



**Kagogo & 3 others (Suing as the joint personal representatives of the Estate of Kabogo Tharau - Deceased) v Mayenga & 3 others (Environment and Land Case 16 of 2020) [2026] KEELC 590 (KLR) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 16 OF 2020  
J OMANGE, J  
JANUARY 29, 2026**

**BETWEEN**

**MONICA WAMBUI KAGOGO ..... 1<sup>ST</sup> PLAINTIFF  
JOHN THARAO KABOGO ..... 2<sup>ND</sup> PLAINTIFF  
HEZEKIAH NJAGI KABOGO ..... 3<sup>RD</sup> PLAINTIFF  
GEORGE NGURE KABOGO ..... 4<sup>TH</sup> PLAINTIFF  
SUING AS THE JOINT PERSONAL REPRESENTATIVES OF THE ESTATE OF  
KABOGO THARAU - DECEASED**

**AND**

**PHILIP ONDIEKI MAYENGA ..... 1<sup>ST</sup> DEFENDANT  
CONLET BITEKI KIKECHI ..... 2<sup>ND</sup> DEFENDANT  
EMBAKASI RANCHING CO LTD ..... 3<sup>RD</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant/ Applicant seeks to set aside the Judgement of this court delivered on 30<sup>th</sup> January 2025 and further that leave be granted to the firm of M/s Gachara Adhiambo & Co. Advocates come on record and file their statement of defence
2. The application is brought on the grounds ;



- a. That the failure to put in a statement of defence was a mistake on the part of their former counsel who entered appearance but failed to file a defence which matter they were made aware of after the ex parte judgement had been entered.
  - b. That the Applicant has a strong and valid defence that raises triable issues, which it should be allowed to present in this case by being granted leave to file a statement of defense.
  - c. That titles cancelled by the Judgement delivered by this honourable court in this matter on 30th January, 2025 affects the Applicant herein which is the sole allocating authority of the suit properties and also affects the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are the rightful owners of the suit properties and that cancellation of the lease documents will cause immense irreparable loss to the 1st and 2nd Defendants.
3. The Plaintiffs/ Respondents opposed the application vide a Replying affidavit by the 4<sup>th</sup> Plaintiff dated 28<sup>th</sup> April 2025. He insisted that the application was made in bad faith as the 3<sup>rd</sup> Defendant had actually entered appearance and filed a statement of defense but failed to prosecute the matter. That the advocate on record made an application to cease acting dated 19<sup>th</sup> August 2021 which application was not prosecuted and was ultimately dismissed.
  4. The Plaintiffs contend that hearing notices were served upon the said firm, which failed to attend court and prosecute the matter. Judgment was entered after the court had addressed itself on issues raised by all parties during pre-trial.
  5. Counsel for the Applicant relied on the provision of order 10 rule 11 of the civil procedure rules. He submitted that the defence by the applicant raised triable issues. He argued that given that the subject matter involved proprietary rights, it would be in the interest of Justice to set aside the default judgement. That the mistake not to file a defence was occasioned by the advocate for the 3<sup>rd</sup> Defendant who did not inform his clients who were keen on prosecuting the matter that they had ceased acting in the matter. He cited the case of James Kanyita Nderutu & Another Vs Marios Philotas Ghika & another (2016) eKLR.
  6. On the issue of having a new counsel come on record, Counsel submitted that the application was merited as the previous counsel's mistakes had led to the default Judgement necessitating the filing of the present application.
  7. On her part counsel for the Plaintiff/ Respondent submitted that no sufficient reasons had been given for setting aside the Judgement. Further that the Defence does not raise any triable issue. Counsel relied on the case of Civil Appeal no 94 of 2006 Job Kilach Vs Nation Media group & 2 others
  8. The twin issues for determination are whether the law firm of M/S GACHARA ADHIAMBO & CO. ADVOCATES should be allowed to come on record for the 3<sup>rd</sup> Defendant and secondly whether the Judgement should be set aside. The issue of change of advocate after Judgement is governed by Order 9 Rule 9.
  9. Order 9 rule 9 of the Civil procedure provides;
 

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

    - (a) upon an application with notice to all the parties; or



(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be

10. Parties have a right to legal representation of their choice. Order 9 however provides that once Judgement has been passed such change can only be entered once the outgoing advocate are notified. This provides the advocate with an opportunity to raise any objection if there are any outstanding issues between him and the client. In the instant case there was no such objection raised by the firm of Chege Kibathi & Co Advocates who previously represented the 3<sup>rd</sup> Defendant/ Applicant. I will therefore grant leave as prayed.

11. On the second limb of setting aside the Judgement, the jurisdiction of this Court to set aside an ex parte judgment is anchored in Order 10 Rule 11 of the Civil Procedure Rules:

“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.”

12. The first task is to determine whether the judgment is regular or irregular. The Court of Appeal in *James Kanyita Nderitu vs Maries Philotas Ghika & Another* [2016] eKLR drew the distinction between a regular and irregular Judgement thus;

“...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 appearances 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 (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).”

13. In this instant case; there is no contention as to service, as the Applicant was duly served and entered appearance hence the judgement is to regular. This Court must therefore proceed to consider whether the Applicant has laid a sufficient basis for the exercise of discretion in its favour.

14. The locus classicus of *Shah versus Mbogo* 1967] EA 116, underscored the importance of exercising the discretionary power of setting aside to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, but cautioned against exercise of the power to assist a party who has deliberately sought to obstruct or delay justice.

15. In the instant case, the 3<sup>rd</sup> Defendant has stated that he was not informed by his counsel of the hearing date hence the failure of the 3<sup>rd</sup> Defendant to participate in the proceedings. It is also a matter of record that the said counsel had filed an application seeking to cease acting way back on 19<sup>th</sup> August 2021. Given the breakdown in communication with its counsel it is probable the 3<sup>rd</sup> Defendant had no information on the position of the case. The failure to participate is therefore attributable to inadvertence rather than willful default. However I must also reiterate that the 3<sup>rd</sup> Defendant too had a responsibility to follow up with its counsel the position of the case.



16. The application was filed three months after delivery of the Judgement. However, in my view, the critical factor in deciding the application is the fact that the Judgement sought to be set aside points to gaps arising from the absence of the 3<sup>rd</sup> Defendants evidence. This suit revolves around ownership of land and the allocation of plots within Embakasi Ranching Company Limited. The 3<sup>rd</sup> Defendant, as the entity charged with the management, allocation, and documentation of the company's land parcels, is the custodian of records which are crucial to a just determination of the dispute. Its participation will therefore further the ends of justice which this court has a responsibility to safeguard.
17. I therefore find that this is a fit case for the court to exercise its discretion to set aside the Judgement subject to payment of costs to the Plaintiffs who opposed the application. As the other parties did not oppose the application they will not be awarded thrown away costs. The application is allowed in the following terms;
- a. The Judgment delivered on 30<sup>th</sup> January 2025 is hereby set aside to facilitate participation of the 3<sup>rd</sup> Defendant
  - b. The 3<sup>rd</sup> Defendant shall file and serve its documents and witness statements within 30 days of uploading the Ruling on the CTS.
  - c. That the other parties shall be at liberty to respond within 30 days of service.
  - d. The costs of this application shall be borne by the 3<sup>rd</sup> Defendant. The Plaintiff shall be paid thrown away costs of Kshs 100,000 before the hearing date.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 29<sup>TH</sup> DAY OF JANUARY 2026.**

**JUDY OMANGE**

**JUDGE**

In The Presence Of:

Ms. Muhuhu for Plaintiff/Respondent.

Ms. Njeri for Macharia for the 3<sup>rd</sup> Defendant/ Applicant.

Peter – Court Assistant.

