Majani Estates Limited v Nkonge & 8 others (Environment and Land Case 8 of 2020) [2025] KEELC 5596 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5596 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND CASE 8 OF 2020

BM EBOSO, J

JULY 21, 2025

BETWEEN

MAJANI ESTATES LIMITED ..... PLAINTIFF

AND

MUTHONI NKONGE ..... 1ST DEFENDANT

MURIUKI NDUBI ..... 2ND DEFENDANT

SAULU NDIGA ..... 3RD DEFENDANT

KARIBA KANAMPIU ..... 4TH DEFENDANT

MWIRIGI MIRITI ..... 5TH DEFENDANT

MUGENDI KAINYATI ..... 6TH DEFENDANT

PAUL KINYUA RIUNGU ..... 7TH DEFENDANT

MWITI RIUNGU ..... 8TH DEFENDANT

BENEDICTINE NJIRU ..... 9TH DEFENDANT

RULING

Background

1. The nine (9) defendants in this suit entered appearance in the case on 21/9/2020 through a joint memorandum of appearance dated 18/9/2020, filed by M/s Muthomi Gitari & Co Advocates. On the same day, 21/9/2020, the nine (9) defendants filed a joint written authority to plead, dated 18/9/2020. Through the said joint written authority to plead, the 7th defendant was authorised by the other eight (8) defendants to sign/execute all court documents and plead for and on behalf of the nine defendants. The nine defendants also filed a joint defence and joint counterclaim dated 2/12/2020. In addition, they filed a joint list of witnesses identifying:

(i) Paul Kinyua Riungu;

(ii) Mwiti Riungu; and

(iii) M'Ndaka Kangangi as their three witnesses who would testify on their behalf.

2. Trial hearing in the suit was conducted by P.M Njoroge J on several days between 26/4/2021 and 20/9/2021. On all the occasions when trial hearings proceeded, the nine defendants were represented by their duly appointed joint advocates, M/s Muthomi Gitari & Co Advocates, who were in court representing all the defendants jointly during all the trial sessions.

3. PM Njoroge J was transferred to Isiolo ELC after concluding trial hearings but before submissions. With the concurrence of the parties, Yano J who succeeded P.M Njoroge J at Chuka ELC rendered a Judgment in the suit on 29/11/2021. The court found that the plaintiff had proved his primary claim. The court further found that the defendants had failed to prove their joint counterclaim. The court disposed the suit through the following verbatim orders:

> " a) An order of eviction be and is hereby issued against the defendants if any of them are in occupation of land parcels No. Mwimbi/Chogoria/5951, 5952 and 5953 with the assistance of the O.C.S Chogoria Police Station.
>
> b) An order of permanent injunction be and is hereby issued restraining the defendants and or their servants or agents from entering or carrying out any dealings in land parcel No. Mwimbi/Chogoria/5951, 5952 and 5953.
>
> c) The defendants' counterclaim is hereby dismissed.
>
> d) The cost of the suit shall be in favour of the plaintiff against the defendants jointly and severally.
>
> e) It is so ordered."

4. More than three (3) years later, the 5th, 6th and 8th defendants brought a post-judgment application dated 13/12/2024, seeking: (i) an order adopting the consent between them and their joint advocates, allowing a post-judgment change of advocates by the three defendants /applicants; and (ii) interim orders staying execution of the judgment, pending the interpartes hearing of the application. The motion did not seek any substantive order beyond the interpartes hearing of the application. The court (Eboso J) heard and disposed the application through a ruling dated 25/3/2025. The court allowed the plea for change of advocates by the three defendants/applicants. In addition, the court marked all the other prayers in the application "spent".

Application dated 4/4/2025

5. On 9/4/2025, the 5th, 6th and 8th defendants brought a second application dated 4/4/2025, seeking the following verbatim reliefs:

> " 1. Spent
>
> 2. Spent
>
> 3. That the judgment entered on 29th November 2021, the decree and all other subsequent orders thereto be set aside and or varied.

4. That the suit herein be heard de novo at the instance of the 5th, 6th & 8th defendants.

5. That the costs of this application be in the cause."

6. The application dated 4/4/2025 is what falls for determination in this ruling. The application was premised on the grounds outlined in the motion and in the applicants' joint affidavit dated 4/4/2025. It was canvassed through written submissions dated 9/5/2025, filed by M/s Karanja W. & Associates. The application was opposed by the plaintiff.

7. The case of the applicants is that they were previously represented by M/s Muthomi Gitari & Co. Advocates. They lost contact with their counsel "as he broke communication" with them during the Covid 19 period. They add that they were shocked to learn that their case was heard and determined without their advocate's involvement and without their involvement.

8. The applicants state that they were condemned unheard, adding that the suit was never heard on merits. They contend that this court has unlimited jurisdiction to set aside and/or vary ex parte judgements and hear a case afresh. They add that their previous advocate neither attended court for hearing of the case on 17/5/2021 nor informed them of the hearing date.

9. The applicants add that the judgment and the subsequent orders have serious implications on them and their families because they reside on the suit land. They contend that they stand to suffer great prejudice if the impugned judgment is not set aside.

10. The applicants state that the right to be heard is an unfettered right under Article 50 of *the Constitution* of Kenya. They further state that the right to a fair trial under Article 25 is absolute, and it requires that both parties are heard on the merits. They contend that mistakes made by their advocate should not be visited on them. They add that if the judgment and the subsequent orders are executed, they will be rendered destitutes because they will be evicted from their lands.

Opposition to the Application

11. The plaintiff/respondent opposed the application through a replying affidavit sworn on 14/5/2025 by Ronald Mutuma Mutai and written submissions dated 20/5/2025, filed by Mutegi Mugambi & Co. Advocates. The case of the respondent is that the application is scandalous, frivolous and an abuse of the process of the court and ought to be dismissed. They contend that judgment in this matter was delivered on 29/11/2021 in their favour. The respondent adds that the assertion that the applicants were not aware of the hearing date is untrue because the applicants, together with the other defendants, used to attend court together, adding that they were represented by the same law firm, Muthomi Gitari & Co Advocates, who were in court throughout the proceedings and their advocate was always in court.

12. The respondent states that on 17/5/2021, the 7th defendant who is a brother to the 8th defendant/applicant and a son to the 9th defendant, testified as DW1. The respondent further states that Covid-19 should not be accepted as an excuse because in 2021 normalcy had returned, adding that the impugned judgment was delivered in open court. The respondent argues that the applicants have not shown how Covid-19 hindered them for "four years" since they did not state that they were sick.

13. The respondent contends that when the 7th defendant testified, he stated that the 8th & 9th defendants did not reside on the suit land, adding that the applicants continued attending court after 17/5/2021 and never bothered to apply to testify. The respondent argues that the applicants have not demonstrated sufficient reason why they waited for more than three years to apply to set aside the judgment.

14. The respondent states that this application has been overtaken by events because eviction was carried out.

Analysis and Determination

15. The court has considered the application, the plaintiff's response to the application and the parties' respective submissions. The court has also considered the relevant legal frameworks and the relevant jurisprudence on the key issue that falls for determination in the application. The single issue falling for determination in the application is whether the application satisfies the criteria for setting aside/ varying a regular interpartes judgment.

16. The notice of motion dated 4/4/2025 does not seek an order setting aside the orders made on 17/5/2021 when the applicants' counsel failed to attend court at 11:30 am but eventually entered the courtroom at 11:59 am and took a new date for defence hearing. The notice of motion targets the judgment rendered on 29/11/2021. The court will focus on the plea before it.

17. The judgment rendered on 29/11/2021, which is the subject of the application under consideration, was not an exparte or a default judgment. By and large, it was a regular interpartes judgment. This conclusion is informed by a number of reasons. First, all the defendants were served and duly entered appearance by filing a joint memorandum of appearance dated 18/9/2020. Secondly, the defendants filed joint pleadings which included a joint defence and a joint counterclaim dated 2/12/2020. Thirdly, all the defendants filed a joint list of witnesses dated 2/12/2020 and joint list of documents dated 2/12/2020. Through a joint written authority dated 18/9/2020, the nine defendants jointly nominated one of their own, Paul Kinyua Riungu, whom they authorized to sign/execute court documents on their behalf. Fourthly, despite what appeared to be adverse orders that were made against some defendants on 17/5/2021 shortly before their advocate entered the courtroom at 11:58 am, the affected defendants elected not to move the court to vacate those orders. They elected to proceed with the trial. Fifth, the nine defendants, through their joint advocate, cross-examined the respondent's witness and led evidence during defence hearing. Six, the nine defendants, through their duly appointed joint advocate, tendered submissions and consented to the writing of the judgment by Yano J. Eighth, the nine defendants attended court through their joint advocates and procured delivery of the interpartes judgment. Ninth, through their joint advocate, the nine defendants subsequently filed a joint notice of appeal, initiating an appeal against the impugned judgment rendered on 29/11/2021.

18. I have reflected on the plea for an order setting aside or varying the judgment and decree of the court. Taking into account the fact that what is sought to be set aside or varied is a regular interpartes judgment, the plea is, in essence, a prayer for review of the judgment.

19. The jurisdiction of a court to review its own judgments is exercised on the basis of settled principles. In Mohamed Fugicha v Methodist Church in Kenya (Through its Registered Trustees) & 3 others (2020) eKLR, Civil Application no. 4 of 2019, the Supreme Court of Kenya emphasized that the jurisdiction of a court to review its own judgment was never intended to give a party the opportunity to canvass an appeal before the same court. The Supreme Court emphasized that where review is sought, the applicant has to demonstrate, to the satisfaction of the court, the grounds for review.

20. The Supreme Court of Kenya similarly outlined the above principle in Fredrick Otieno Outa v Jared Odoyo Okello & 3 others (2017) eKLR. The Court quoted with approval, the following principle that was outlined in Sow Chandra Kanta & Another v Sheik Habib 1975 AIR 1500, 1975 SCC (4) 457:

> " A review of a judgement is a serious step and a reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility"

21. The Supreme Court similarly adopted the following principle that was articulated in Northern India Caterers (India) v Governor of Delhi 1980 AIR 674:

> " It is well settled that a party is not entitled to seek a review of a judgement delivered by this court merely for the purpose of rehearing a fresh decision of the case. The normal principle is that a judgment pronounced by this court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so"

22. The Court of Appeal in Daniel Macharia Karagacha v Monica Watithi Mwangi, Civil Appeal No. 159 of 2000 rendered itself on the relevant principle as follows:

> " Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter or evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application."

23. The three applicants are, in essence, telling the court that it should revisit the regular interpartes judgment dated 29/11/2021 because there was inadequate communication between the three of them and their joint advocates during the period when defence hearing was conducted. They have come to court more than three years after the impugned Judgment was rendered. They want the court to review and set aside the judgment while their appeal is pending.

24. None of the applicants has demonstrated any error of law apparent on the face of the record. None of them has demonstrated discovery of new and important matter or evidence which they could not have placed before the court during trial despite exercise of due diligence. All they are saying is that, there was inadequate communication between them (between three out of the nine defendants whose joint defence was conducted by the same joint advocates) and their joint advocates.

25. Given the fact that the applicants elected to have a joint advocate who fully participated in the trial at all stages, and procured the impugned interpartes judgment, there is no proper ground why this court should revisit and set aside the regular and interpartes judgment that was procured by the defendants. If the applicants are dissatisfied with the way their joint advocates handled their defence, that is not a proper ground for setting aside a regular interpartes judgment entered after an interpartes hearing.

26. In the absence of a proper justification, the court has no basis upon which to set aside the judgment dated 29/11/2021. Consequently, the finding of the court is that the criteria for setting aside a regular interpartes judgment has not been met.

27. In the end, the notice of motion dated 4/4/2025 is rejected and dismissed for lack of merit. The applicants shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 21ST DAY OF JULY, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Mrs. Mutegi for the Plaintiff

Mr. Karanja for the Defendants

Court Assistant – Mr. Mwangi