

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. E026 OF 2020

BENSON MUIA MULI:.....:PLAINTIFF/RESPONDENT

VERSUS

DAVID MATHERI WARIUNGI:.....:1ST DEFENDANT/APPLICANT

THE LAND REGISTRAR NAIROBI:.....:2ND DEFENDANT

RULING

The application is dated 13th August 2025 and is brought under Order 50 of the Civil Procedure Rules 2010, Section 1A, 1B 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent, service of the application be dispensed with and be heard ex-parte in the first instance.
2. That pending the hearing and determination of this application this Honourable Court do issue an order of stay of Notice to show Cause Application dated 21st January 2025.
3. That pending the hearing and determination of this Application the Honourable Court be pleased to grant an order of stay, staying the Ruling and Order delivered by this Honourable Court by Honorable Lady Justice Christine Ochieng on 7th November 2024 and dated 14th November 2024 and all consequential orders thereto and all resultant proceedings in this case.

4. That upon hearing and determination of this Application the Honourable Court be pleased to set aside the ex parte proceedings conducted from 2nd September 2024, the Ruling delivered on 7th November and the order emanating therefrom dated 14th November 2024 and grant leave to the 1st Defendant/Applicant to respond to the chamber summons Application dated 2nd September 2024.
5. That the costs of this Application be provided for.

It is supported the annexed affidavit of Nyangayo Vincent O. and grounds that the Applicant faces the risk of attachment and disposal of his personal properties and or arrest on account of a ruling and order that was entered on 7th November 2024. That the risk of attachment and arrest arise from the Notice to show cause dated 21st January 2025. That the Notice of Motion Application dated 2nd September 2024 and all consequential proceedings were conducted ex-parte with lack of service upon the Applicant together with the resultant ruling and order dated 7th November 2024. That the Plaintiff/Respondent alleges service was done at the Applicant/Advocate without service or proof thereof. That the Applicants place of service is well known to the Respondent but the Respondent never bothered to serve the Applicant. That the Applicant was never aware of the existence of the application dated 2nd September 2024 as he was never served. That the proceedings against the applicant in absence of proper service was a violation of the right to be

heard and contravenes the principles of natural justice. That unless urgent injunctive relief is granted, the Applicant stands to suffer prejudice and irreparable harm without having had the opportunity to be heard. That the application raises serious legal and procedural issues which warrant urgent attention of this Honourable Court.

This court has considered the application and submissions therein. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

This provision is amplified by Order 51, Rule 15 which provides that the Court may set aside an order made ex parte. In setting aside ex parte orders, the Court must be satisfied of one of two things, namely, either that the Respondent was not properly served or that the Respondent failed to appear in Court at the hearing due to sufficient cause. Essentially, setting aside an ex parte order is a matter of the discretion of the court.

In *Esther Wamaita Njihia & two others vs Safaricom Ltd* (2014) Eklr, the court held inter alia that;

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel v E.A. Cargo Handling Services Ltd.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see Shah v Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration v Gasyali.) It also goes without saying that the reason for failure to attend should be considered."

It then follows that the decision whether or not to set aside an ex parte order is discretionary. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See Shah vs Mbogo & Another (1967 EA 116.

The applicant's main contention was that That the Plaintiff/Respondent alleges service was done at the Applicant/Advocate without service or proof thereof. That the Applicants place of service is well known to the Respondent but the Respondent never bothered to serve the Applicant. That the Applicant was never aware of the existence of the application dated 2nd September 2024 as he was never served.

The Respondent in this application stated that the Applicant was properly served through his known address wakiliswan@gmail.com and an affidavit of service filed confirming the same (annexed and marked FK/3 is the affidavit of service together with a receipt confirming filing of the same, copy of the hearing notice and an email acknowledging receipt dated 26th September 2024.

Evidence of this email service of the application dated 2nd September 2024 has been adduced and the Judge was satisfied and hence proceeded with the hearing and rendered her ruling. I find that service was proper in this case and the proceedings of that day stand. 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 24TH DAY OF MARCH 2026.

N.A. MATHEKA

JUDGE

ORIGINAL