

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT MILIMANI**  
**ELC NO. E015 OF 2025[OS]**

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**HUSSEIN MOHAMMED HAJI** - **APPLICANT**

**VS**

**NAIROBI POWER ENGINEERS**

**LIMITED** - **RESPONDENT**

**RULING**

**(In respect of the Respondent's application dated 5/5/2025)**

1. By way of background, the Applicant instituted this suit by way of Originating Summons dated 3/3/2025 seeking for orders inter alia; Declaratory orders that he had acquired title to the parcel of land known as LR No.209/12939, the suit property herein, by way of adverse possession and thus entitled to be registered as the owner thereof in place of the Respondent.
2. Alongside the Originating Summons, the Applicant filed a Notice of Motion application of even date seeking in the main; a temporary injunction restraining the Respondent from evicting, taking possession, selling, transferring, leasing, charging or in any way interfering with the Applicants possession of the suit property pending hearing and determination of the suit. The Applicant also sought an order of inhibition against the property known as LR No. 36/2/321 pending the hearing and determination of the suit.
3. The Court directed the Applicant to serve the Respondent and slated the application for hearing. On 17/3/2025, the Court was informed that despite service, the Respondent had not filed a response to the application. Upon perusal of the Affidavit of Service of Boniface Kilonzo sworn on 11/3/2025, the Court being satisfied that service had been effected in accordance with the applicable rule upon the Respondent,

allowed the application in terms of Prayer 3 & 4(which were the substantive prayers) with no orders as to costs. It is the said orders issued on 17/3/2025 that are subject of this application.

4. The application before this Court is the Respondent's Notice of Motion dated 5/5/2025. The application is brought under Order 40 Rule 7 and Order 51 Rule I of the Civil Procedure Rules 2010, Sections IA, 1B, 3A of the Civil Procedure Act, Article 159 (2)(a) of the Constitution. The Respondent prays for orders that:
  - a. The ex-parte order of this Honourable Court made on 17/3/2025 and all consequential orders made therein be set aside, varied and/or vacated forthwith.
  - b. The Respondent/Applicant be granted leave to file a Replying Affidavit and other necessary documents in respect thereto in opposition to the Applicant's/ Respondent's Notice of Motion dated 3/3/2025.
  - c. Consequent to order 3 here above, the Notice of Motion dated 3/3/2025 be heard de novo.
  - d. The costs of this application be provided for.
  - e. Such other and/or further relief be granted as this Honourable Court may deem fit and just to grant in the circumstances of this matter.
5. The application is premised on the grounds on the face of it and supported by the affidavit of Alphonse Mwangi Gitonga, the Respondent's Director, sworn on even date. The deponent avers that the Respondent had engaged M.W. Muli of M.W. Muli & Co. Advocates to pursue its complaint regarding a forged title held by the Applicant. That on 3/4/2025, the said counsel informed him that they had received a copy of the Court order made on 17/3/2025 from Mr. Yegon from the DCI's Office, Makadara. That the said Officer was investigating the Respondent's complaint.

6. He avers that only after the Respondent's then-Advocate filed a Notice of Appointment were they able to download the pleadings and the application dated 3/3/2025. That Counsel also obtained an Affidavit of Service of Boniface Kilonzo, sworn on 11/3/2025, as well as the orders issued by this Court on 17/3/2025. That upon perusal of the Affidavit of Service of the said process server, it was alleged that he had served the documents at the Respondent's offices, which documents were allegedly received by a Mr James, but that he refused to stamp or sign the process server's copies. However, the said James denied receiving the said Court documents. That, for one to reach his office, he must be cleared by the Receptionist, which the said process server never did. He attaches an Affidavit of the said James Wanjohi confirming the assertions. He therefore urges the Court to summon the said process server for cross-examination regarding service.
7. The deponent further states that the Respondent has, since 1996, been protecting the suit property, which is prime, from squatters and trespassers who have been trying to seize it. He avers that, sometime back in September 2023, some squatters started creating temporary structures on the suit property. That, upon conducting investigations with the DCI, it emerged that the Applicant had procured a forged title. That whereas the Applicant claims the suit by way of adverse possession, he holds a forged title to the suit property. The deponent attached a draft Replying Affidavit to prove that the Respondent has sufficient grounds to oppose the application. He urges the Court to allow the application.

### **The Replying Affidavit**

8. The application was opposed by the Applicant's Reply Affidavit dated 21/7/2025. The Applicant contends that the application is intended to mislead the Court into setting aside lawful orders issued on 17/3/2025. He avers that the assertion that the application dated 3/3/2025 was not served is untrue. The Applicant states that the Respondent's admission that it has an employee named James confirms that the Respondent was

duly served. He further avers that the Process Server attached photographs of the Respondent's premises to his Affidavit.

9. He maintains that the Respondent was properly served but failed to act as required. He further contends that it was only after being served with adverse orders that it filed the instant application. He contends that the Respondent has not met the threshold for the Court to exercise its discretion.
10. The Applicant asserts that he has been in possession of the suit property since 1996. He avers that the dispute over the duration and nature of his possession, as alleged in the Draft Replying Affidavit, can only be determined at trial on the basis of documentary evidence. On that basis, he sought orders to prevent his eviction and dispossession, which would undermine the substratum of the suit and render the proceedings herein nugatory.
11. He avers that the application is overtaken by events, as the inhibition against the title of the suit property has already been registered. He further avers that setting aside the orders would be procedurally costly, disruptive, and prejudicial to him. The Applicant further cites Order 51 Rule 3 of the Civil Procedure Rules and avers that it is just and equitable that the interim orders be maintained. He argues that it is in the interests of justice for the Court to proceed to the hearing of the substantive suit to prevent the abuse of the Court process.

### **The written submissions**

12. By consent of the parties, the Court directed on 30/10/2025 that the application be dispensed with by way of written submissions. Both parties complied. The Respondent's submissions are dated 2/12/2025, while the Applicant's submissions are dated 26/11/2025. The Court has read and considered the parties' submissions.

### **Analysis and determination**

13. I have considered the application, the rival affidavits, the submissions as well as the Court record. The Court is of the view that the issues for determination in this matter are: -

- a. Whether the Respondent was duly served with the Applicant's Originating Summons and Application dated 3/3/2025.
- b. Whether the Respondent has demonstrated sufficient cause to warrant the exercise of this Court's discretion to set aside the ex-parte orders issued on 17/3/2025.
- c. Which orders should the Court issue?

**Whether the Respondent was duly served with the Applicant's Originating Summons and Application dated 3/3/2025.**

14. The manner of service of summons on a Corporation is set out in Order 5 rule 3 of the Civil Procedure Rules which states as follows:

3. Subject to any other written law, where the suit is against a corporation the summons may be served -

- a) on the secretary, director or other principal officer of the corporation; or
- b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) -
  - i. by leaving it at the registered office of the corporation;
  - ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the Court to the registered postal address of the corporation; or
  - iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
  - iv. by sending it by registered post to the last known postal address of the corporation. [Emphasis mine]

15. From the aforesaid provisions, the Summons must, in the first instance, be served, “on the secretary, director or other principal officer of the corporation”, before resorting to other modes of service.
16. In the instant case, the Affidavit of Service is clear that the pleadings together with the application were served at the Respondent’s office. The Process Server avers at paragraph 3 of his Affidavit of Service sworn on 11/3/2025;

“THAT on 6/3/2025, at 12.27 a.m. I proceeded to the Office of the Respondent situated at Industrial Area, Baricho Road behind Carrefour Supermarket in Nairobi accompanied by the Applicant who knows the Office of the Respondent. Upon my arrival at the office reception, I found three men sitting, one of them introduced himself as James, to whom I introduced myself and the purpose of my visit and tendered the Court Orders issued on 4/3/2025 and the Application together with the Originating Summons dated 3/3/2025. Which he acknowledged service but did not stamp nor sign my copies. It was at 3.30 p.m. (Attached herein is the photos of the place).”
17. The Respondent has denied service as alleged by the Process Server. The Respondent avers that, to reach Mr James’ office, one must be cleared by the Receptionist, which never occurred. The Respondent seeks that the Process Server be summoned for cross-examination.
18. It must be recalled that a default judgment is entered on the basis of an affidavit of service, which must, on its face, show that service has been effected in accordance with the applicable rules. An affidavit of service must, on its face, disclose proper and actual service, for it is on the basis of this service that judgment is entered or an order is issued.
19. In this case, although the Respondent denies service of the document, it is evident that it was properly served. Why do I say so? First, the Respondent has confirmed that it has an employee named James. Further, there is a reception area and workstations for other staff

members before accessing the said employee's office. This supports the Process Server's account that he found three men seated at reception, one of whom introduced himself as James. Secondly, the Process Server attached photographs of the Respondent's premises. The Respondent has not disputed that, in fact, that is its place of business. This Court finds that the summons was left at the place where the applicant conducts its business and is therefore satisfied that service was proper.

20. It is therefore my finding that the Respondent, being a corporation, was properly served in accordance with Order 5 Rule 3 of the Civil Procedure Rules.

**Whether the Respondent has demonstrated sufficient cause to warrant the exercise of this Court's discretion to set aside the ex-parte orders issued on 17/3/2025**

21. It is trite that the Court has unfettered powers to set aside ex parte orders, provided that it does so upon such terms as are just.

22. The discretionary power to set aside an ex parte order has been held to be intended to avoid injustice and hardship arising from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice, whether by evasion or otherwise. This was held in the case of *Shah v. Mbogo & Another* [1967] EA 116.

23. 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."

24. 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 two things, namely, either that the Applicant was not properly served or that the Applicant failed to appear

in Court at the hearing for sufficient cause. Essentially, setting aside an ex parte order is a matter for the Court's discretion.

25. In the case of Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal and 2 others [2013] KEHC 681 (KLR), the Court held as follows: -

“The principles guiding the setting aside ex parte orders are trite that the Court has wide powers to set aside such ex parte orders save that where the discretion is exercised the Court will do so on terms that are just. In CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173 it was held as follows: -

“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 others 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 answer to that weighty matter was not to advise the Appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the Appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the Appellant by its advocate.”

26. In Esther Wamaitha Njihia & 2 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."

27. The Court of Appeal in the case of the Honourable Attorney General - vs- The Law Society of Kenya & Another Civil Application No.133 of 2011 stated that:

"Sufficient cause or good cause in law means: the burden placed on a litigant usually by Court, rule or order to show why a request should be granted or an action excused. (See *Black's Law Dictionary*, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events."

28. Having found that the Respondent was duly served, I find that the Respondent has not adduced sufficient reason. It has also not been shown that the Respondent will suffer any irreparable damage if the orders issued are not vacated. In any case, the Respondent has averred that the suit property is undeveloped. I have also perused the Draft Replying Affidavit attached to the application. I note that the issues raised therein have also been raised in the Replying Affidavit in response to the Originating Summons. The issues raised therein shall be addressed at trial. It is my finding that no prejudice will be occasioned to the Respondent if the orders issued on 17/3/2025 are not set aside.

29. This Court is mandated under the overriding objectives to facilitate a just, expeditious, proportionate and affordable resolution of the disputes.

In my view, given the circumstances of this case, justice would be better served by proceeding to a hearing.

**30. Final orders for disposal**

The upshot of the foregoing is that the instant application is without merit and the same is dismissed with no orders as to costs.

31. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL 2026 THROUGH MICROSOFT TEAMS.**

**J G KEMEI  
JUDGE**

**Delivered in the presence of;**

1. N/A for the Applicant
2. Ms Mwangi HB for Mr Kimondo Mubea for the Respondent
3. CA-Ms Yvette