



REPUBLIC OF KENYA



**Tonui v Kimeu & 4 others (Environment and Land Case
E078 of 2023) [2026] KEELC 2509 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E078 OF 2023**

OA ANGOTE, J

APRIL 30, 2026

BETWEEN

PHILIP KIBET TONUJ PLAINTIFF

AND

WILLY KIMEU 1ST DEFENDANT

SOLOMON WERE 2ND DEFENDANT

NAIROBI CITY COUNTY 3RD DEFENDANT

CHIEF REGISTRAR OF LANDS 4TH DEFENDANT

DIRECTOR OF SURVEYS 5TH DEFENDANT

RULING

1. Vide a Motion dated 22nd January, 2025 brought pursuant to the provisions of Articles 10, 20, 21, 22, 25 (c), 27, 40, 47, 48, 50 & 159 of *the Constitution*, Section 1A, 1B, 3A, of the *Civil Procedure Act*, Section 146 of the *Evidence Act*, Cap 80, Order 12, Order 18 Rule 10, and Order 51 Rule 1 of the Civil Procedure Rules 2010, the 1st Defendant/Applicant seeks the following reliefs:
 - i. Spent.
 - ii. Spent-THAT the Honourable Court be pleased to defer and/or arrest the Judgment which is scheduled to be delivered on 18th February 2025 until the 1st Defendant and his witnesses are heard on merits.
 - iii. Spent-THAT the Honourable Court be pleased to stay the proceedings of ELCLC/E078/2023 in this matter until the issue of fair trial under Article 25(c) is addressed.
 - iv. That the Honourable Court be pleased to re-open this case to allow the 1st and 2nd Defendants to adjudicate their case.



- v. That the 1st Defendant be granted leave to file his defence.
 - vi. That costs of this application be in the cause.
 - vii. That the Honourable Court be pleased to issue any such further orders it may deem fit and convenient in the circumstances.
2. The Motion is premised on the grounds set out on its face and supported by the affidavit of Wilson Kimeu Makau, the 1st Defendant/Applicant herein of an even date. Mr. Makau stated that he was never served with summons to enter appearance or with any pleadings in this matter.
 3. He contests the alleged service effected via WhatsApp, terming it improper and unreliable, particularly in light of the prevalence of fraud associated with that platform. He further stated that he has at all material times resided on the suit property and was readily accessible for personal service at the premises, which, however, was never effected.
 4. He further deposed that the Plaintiff purported to rely on a non-existent law firm, Anne Musyimi & Company Advocates, to enter appearance on behalf of the complainants on 22nd May 2024. According to him, the said firm does not exist, the email address attributed to it is fictitious, and no pleadings or documents were ever subsequently filed by the alleged advocates. He added that there was no instruction note from him authorising the firm to act, and contended that the purported appearance was therefore irregular, unprocedural, and indicative of fraud.
 5. According to Mr. Makau, he has lived on Land Reference No. 209/11036, Villa Franca, Embakasi South, Nairobi County (the suit property), for approximately twenty-eight (28) years, having been lawfully allocated the land as part of a group allocation.
 6. It was deposed by the Defendant that the land has since been developed with several structures, including a perimeter wall, offices for the Mukuru Kwa Njenga Women's Group, and residential apartments comprising a two-storey block of twelve two-bedroom units, and that these developments were approved by the Nairobi City County, as evidenced by receipts and supporting documentation annexed to his affidavit.
 7. The deponent maintains that he has an arguable defence raising serious triable issues of law and fact, including constitutional issues, which merit a full hearing on their merits. He further contends that judgment in the matter was scheduled for 18th February 2025 without proper service having been effected upon him, thereby condemning him unheard and in violation of the rules of natural justice as well as his rights under Articles 25(c), 27(1), 50(1), 50(2), 50(4) and 159 of the Constitution of Kenya.
 8. Mr. Makau therefore urges the court to grant him leave to participate in the proceedings so that the dispute may be determined on its merits. He asserts that the Respondent will suffer no prejudice if the application is allowed and the matter proceeds to hearing with the participation of all parties, and reiterates that the application has been brought in the interest of justice.
 9. In response to the Motion, the Plaintiff/Respondent filed a replying affidavit sworn on 20th February 2025, in which he stated that the application is replete with falsehoods intended to mislead the court and delay the determination of the suit. He maintained that the 1st and 2nd Respondents were duly served with the pleadings and court documents through both physical service at the suit property and electronic service, as evinced by several affidavits of service.
 10. Mr Tonui stated that the Applicant admitted receipt of the pleadings through electronic means but deliberately chose to ignore them, and cannot therefore be heard to deny service. In his view, this conduct demonstrates a calculated evasion and a blatant disregard for the court process.



11. As advised by Counsel, he stated, the law permits service of documents through electronic means. In that regard, reliance was placed on Order 5 Rule 22B of the Civil Procedure Rules (Amendment) Rules, 2020, as well as Section 1B(1)(e) of the *Civil Procedure Act*, and the Practice Directions on Electronic Case Management issued by the Hon. Chief Justice on 4th March 2020 (Gazette Notice No. 2357), all of which recognize service through electronic platforms.
12. While acknowledging that the right to be heard is crucial, he noted that judicial process ought not to be impeded or stalled on account of a litigant's indifference. With regard to the allegation that a fictitious law firm, Anne Musyimi & Company Advocates, had been created to mislead the court, Mr Tonui dismissed the same as baseless and defamatory.
13. He stated that the said advocate exists and is duly registered with the Law Society of Kenya. He further pointed out that the filing of a notice of appointment by that firm, followed by a subsequent change of advocates, is indicative of proper instructions having been issued.
14. In any event, he noted that Anne Musyimi has not sought to be cross-examined on the matter and any dispute on representation is a matter to be addressed before the Advocates Disciplinary Tribunal, and is irrelevant to the present proceedings.
15. He noted that the allegation by Mr Makau that he has lived on the suit property for 28 years is a falsehood; that there is no habitable house on the suit property; that his parcel of land, which is LR No. 209/13407, is an undeveloped plot with a perimeter wall and that it is bordered by LR No. 209/13406 which has an unfinished house and makeshift office.
16. It was deposed by the Plaintiff that the property referred to as LR No. 206/11036/Villa Franca in Embakasi South does not exist; that these issues are res judicata and issue estoppel pursuant to the judgment in ELC No. 921 of 2016 Thomas Kirui -vs Joshua Odhiambo Tollo [2022] eKLR where the court found, inter-alia, that the parcel L.R 209/11306 does not exist and that the lawful owner of L.R 209/13406 adjacent to L.R 209/13407 is Thomas Kirui.
17. It was urged that the Applicant's case is not merely contradictory but wholly untenable; that on one hand, he asserts that he is the registered proprietor of the suit property, yet in prayer 3 of the counterclaim, he contends that the Mukuru Housing Project has acquired prescriptive rights over the same by virtue of 27 years' occupation and that this position is legally unsustainable, as a registered owner cannot, in law, acquire prescriptive rights over his own property because such rights can only arise where occupation is adverse to the interests of the true owner.
18. He accordingly urged the court to dismiss the application. In the alternative, and only in the event that the court is inclined to permit the Applicant to participate in the proceedings, he prayed that they be condemned to pay throwaway costs of Kshs. 60,000 to compensate for the delay and inconvenience occasioned.
19. The Applicant filed a supplementary affidavit on 22nd January, 2025 in which he asserted that he is entitled to a fair hearing under Article 50 of *the Constitution* of Kenya, 2010, and urged the court to grant him an opportunity to be heard. He further relied on Article 159(2)(d) of *the Constitution*, which requires courts to administer justice without undue regard to procedural technicalities.
20. The Applicant denied the Respondent's assertions that service had been effected, particularly through WhatsApp or other electronic means, contending that such service was improper and unreliable. He stated that he only recently acquired a smartphone and that electronic communication platforms can easily be manipulated. He further argued that even where Order 5 Rule 22B of the Civil Procedure



Rules (Amendment) Rules, 2020 permits electronic service, the Respondent has not demonstrated that the alleged electronic communication was actually received by him.

21. Mr. Makau also challenged the Respondent's claim to ownership of the suit property, alleging that the alleged title was obtained through fraud and misrepresentation and therefore does not enjoy constitutional protection under Article 40(6) of *the Constitution*. He reiterated that he never instructed the advocate alleged to have appeared on his behalf.
22. The deponent further maintained that he has been in peaceful, open, and continuous occupation of the suit property since 1998, having obtained approval to construct a perimeter wall and permanent structures, including a residential complex. He disputed the assertion that the property is undeveloped and insisted that the parcel known as LR No. 209/11036 exists and that he has documentation from the Director of Land Administration supporting his claim.
23. With regard to the Respondent's reliance on ELC No. 921 of 2016, Thomas Kirui vs Joshua Odhiambo Tollo [2022] eKLR, the deponent argued that he was not a party to those proceedings, and therefore the findings therein cannot be relied upon against him pursuant to Section 34(c) of the *Evidence Act*, Cap. 80 Laws of Kenya. He further asserted that the issue of ownership of LR No. 209/11036 remains unresolved and that the Respondent has misrepresented facts relating to the property.
24. The Applicant opposed the Respondent's request for throwaway costs of Kshs 60,000 terming the same excessive and unwarranted. He argued that any delay in the proceedings had been occasioned by the Respondent's failure to effect proper service and by the unsubstantiated allegations made against him. He therefore urged the court to allow the application and, if costs were to be awarded, that they be limited to Kshs

Submissions

25. The 1st Defendant/Applicant's counsel filed submissions on 31st October 2025. Counsel submitted that the Respondent had placed undue reliance on the decision in ELC No. 921 of 2016, Thomas Kirui v Joshua Odhiambo Tollo [2022] eKLR, yet neither the Applicant in the present proceedings nor the Plaintiff in ELC No. 410 of 2025 were parties to that suit. It was argued that the judgment cannot therefore bind the present parties and did not conclusively determine ownership of LR No. 209/11036 as between them.
26. Counsel further submitted that entering judgment in the present suit before the issues in the related matter are resolved will create a real risk of conflicting and irreconcilable judgments, particularly because ELC No. 410 of 2025 involves the same parcel of land and raises similar legal questions regarding ownership.
27. In that regard, Counsel urged that the present matter be consolidated with the related proceedings, noting that this court is empowered under Order 11 Rule 3 of the Civil Procedure Rules to consolidate suits where common questions of law or fact arise.
28. It was submitted that consolidation promotes the efficient and expeditious disposal of disputes, saves time and costs, and ensures fair adjudication without occasioning prejudice to any party, as affirmed in Prem Lala Nahata & Another v Chandi Prasad Sikaria [2007] 2 SCC 551, Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others [2014] eKLR, and Nyati Security Guards & Services Ltd v Municipal Council of Mombasa [2000] eKLR.
29. In concluding, Counsel asked the court to exercise its discretion in the interests of efficiency, consistency, and the overriding objective of justice under Sections 1A, 1B and 3A of the *Civil Procedure*



Act and arrest the entry of judgment in ELC No. 921 of 2016 pending the outcome of the consolidated proceedings with ELC No. 410 of 2025, grant the applicant leave to be joined as a necessary party, stay further proceedings in the present matter, and grant any other orders necessary to ensure a comprehensive and uniform determination of the dispute.

30. No submissions were filed by the Respondent as at 25th March, 2026]
Analysis and Determination
31. Having considered the Motion, responses and submissions, the sole issue that arises for determination is whether the 1st Defendant/Applicant has demonstrated sufficient grounds to warrant the re-opening of the case and filing of his defence?
32. The Evidence Act and the Civil Procedure Rules grant this court the power to recall witnesses. In this respect, Section 146(4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules are pertinent. Section 146 (4) of the Evidence Act provides thus:
- “(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
33. On the other hand, Order 18 Rule 10 of the Civil Procedure Rules provides thus:
- “The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of evidence for the time being in force; put such questions to him as the Court thinks fit.”
34. The above provisions do not specifically address the issue of re-opening of cases and as such, the same is a discretionary power exercised by the court pursuant to the provisions of Section 3A of the Civil Procedure Act.
35. It is common ground that where a court is called upon to exercise discretion, the same must be exercised judiciously and in the interest of justice. This was as aptly expressed by the Court of Appeal in *Patriotic Guards Ltd vs James Kipchirchir Sambu*, Nairobi CA No. 20 of 2016, (2018)eKLR as follows:
- “It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
36. The court is so guided.
37. Vide the present Motion, the Applicant asserts that he was never served with summons to enter appearance or with any pleadings in this matter, and that the proceedings were consequently conducted in his absence and without notice.
38. In response, the Respondent contends that they duly effected service, both physically and through electronic means, and that the Applicant deliberately failed and/or refused to participate in the proceedings despite having notice thereof.



39. Service of summons is a foundational prerequisite to a fair trial, as it is the means by which a party is notified of proceedings and afforded an opportunity to be heard. In the absence of such service, the ensuing proceedings are rendered contrary to the rules of natural justice and in violation of the non-derogable right to a fair hearing guaranteed under Articles 25(c) and 50 of *the Constitution*. Accordingly, where a court is satisfied that proper service was not effected, any resultant proceedings or judgment are liable to be set aside ex debito justitiae, as of right.
40. In the present case, the Respondent asserts that service was severally affected on the Applicant both personally, albeit electronically, and through the 2nd Defendant as well as through affixing the same on the sentry gate/white tent on the suit property.
41. Personal service remains the primary mode of service under Order 5 of the Civil Procedure Rules. The law sets out a clear hierarchy and standards which must be strictly complied with. Under Order 5 Rule 8(1), service must, wherever practicable, be effected personally upon the Defendant, unless there exists an agent duly authorized to receive service.
42. Where personal service is not possible, Order 5 Rule 12 permits service upon an agent or an adult member of the defendant's household, but only after reasonable attempts at personal service have been made. Further, Order 5 Rule 13 requires acknowledgment of service, or proof that such acknowledgment was refused.
43. It is only where such efforts fail that Order 5 Rule 14 permits service by affixation, which must be preceded by due diligence and accompanied by clear evidence that the summons were affixed at a conspicuous place at the defendant's residence or place of business. As a last resort, Order 5 Rule 17(1) allows for substituted service upon leave of the court.
44. It is indeed now settled that service through electronic means, including WhatsApp, is permissible under Kenyan law pursuant to Order 5 Rule 22B and 22C of the Civil Procedure Rules (Amendment) Rules, 2020. However, the Rules impose strict conditions: service is only deemed effective upon proof of actual delivery, evidenced by a delivery receipt which must be annexed to the affidavit of service.
45. This position has been consistently affirmed by the courts. In *Commission for Human Rights and Justice vs Jacob Kimutai Torutt & 5 Others* [2021] eKLR, the court noted thus:
- “Needless to say, the Civil Procedure (Amendment) Rules, 2020 now embrace the Electronic Mail Service and service via Mobile Enabled Messaging applications. The Rules further provide that the person effecting service shall attach the Electronic Mail Service delivery receipt upon confirming service, and in case of service via Mobile Enable Messaging application also attach delivery receipts confirming service (See Order 5 rules 22B and rule 22 respectively).”
46. As to what constitutes delivery for purposes of proof of service through WhatsApp, the court in *Oyunge Barnabus & 3 others (Suing as Administrators of the estate of Mathayo Ratemo Mayaka (deceased)) v Charles Oteki Rioba* [2021] eKLR persuasively stated thus:
- “It is common knowledge that delivery in most cases is confirmed by double ticks which turn blue immediately the recipient views the Message sent. The Respondents have attached a document showing a screenshot message sent to the number that the Applicant has acknowledged to be his that shows two blue ticks signifying that the documents were indeed delivered to the afore said number belonging to Applicant. ” held that failure to annex



delivery receipts for WhatsApp service renders such service unproven. proper service must be strictly proved, as it is the foundation of a fair trial.”

47. In the present case, while the process server deponed that he sent the pleadings via WhatsApp to the Applicant’s mobile number, no delivery report or confirmation of receipt was annexed. The annexures merely show that messages were sent. That, in law, is insufficient. The Rules require proof of delivery, not mere dispatch.
48. In the absence of such delivery receipts, the alleged electronic service does not meet the statutory threshold under Order 5 Rules 22B and 22C aforesaid and cannot be deemed proper service.
49. The court also notes that the Respondent relied, in part, on alleged service upon the 2nd Defendant. That approach is legally untenable. There is no evidence that the 2nd Defendant was an authorized agent of the Applicant for purposes of service under Order 5 Rule 8(1) or Rule 12. Service upon one Defendant cannot, in law, be imputed to another absent proof of agency.
50. It has also been asserted that service was effected at the suit premises, including by affixing documents at the property. However, no photographic evidence or independent corroboration was tendered to support that assertion.
51. The court has also considered the issue relating to the firm of Anne Musyimi & Company Advocates. The Applicant made serious allegations of collusion and possible criminal conduct against the said firm, contending that it purported to act without his instructions. However, those allegations have not been substantiated, nor has it been demonstrated that any formal complaint has been lodged with the relevant regulatory bodies.
52. Be that as it may, upon perusal of the record, it does not appear that a memorandum of appearance by the said firm was formally filed. Indeed, the Respondent states that it had no dealings with the firm having not been served with any memorandum of appearance and did not effect service upon it. Consequently, reliance on the Appearance by the said firm does not cure the defects in service nor establish that the Applicant had notice of the proceedings.
53. In the premises, the plea for re-opening of the proceedings is merited *ex debito justitiae*, and the court is duty-bound to restore the Applicant to the seat of justice.
54. It is noted that the Respondent has raised objections to the intended defence touching, *inter alia*, on the doctrines of *res judicata* and *sub judice*. However, those issues cannot be conclusively determined at this stage. They can only be properly canvassed and adjudicated upon once the Applicant has filed his defence and the issues in controversy have crystallized.
55. Accordingly, the court finds the Notice of Motion dated 22nd January, 2025 to be merited and proceeds to issue the following orders:
 - a. The proceedings herein are hereby set aside, and the suit is re-opened for hearing *de novo*.
 - b. The 1st Defendant/Applicant is hereby granted leave to file and serve his Defence within 14 days of the date hereof.
 - c. Each party shall bear its Costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF APRIL, 2026.

O. A. ANGOTE



JUDGE

In the presence of;

Mr. Ondieki for 1st Defendant

No appearance for Plaintiff

No appearance for Defendant

Court Assistant: Tracy

