



**Kili v Maiyo & 4 others (Environment and Land Case
E014 of 2023) [2025] KEELC 5516 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND CASE E014 OF 2023
GMA ONGONDO, J
JULY 23, 2025**

BETWEEN

ARON KIPTANUI KILI PLAINTIFF

AND

ELIZABETH JELEL MAIYO 1ST DEFENDANT

ROSA KARONEI 2ND DEFENDANT

THE LAND REGISTRAR NANDI 3RD DEFENDANT

THE COUNTY SURVEYOR NANDI 4TH DEFENDANT

SOLOMON KIPROP 5TH DEFENDANT

RULING

1. This ruling is in respect of the 1st defendant/applicant's Notice of Motion application dated 6th February 2025 and filed herein on even date (the application), originated under Articles 48, 50 and 159 of *the Constitution*, Section 72 of the General Provisions and Interpretation Act, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 12 Rule 7, Order 22 Rule 22(1) and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010, through M/S Cheruiyot Melly and Associates Advocates, seeking the orders infra:
 - a. Moot
 - b. Moot
 - c. Moot
 - d. Moot



- e. That the Court be pleased to set aside, annul and/or vary the judgment entered against the 1st defendant/applicant herein together with the consequential orders.
 - f. Moot
 - g. That the Honourable Court be pleased to enlarge time and grant the applicant leave to file his Statement of Defence and Counterclaim, if any, within the time so enlarged and/or as may be appropriate in the circumstances,
 - h. Costs of the application be provided for.
 - i. Any such and/or further order as the Honourable Court may deem fit and just to grant in the circumstances.
2. The application is founded on twenty-one grounds which include:
- a. That on the 14th November 2024, this Honourable Court delivered an ex parte judgment despite clear evidence that the 1st defendant and perhaps none of the defendants were properly served and/or at all with summons alongside pleadings to defend themselves.
 - b. That lack of proper service of the Summons and pleadings contrary to the provisions of Order 5 of the Civil Procedure Rules renders the impugned judgment irregular to an extent that its implementation is marred with irregularities and would infringe on a litany of rights, not limited to the constitutional right to be heard of the applicant.
 - c. That the plaintiff/respondent in execution of an ex parte judgment and impugned decree caused to be issued to the applicant a letter by the County Surveyor showing that a team of surveyors shall be visiting land parcel number Nandi/Kombe/745 (hereinafter referred to as the suit land) on the 11th day of February 2025 for purposes of sub-dividing it afresh pursuant to the impugned judgment and decree of this Honourable Court.
 - d. That if the plaintiff is allowed to execute the impugned judgment and decree by applying to arrest and commit the applicant to civil jail, she shall be condemned unheard against the rule of natural justice and fair hearing and shall suffer irreparably, in which event no amount of damages can reasonably compensate her.
 - e. That the respondent does not stand to suffer any harm as this court shall accord him the opportunity to be heard at any stage of the proceedings and, in any event, costs will be an adequate remedy should he prove that he proceeded regularly and in compliance with the Civil Procedure Rules on the issue of service which is couched in mandatory terms.
 - f. That this motion is presented without unreasonable delay and as soon as the applicant learnt of this matter and in utmost good faith.
 - g. That unless stay of execution is granted there is grave risk that the applicant who has not been heard herein will suffer substantial loss.
3. Further, the application is anchored on the applicant's supporting affidavit of thirty-five paragraphs sworn on even date. Briefly, the applicant reiterated the grounds of the application and lamented that the person who swore the Affidavit of Service dated 27th April 2023, one Mr. Kemei Cheptei, failed to demonstrate that he is a licensed court process server since he did not attach a valid license thereto. That she intends to seek leave of this Court to cross-examine the said process server. Further, she averred that she was never served as by law required hence, the ex parte judgment entered herein is irregular and ought to be set aside in the interest of justice.



4. The plaintiff/respondent through M/s Kipkosgei Choge and Company Advocates, opposed the application by way of a Replying Affidavit sworn on 17th February 2025. He deponed that he is the registered owner of the suit land and has been in possession and occupation of the same from the time of registration following a transfer from the applicant herein. That the applicant was served with the pleadings in this case and had actual knowledge of its existence. That there have been proceedings between the applicant and the respondent herein before the area administrators over the suit land. That no prejudice will be occasioned upon the applicant if the respondent's parcel is recreated on paper to match the ground position.
5. In a rejoinder, the applicant filed a Supplementary Affidavit sworn on 1st April 2025 and denied knowledge of any proceedings relating to the suit land. She reiterated that service was never effected upon her and that such lack of valid service diminishes the possibility of conducting a fair trial.
6. On 2nd April 2025, the court ordered and directed that the application be heard by way of written submissions in the spirit of Article 159 (2)(b) of *the Constitution* of Kenya, 2010; see also Order 51 Rule 16 of the Civil Procedure Rules, 2010.
7. Accordingly, the applicant's counsel filed submissions dated 9th May 2025 and identified five issues for determination thus:
 - a. Whether the applicant was properly served with Summons and pleadings as envisaged in law.
 - b. Whether the ex parte judgment was regularly obtained.
 - c. Whether the applicant has a prima facie defence raising triable issues.
 - d. Whether the applicant has met the threshold for setting aside the ex parte judgment, if so, is she entitled to the orders sought?
 - e. Who should bear costs?
8. Learned Counsel submitted that the affidavit of service relied upon by the plaintiff/respondent has no signed acknowledgement or corroborating material attached thereto. That further, the alleged process server is unlicensed hence, the Affidavit of Service filed herein cannot be deemed to be proper. That the said Affidavit of Service shows that the persons allegedly served are the 1st and 2nd defendants only, yet the plaintiff obtained decree and judgment against all the defendants herein. That no evidence has been provided by the plaintiff to show that a licensed process server effected service upon the applicant in person or left the documents with an adult member of her household or employee as required under Order 5 Rule 12 of the Civil Procedure Rules. That therefore, the Affidavit of Service dated 27th April 2023 is defective in the circumstances.
9. Furthermore, Counsel submitted that the judgment entered herein is irregular and ought to be set aside ex debito justitiae. That the applicant's draft statement of defence raises substantive issues regarding ownership, occupation and subdivision of the suit land herein, which issues require judicial determination through oral evidence and cross-examination. That the instant application has met the threshold for grant of the orders sought and ought to be allowed as prayed. To fortify the submissions, Counsel relied on various authoritative pronouncements including Shadrack Arap Baiywo vs Bodi Bach (1987) KECA 69 (KLR), Ceneast Airlines Ltd. vs Kenya Shell Ltd. [2002] 2 EA 362, James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR and Philip Chemwolo & Another vs Augustine Kubende [1982-88] KAR 103, among others.
10. Learned counsel for the plaintiff/respondent filed submissions dated 27th May 2025 and identified a single issue for determination thus: whether the applicant has demonstrated a sufficient cause to



warrant setting aside the judgment entered on 14th November 2024. Learned Counsel submitted that the grounds advanced by the applicant herein are not sufficient to enable the court exercise its discretion and set aside its judgment aforementioned. That there must be an end to litigation. That the manner of service as set out in the Affidavit of Service on record is sufficient and complies with Order 5 Rule 3(a) of the Civil Procedure Rules, 2010 hence, there was no need to cross-examine the process server. That the resultant judgment is regular thus, the instant application is devoid of merit and ought to be dismissed with costs to the respondent. Counsel relied on the Court decisions in *Tree Shade Motor Ltd. vs DT Dobie Company Ltd.* CA 38 of 1998, *CMC Holdings Ltd. vs James Mumo Nzioki* [2004] eKLR and *Onjom vs Owota Civil Appeal No. 14 of 2001* [2003] UGSC 16/20 March 2003, among others, to fortify the submissions.

11. I have duly considered the application, the response thereto and the parties' respective submissions. The principal issues for determination boil down to:
 - a. Whether the instant application is merited?
 - b. Just orders to issue herein.
12. On the first issue, the applicant contends that the instant application meets the threshold for setting aside of an ex parte judgment for lack of proper service. That the alleged process server is unlicensed hence, the Affidavit of Service filed herein is improper and defective. That further, the said Affidavit of Service shows that the persons allegedly served are the 1st and 2nd defendants only, yet the plaintiff obtained decree and judgment against all the defendants herein.
13. However, the plaintiff/respondent avers that the ex parte judgment entered by this court on 14th November 2024 is regular and ought not to be set aside, since the applicant was duly served with the summons and pleadings relating to the suit as by law required, but failed to enter appearance or defend the suit.
14. In that regard, service of Summons to Enter Appearance is key to the exercise of the constitutional right to fair hearing as envisaged by Article 50(1) of *the Constitution*; see also Order 5 of the Civil Procedure Rules, 2010 (hereinafter referred to as the 'Rules').
15. Order 5 Rule 1 of the Rules provides in part that:
 - (2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
 - (3) Every summons shall be accompanied by a copy of the plaint.
 - (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.
 - (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.
 - (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.



16. It is further provided under Order 5 Rule 5 (1) of the Rules that when summons have been issued by the court to be served upon the defendant the following persons are recognized as duly authorized to serve the summons:
 - a. Any person for the time being duly authorized by the court;
 - b. An advocate, or advocate's clerk approved by the court;
 - c. Any subordinate court having jurisdiction in the place where the defendant resides;
 - d. A police officer appointed under the Police Act (Cap.84) or to an officer appointed under the Administration Police Act (Cap.85); or
 - e. A licensed courier service provider approved by the court.
17. Furthermore, Order 5, Rule 7 of the Rules stipulates that 'Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant', while Rule 8(1) thereof provides that 'Whenever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.'
18. Service may also be effected upon an advocate who has instructions to accept service on behalf of the defendant; See Order 5 Rule 8(2) of the Rules.
19. As indicated hereinabove, summons to enter appearance ought to be served upon the defendant personally or his or her appointed agent. So, was proper service effected upon the applicant herein and if not, does such omission warrant the setting aside of the ex parte judgment of this court entered on 14th November 2024?
20. It is trite law that the decision on whether or not to set aside ex parte judgement is discretionary and that the discretion is intended 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.
21. This court subscribes to the decision in *James Kanyiita Nderitu* case (supra) where the Court of Appeal made a distinction between a default judgment that is regularly entered and one which is irregularly entered. The court stated in part:

“... In a regular default judgment, the defendant will have been duly served with summons to enter appearance 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 an irregular default 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 justiae, 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...”



22. Further, in *Yooshin Engineering Corporation -vs- AIA Architects Limited* [2023] KECA 872 (KLR), the Court of Appeal pronounced itself thus:

“...where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise...”

23. In the instant case, I note from the record that the plaintiff filed an Affidavit of Service sworn by one Kemei Cheptei on 27th April 2023, wherein he states that he served copies of the plaint, supporting affidavit, verifying affidavit, list of witnesses and list of documents upon the applicant and the 2nd defendant herein on 14th April 2023. Even so, there has been no sufficient evidence adduced herein to prove that the said Kemei Cheptei is a licensed process server who possessed an active license at the time of effecting service. Also, the plaintiff has failed to explain why purported service was only effected on the 1st and 2nd defendants herein, whilst excluding the other defendants.

24. In light of the foregoing, it is my considered view that the ex parte judgment entered by this court on 14th November 2024, is irregular. It is a technical one as observed in *Kanwal Sarjit Singh Dhiman -vs- Kashavji Jivraji Shah* (2015) eKLR. The same ought to be set aside.

25. Consequently, the application by way of Notice of Motion dated 6th February 2025, hereby succeeds and is allowed as set out in paragraph 1 (e) and (g) hereinabove.

26. A fortiori, I hereby direct the 1st defendant/applicant herein to file and serve her Statement of Defence and counterclaim, if any, in response to the suit within 14 days from the date of this ruling, failure to which the orders granted herein shall automatically lapse.

27. Costs of this application to be in the cause.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPSABET THIS 23RD DAY OF JULY 2025.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms Koech instructed by Mr Kiprono learned counsel for the 1st defendant/applicant

2. Walter, court assistant

