



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 14 OF 2023 O.S**

**LUCAS NGANGA JOHN..... APPLICANT**

**VERSUS**

**A. S FONDO**

**.....RESPONDENT**

**JUDGMENT**

**1.** The respondent submitted a Notice of Motion to this Court on 22nd July 2025, seeking various reliefs:

**a) Spent;**

**b) Spent;**

**c) The Honorable Court be pleased to set aside, vacate, and/or review the judgment delivered on 2nd October, 2024, together with all consequential orders.**

**d) The respondent be granted leave to file a defense and other necessary pleadings within such period as this**

**Honorable Court may direct.**

**e) The costs of this application are to be provided for.**

- 2.** The application was opposed. The applicant filed a replying affidavit dated 6th October 2025. In that affidavit, he deposed that the respondent intended to delay the course of justice by seeking to set aside the default judgment and that the respondent had not offered a reasonable and satisfactory reason for the delay in filing a defense.
- 3.** The application was canvassed through written submissions. I acknowledge receipt of submissions from counsels representing the parties, with much appreciation, as they went a long way toward resolving the issues raised in the application.
- 4.** The issues I frame for the court's decision, based on the materials and submissions submitted to me, are as follows: Whether the ex parte judgment issued on 2nd October 2024 should be annulled. Whether the respondent has established a triable and bona fide defense. Whether the respondent was correctly served. Cost.
- 5.** The Os herein, dated 23<sup>rd</sup> June 2023, was filed by the

applicant seeking a declaration that he be registered as proprietor of Parcel Tana River/Witu/62, currently registered in the name of A.S Fondo (the respondent), having acquired the same by way of adverse possession.

6. Despite service by advertisement in the Daily Nation, after this Court had granted leave, the respondents did not enter an appearance or mount a defense. Consequently, the matter proceeded to a hearing on formal proof on 24th April 2024, and judgment was entered for the applicant on 2nd October 2024 in the following manner:

***“Consequently, the applicant’s claim in the Originating Summons dated 23<sup>rd</sup> June 2023 succeeds and is hereby upheld as prayed. Since the claim was not defended, no order has been made regarding costs.”***

7. The respondent asserts that the substituted service employed in this matter was obtained without disclosure that the respondent's postal address and residence were publicly known and readily accessible. This omission renders the process irregular and violates the duty of full disclosure mandated in ex parte applications.

8. The respondent further avers that the draft defense raises

substantial and triable issues, including: fraudulent entry by a third party lacking legal authority; illegality of the applicant's possession; interrupted and non-exclusive occupation; and the absence of the hostility required under Section 38 of the Limitation of Actions Act. See **Tree Shade Motor Ltd v D.T. Dobie & Another [1995-1998] 1 EA 324**, in which the Court held that: where a draft defense raises even one triable issue, the court is compelled to allow the defendant to be heard.

**9.** The applicant in this suit contends that the respondent was served with a summons, as acknowledged, and was aware of this suit but ignored it. He further alleges that he was never personally served. The purpose of a summons is to notify a party that a case has been filed against it and to prepare to file a response to defend the suit.

**10.** The applicant avers that once service is properly effected, if a party does not respond, the Court, if satisfied that the service was done according to the procedure, will proceed to hear and determine the case without further reference to the respondent. This is why the Civil Procedure Rules were enacted: to provide specific procedures and consequences

for non-compliance.

**11.** On 11 October 2023, this Court allowed the application filed by the applicant on 8th August 2023 and directed that service of the suit upon the respondent be effected by way of substituted service, through an advertisement in either the Daily Nation or The Standard newspaper, as the Court deemed this the most appropriate mode of bringing the proceedings to the respondent's attention.

**12.** Pursuant to the said Court order, the applicant proceeded to effect service upon the respondent by placing a notice of advertisement in the Daily Nation newspaper dated 16 October 2023. The said advertisement was published in the Daily Nation, a newspaper of wide national circulation, thereby duly complying with the Court's directive on substituted service.

**13.** Despite service having been duly effected by substituted service through the Daily Nation newspaper on 16th October 2023, the respondent failed to enter an appearance and did not file a response to the OS. Consequently, the Court, upon being satisfied that service had been properly effected and

that the matter was unopposed, delivered its judgment on 2nd October 2024, thereby allowing the prayers in the Originating Summons.

**14.** It is averred that the substituted service was effected as directed by the Court order and that an affidavit of service was filed. The only contention is that the respondent has a known address, but he does not dispute that the substituted service was regular.

**15.** The applicant thus argues that, because service was regularly made, the ex parte judgment was valid and regular and cannot be set aside solely on the ground of non-service of the summons to enter appearance. Thus, the explanation provided does not demonstrate why the suit was not defended. Even though the respondent contends that he has a plausible and meritorious defense which raises triable issues, the respondent ought to have shown sufficient reason as to why such plausible defense was not advanced as and when it was required to be put forth, despite service having been duly effected, as the Court's discretion cannot be exercised to assist a person who has deliberately sought, by evasion or otherwise, to obstruct or delay the cause of

justice.

**16.** Because the court issued directions for substituted service, the judgment then in place stands regular.

**17.** What remains to be deduced is whether the court should allow the respondent to defend in view of the defence in place.

**18.** The respondent in the draft defense raises issues regarding the applicant's entry onto the suit property, alleging that it was due to a fraudulent sale, which will be substantiated by documentary evidence annexed to his affidavits at the hearing. The respondent postulates that the law prohibits a party from transforming fraudulent or unlawful possession into adverse possession. See **Samuel Miki Waweru v. Jane Njeri Richu [2007] eKLR**. Besides, the respondent contends that the entirety of the tenets of adverse possession will also be challenged at the hearing.

**19.** Although the judgment herein was obtained regularly, the court has discretion to set it aside. In **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, the Court of Appeal emphasized that this discretion was intended to avoid

injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice.

**20.** Given that Article 50(1) of the Constitution guarantees every person the right to a fair hearing, and that the Courts have consistently reaffirmed (**Mbaki & Others v Macharia & Another [2005] 2 EA 206**) that no party should be condemned unheard and that a plausible defense has been raised by the applicant/respondent in the draft defense, I believe that the discretion to set aside the default judgment in place is the right recourse to take to give the respondent his day in court.

**21.** Consequently, the ex parte judgment of this court dated 2nd October 2024 is set aside, and all consequential orders arising therefrom are vacated. The respondent is granted leave to file a defense and any necessary pleading within 14 days of this ruling.

**22.** The costs of this application shall be in the cause.

**Dated, signed, and delivered virtually at Nyeri on this**

**5th day of February 2026.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr. Mwau for the Applicant**

**Mr. Bunde for the Respondent.**

**Kendi: Court Assistant**

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