



**Abdullahi & another v Mohamed & 3 others (Environment and Land Case 725 of 2016 & 325 of 2019 (Consolidated)) [2026] KEELC 2404 (KLR) (24 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2404 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 725 OF 2016 & 325 OF 2019 (CONSOLIDATED)**

**TW MURIGI, J  
APRIL 24, 2026**

**BETWEEN**

**HABIBA NYAMBURA ABDULLAHI ..... PLAINTIFF**

**AND**

**SHEIKH ABDULLAHI MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**MELIHUN HASSEN WORSAME ..... 2<sup>ND</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE 325 OF 2019**

**BETWEEN**

**MELIHUN HASSEN WORSAME ..... PLAINTIFF**

**AND**

**HABIBA NYAMBURA ABDULLAHI ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the Court for determination are two applications. The first application is a Notice of Motion dated 12th November 2025, brought under Sections 3A and 63(e) of the *Civil Procedure Act* and Order 1 Rules 1 and 17 of the Civil Procedure Rules, in which the 1st Defendant seeks the following orders:
  - a. Spent.



- b. Spent.
  - c. That the Honourable Court be pleased to set aside the judgment of the Hon. E. K. Wabwoto J made herein on 20-03-2024 without the participation of and in the absence of the 1<sup>st</sup> Defendant/Applicant.
  - d. That the Honourable Court be pleased to issue orders granting the 1<sup>st</sup> Defendant/Applicant leave to file his statement of defence and/or counterclaim and for the suit to be heard de novo on its merits.
  - e. That the costs be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit sworn by the 1<sup>st</sup> Defendant.

### **The 1<sup>st</sup> Defendant/applicant's Case**

3. The Applicant averred that although he initially participated in the proceedings, including filing an application dated 26<sup>th</sup> February 2019, he later lost contact with his former advocates and was unaware of the case's progress until October, when he discovered that the suit had proceeded to full hearing and judgment had been entered in his absence.
4. He further averred that the Court acknowledged in its judgment that he did not fully participate in the proceedings, and consequently, the Court did not have the benefit of his evidence. He argued that there was no affidavit of service on record showing he had been served with subsequent pleadings, applications, or hearing notices, and he attributed his non-participation to a lack of proper service.
5. He argued that the failure to serve him was deliberate and aimed at excluding him from the proceedings in a dispute involving property of substantial value. He maintained that he was neither served with a judgment notice nor made aware of the judgment, and that he only became aware of it upon the commencement of execution, prompting him to instruct his current advocates to access the Court record and take appropriate steps to safeguard his interests.
6. He contended that the proceedings and the resulting judgment are irregular due to lack of proper service and should be set aside as of right. He further asserted that he has a good defence that raises triable issues, as shown by the annexed draft defence. He asserted that the evidence previously tendered in his absence was false and that the suit was fundamentally defective, due to lack of jurisdiction.

### **The Plaintiff's Case**

7. The Plaintiff filed a replying affidavit dated 8<sup>th</sup> December 2025, in opposition to the application. She averred that judgment was regularly entered in default of appearance and defence, with the Plaint and summons having been served upon the Applicant by way of substituted service through the Standard Newspaper on 7<sup>th</sup> December 2018, as evidenced by an affidavit of service dated 17<sup>th</sup> December 2018.
8. She further averred that the Applicant was represented by Counsel and actively participated in the proceedings at various stages. She contended that the Applicant disobeyed the orders issued on 31<sup>st</sup> January 2017 by transferring the suit property to his wife, the 2<sup>nd</sup> Defendant, and continuing construction thereon. It was further asserted that in ELC 325 of 2019, the 2<sup>nd</sup> Defendant deposed on oath that she had purchased the suit property from the Applicant.
9. She argued that the Applicant subsequently instructed different advocates to file applications for review of previous orders, thereby demonstrating continued involvement in the proceedings.



10. She contended that the Applicant deliberately stopped attending Court. It was asserted that the purported transfer to the 2<sup>nd</sup> Defendant lacked credible supporting documentation and was contradicted by the Applicant's continued occupation and development of the suit property. Further, there were inconsistencies in the evidence regarding the alleged ownership and previous acquisition of the property.
11. The Respondent challenged the Applicant's standing, noting that he had failed to demonstrate any subsisting interest in the suit property following the alleged transfer.
12. The Respondent contended that the application is an abuse of the Court process aimed at delaying the final determination of the dispute.

### **The Response**

13. In a Supplementary Affidavit dated 31<sup>st</sup> December 2025, the 1<sup>st</sup> Defendant denied the averments contained in the replying affidavit.
14. He specifically denied any marital relationship with the said Melihun Hassen Worsame and argued that the assertions were unfounded and misleading. He maintained that, in the absence of such a relationship, the contention that his participation in the proceedings was unnecessary was untenable.
15. He argued that even if such a relationship existed, there was no evidence of proper service on him or through any alleged proxy, and no affidavit of service had been filed to demonstrate compliance with procedural requirements.
16. He argued that he should be given the opportunity to contest the matters raised in the replying affidavit as they relate to disputed facts. He maintained that his draft defence and counterclaim addressed the issues raised and disclosed triable issues.
17. He also denied the allegations regarding ongoing construction on the suit property and asserted that they were unsupported by evidence.
18. The 1<sup>st</sup> Defendant reiterated the contents of his supporting affidavit and urged the Court to allow the application as prayed.
19. The second application is a Notice of Motion dated 17<sup>th</sup> December 2025, brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 19 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules 2010, in which the 2<sup>nd</sup> Defendant seeks the following orders:
  - a. That this Honourable Court be pleased to strike out paragraphs 4, 6,7,8,9,10,12,13,15,16 and 17 of the Affidavit in Reply dated 8<sup>th</sup> December 2025 by Habiba Nyambura Abdullahi to the Notice of Motion Application dated 12<sup>th</sup> November 2025.
  - b. That the costs of this Application be in the cause.
  - c. That this Honourable Court be pleased to grant any orders as it deems fit.
20. The application is based on the grounds appearing on its face together with the supporting affidavit of Melihun Hassen Worsame, sworn on even date.



## **The Applicant's Case**

21. The Applicant averred that upon perusing the Plaintiff's replying affidavit dated 8<sup>th</sup> December 2025, she found several paragraphs to be scandalous, vexatious, oppressive, false, and irrelevant to the issues in the said application.
22. She denied any marital relationship with the 1<sup>st</sup> Defendant and stated that she has been married to Adan Mohammed Abdullai since 9<sup>th</sup> July 2014. She argued that references to her as the 1<sup>st</sup> Defendant's wife were false, misleading, and prejudicial.
23. She argued that the impugned paragraphs contain unsubstantiated allegations, unwarranted attacks on her character, and matters unrelated to the determination of the application dated 12<sup>th</sup> November 2025.
24. It was therefore argued that the inclusion of the said averments was prejudicial and intended to embarrass and scandalise her, and they should be struck out to enable the Court to determine the application on its merits.
25. Both applications were canvassed by way of written submissions

## **The 1<sup>st</sup> Defendant's Submissions**

26. The 1<sup>st</sup> Defendant/ Applicant filed his submissions dated 6<sup>th</sup> February 2026.
27. On behalf of the 1<sup>st</sup> Defendant, Counsel argued that there was no proof of service on the Applicant, as no affidavit of service had been filed to show he had notice of the hearing dates. To support this argument, reliance was placed on *Njoroge v Kiarie* [1988] eKLR.
28. Counsel further submitted that the Court has a duty to verify proper service before proceeding with the hearing, and that such verification can be undertaken suo moto. To support this position, Counsel relied on *In re Estate of JKM (Deceased)* [2020] KEHC 6842 (KLR).
29. Counsel contended that the judgment entered against the Applicant was irregular due to lack of service and should be set aside as of right. In this regard, reliance was placed on *Gulf Fabricators v County Government of Siaya* [2020] eKLR, where the Court held that an irregular judgment is liable to be set aside in limine. Further reliance was placed on *Ali Bin Khamis v Salim Khamis Korobe & 2 others* [1956] 23 EACA 195, which established that a judgment entered without service is a nullity.
30. Counsel further invoked the principles of natural justice, particularly the right not to be condemned unheard, citing *Republic v County Executive Committee Member (Lands, Urban Development, Environment and Climate Change, Government of Makueni County) & another; Highway Holdings Ltd (Ex parte Applicant)* [2023] KEELC 15755 (KLR).
31. Regarding the merits, Counsel submitted that the Applicant's defence raises triable issues, particularly on ownership of the suit property. Counsel argued that the Applicant should be given an opportunity to ventilate his case at trial.
32. Counsel further submitted that failing to set aside the judgment would prejudice the Applicant by enforcing an irregular decree against him. To support this argument, reliance was placed on *Sankale Ole Kantai t/a Kantai & Co. Advocates v Housing Finance Company of Kenya Ltd* [2013] eKLR and *Crescent Construction Co Ltd v Delphis Bank Ltd* [2007] eKLR, where the Courts underscored the principle that litigants should not be driven from the seat of justice without being heard.
33. In conclusion, Counsel urged the Court to allow the application with costs to the Applicant.



## **The Plaintiff's Submissions**

34. The Plaintiff filed her submissions dated 26<sup>th</sup> February 2026.
35. On behalf of the Plaintiff, Counsel submitted that the 1<sup>st</sup> Defendant's denial of any relationship with Melihun Hassen Worseme was inconsistent with his actions. It was argued that, despite the alleged sale of the suit property to her in February 2016, the 1<sup>st</sup> Defendant stopped attending Court proceedings while continuing to undertake construction on the suit property, as evidenced by documents filed in ELC No. 325 of 2019, which was subsequently consolidated with the present suit.
36. Counsel argued that the 1<sup>st</sup> Defendant continued to be actively involved in the development of the suit property even after the purported transfer, with approvals and construction documents issued in his name by relevant authorities, including the Nairobi City County, the National Construction Authority, and the National Environment Management Authority. Counsel contended that these facts cast doubt on the validity of the alleged sale and demonstrated that the 1<sup>st</sup> Defendant retained a beneficial interest in the property.
37. It was further submitted that the 1<sup>st</sup> Defendant deliberately withdrew from participating in the proceedings while allowing the said Melihun Hassen Worseme to litigate on his behalf through a separate suit, thereby creating the impression that he no longer had an interest in the property. Counsel argued that this conduct indicated collusion between the two, aimed at prolonging litigation whilst the development of the suit property continued.
38. Counsel challenged the 1<sup>st</sup> Defendant's standing, noting that he did not challenge or contradict the alleged transfer of the property, yet he now seeks to re-enter the proceedings after judgment had been delivered.
39. It was submitted that the 1<sup>st</sup> Defendant's conduct was inconsistent and lacked candour. Counsel further submitted that the application is an afterthought aimed at defeating the course of justice and should be dismissed with costs.

## **Analysis And Determination**

40. Having considered the applications, the respective affidavits and the rival submissions filed, the following issues arise for determination:
  - a. Whether the impugned paragraphs in the Plaintiff's Affidavit dated 8<sup>th</sup> December 2025 should be struck out; and
  - b. Whether the judgment delivered on 20<sup>th</sup> March 2024 should be set aside.
41. Regarding the first issue, the 2<sup>nd</sup> Defendant denied the allegations that she is the 1<sup>st</sup> Defendant's wife and sought the same to be struck out.
42. Order 19 Rule 3 of the Civil Procedure Rules states:
  - “(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:  
  
Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.



- (2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.”

43. Order 19 Rule 6 of the Civil Procedure Rules provides that:

“The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.”

44. In her Replying Affidavit dated 8<sup>th</sup> December 2025, the Plaintiff stated that the matters contained therein are within her knowledge unless otherwise expressly stated. In several paragraphs of her affidavit, the Plaintiff averred that the 1<sup>st</sup> Defendant is the husband of the 2<sup>nd</sup> Defendant. However, she did not disclose the basis for this claim. No evidence was tendered to support the alleged marital relationship. Conversely, the 2<sup>nd</sup> Defendant produced a marriage certificate demonstrating that she is married to a third party who is not a party to these proceedings.

45. In light of the foregoing, I find that the averments relating to the alleged marital relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are matters which the Plaintiff could not competently depose from her own knowledge and which have not been substantiated. The allegations contravene the provisions of Order 19 Rule 3 of the Civil Procedure Rules and are liable to be struck out under Order 19 Rule 6 thereof.

46. The Court notes that the impugned paragraphs also contain other material averments relevant to the application dated 12<sup>th</sup> November 2025. Accordingly, the Court declines to strike out the paragraphs in their entirety and instead orders that all references asserting a marital relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Plaintiff’s Replying Affidavit dated 8<sup>th</sup> December 2025 be expunged from the record.

47. Regarding the second issue, Order 10 Rule 11 of the Civil Procedure Rules outlines the procedure for setting aside interlocutory judgments in default of appearance or defence 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.”

48. Courts have the discretionary power to set aside an ex parte judgment with a view to doing justice to the parties. The well-established principles of setting aside interlocutory judgment were set out in the case of *Patel vs East Africa Cargo Handling Services Ltd* (1974) EA 75, where the court held that:

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules”.

49. In *Shah v Mbogo & Another* (1967) E. A 116, the Court of Appeal stated that the discretion to set aside an ex parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to assist a party who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.



50. The Court is called upon to determine whether the judgment is regular or irregular. In *James Kanyita Nderitu v Maries Philotas Ghika & Another* [2016] eKLR, the Court of Appeal drew a clear distinction between regular and irregular judgments:

“...In a regular default judgment, the defendant will have been duly served with a summons to enter an appearance, but for one reason or another, he had failed to enter an appearance or to file a defence, resulting in a 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).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711: “There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

51. In the matter at hand, it is not disputed that the 1<sup>st</sup> Defendant was aware of the suit and indeed participated in the proceedings at an earlier stage, including filing an application dated 26<sup>th</sup> February 2019. The issue that arises is whether there was proper service of subsequent processes, including hearing notices, prior to the hearing that culminated in the judgment delivered on 20<sup>th</sup> March 2024.
52. I have carefully perused the record, particularly the affidavits of service on record. It is not in dispute that the 1<sup>st</sup> Defendant entered an appearance in 2016 through the firm of Ochieng Achach & Kaino Advocates, who, later, in a Chamber Summons dated 13<sup>th</sup> April 2017, sought leave to cease acting for the Applicant on the grounds that they were unable to communicate with their client or obtain instructions to proceed. Leave was granted on 11<sup>th</sup> October 2018.



- 53. Subsequently, a hearing notice was served through advertisement in the Standard Newspaper on 7<sup>th</sup> December 2018. The 1<sup>st</sup> Defendant later re-entered the proceedings through the firm of Paul Minishi & Co. Advocates, who came on record by a Notice of Appointment dated 24<sup>th</sup> January 2019 and filed an application on 26<sup>th</sup> February 2019.
- 54. The record does not show that subsequent hearing notices were served on the 1<sup>st</sup> Defendant or his advocates then on record. In the absence of such evidence, the court can safely conclude that the 1<sup>st</sup> Defendant did not receive a hearing notice of the proceedings leading to the impugned judgment. This omission strikes at the core of procedural fairness.
- 55. The Court is called upon to determine whether the Applicant should be granted leave to file a defence out of time. The Applicant contends that his defence raises triable issues which should be heard on merit. I have carefully perused the draft statement of defence and counterclaim annexed to the application. The 1<sup>st</sup> Defendant asserts proprietorship of the suit property, contending that he acquired title from a third party, and impugns the Plaintiff's title on grounds of fraud. Allegations of fraud, coupled with competing claims to title, raise weighty and triable issues which cannot be disposed of summarily. In my view, these issues should be determined in a full hearing. Article 50 of the Constitution guarantees the right to a fair hearing. No prejudice will be occasioned to the Respondent if the matter is heard on merit.
- 56. In the premises, I find that the Applicant has met the threshold for setting aside the judgment.
- 57. The court is alive to the prejudice that may be occasioned to the Plaintiff by setting aside the judgment. However, such prejudice can be compensated through costs and does not outweigh the 1<sup>st</sup> Defendant's right to be heard.
- 58. Accordingly, the application dated 12<sup>th</sup> November 2025 is merited and is allowed on the following terms:
  - a. The judgment delivered on 20<sup>th</sup> March 2024 by Hon. E. K. Wabwoto J is hereby set aside.
  - b. The 1<sup>st</sup> Defendant is granted 7 days to file and serve his statement of defence and counterclaim.
  - c. The 1<sup>st</sup> Defendant shall pay to the Plaintiff throw-away costs assessed at Kshs 200,000 within 14 days, and in default, the orders herein shall lapse.
  - d. The Plaintiff is awarded costs of the application
  - e. In view of the age of the matter, parties are directed to comply with Order 11 within 14 days from the date hereof.

**RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF APRIL 2026.**

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**HON. T. MURIGI**  
**JUDGE**

In The Presence Of:  
Njeri Kiagayu for the Plaintiff  
Ms Okumu holding brief for Owino for the 2<sup>nd</sup> Defendant  
Otieno holding brief for Maosa for the 1<sup>st</sup> Defendant



Vena- Court assistant

