document despite him having had Power of Attorney and having represented the deceased seller in said sale transaction. That the 2<sup>nd</sup> Defendant/Applicant became aware of the suit herein on or about May, 2024 when he was served with Judgment dated 30<sup>th</sup> April, 2024. That since he was not aware of the proceedings, the 2<sup>nd</sup> Defendant/Applicant did not testify in the case. That the 2<sup>nd</sup> Defendant/Applicant herein instructed his Advocates on record in this matter to peruse the court file, obtain copies of relevant documents filed and to file the appropriate application. That the 2<sup>nd</sup> Defendant/Applicant has a good defence which raises triable issues. That the Defendants/Applicants stand to suffer irreparable harm unless the orders sought are urgently granted. That the Applicants are beseeching this Honourable Court to stay the Judgment dated 30<sup>th</sup> April, 2024 pending the hearing and determination of this application. That it is in the interest of justice to grant the orders sought.
3. The Plaintiff/Respondent submitted that the 2<sup>nd</sup> Defendant was represented by the firm of Gachiengo Gitau Advocates who were present when the matter came up for judgement. There was no appeal filed and the matter rested there. This matter was concluded by a court of competent jurisdiction and the only option for the Applicant was to appeal.
4. I have carefully considered the pleadings, rival submissions and authorities presented before the Court. The main issue for determination is whether the court should set aside the judgment of the court dated 30<sup>th</sup> April, 2024. Of relevance is Order 10 rule 11 of the Civil Procedure Rules which provides 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.”

5. The terms upon which the court may vary or set aside a default judgment are well established in numerous decisions on the issue. The Court of Appeal in the case of James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & another, CA No. 6 of 2015 eKLR, held that;

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a 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 a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to 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 factors 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 respective prejudice each party is likely



to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among others.

6. As was held in *CMC Holdings Limited vs Nzioki* (2004) 1KLR173, the power of the court to set aside *ex parte* judgment is discretionary and the court is enjoined to consider the particular circumstances of each case. In that case, the Court of Appeal held as follows;

In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle....The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues...The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues.”

7. This court has carefully perused the court file and find that by a memorandum of appearance filed in court on the 1<sup>st</sup> October 2015 the firm of Gachiengo Gitau and Company Advocates entered appearance for the 1<sup>st</sup> to the 6<sup>th</sup> Defendants including Philip Musembi Muia who is the 2<sup>nd</sup> Defendant/Applicant. The statement of defence and counter claim for the 1<sup>st</sup> to the 6<sup>th</sup> Defendants was dated 1<sup>st</sup> October 2015 was also filed on the said date. The 2<sup>nd</sup> Defendant further wrote and signed his statement on the 19<sup>th</sup> October 2015 which was duly filed in court on the 26<sup>th</sup> October 2015. During the trial on the 16<sup>th</sup> May 2023, the 4<sup>th</sup> Defendant testified on behalf of the other defendants with the presence of their advocate. I am satisfied that the 2<sup>nd</sup> Defendant and the other Defendants were properly served through their Advocate on record and participated throughout the trial. I disagree with the Applicant’s submissions that the matter proceeded undefended. I find that this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF JULY 2025.**

**N.A. MATHEKA**

**JUDGE**

