



REPUBLIC OF KENYA



**Wangui v Wangui (Environment and Land Case 1403 of 2016)  
[2025] KEELC 5971 (KLR) (2 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 5971 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 1403 OF 2016  
CG MBOGO, J  
SEPTEMBER 2, 2025**

**BETWEEN**

**PERPETUAH MUTHONI WANGUI ..... PLAINTIFF**

**AND**

**AGNES WANGUI ..... DEFENDANT**

**RULING**

1. Before this court for determination are the notices of motion dated 2<sup>nd</sup> January, 2025 and 13<sup>th</sup> January, 2025 respectively. The notice of motion dated 2<sup>nd</sup> January, 2025 is filed by the defendant/applicant, and it is expressed to be brought under Order 51 Rules 1 and 3 of the Civil Procedure Rules seeking the following orders: -
  1. Spent.
  2. That the firm of Bob Okumu & Company Advocates be granted leave to come on record for the defendant applicant.
  3. That the court be pleased to grant stay of execution against the applicant pending the hearing and determination of the application.
  4. That the court be pleased to set aside the ex-parte judgment entered against the applicant on 17<sup>th</sup> July, 2018.
  5. That costs of the application be in the cause.
2. The application is premised on the grounds inter alia that defendant/applicant was never served with the pleadings by the plaintiff/respondent in this suit, and thus she did not file a defence.
3. The application was supported by the affidavit of the defendant/applicant sworn on even date. The defendant/applicant deposed that she was never served with the pleadings in this matter, and that



she only learnt of the same when she was served with a copy of an unsigned decree. The defendant/ applicant deposed that having demonstrated that she was not involved in these proceedings, it is just that the ex-parte judgment delivered on 17<sup>th</sup> July, 2018 be set aside so that she can fully participate in the matter. She deposed that the suit property is her matrimonial home and that there is a succession cause active in court which she is a co-administrator together with the plaintiff/respondent's mother.

4. The defendant/applicant deposed that she is on the verge of being evicted from her residential house no. U14E Uhuru Estate Phase III on land reference no. 209/7388 Nairobi, and that the decree holder has also proclaimed the assets. She deposed that even if the suit property were to be made part of the estate of her deceased husband, the same would still be distributed in accordance to the Law of Succession Act, hence its premature to forcefully vacate her from the said property.
5. The application was opposed vide the replying affidavit of Anne Wanjiru Mbogori on behalf of the plaintiff/respondent sworn on 4<sup>th</sup> February, 2025. The plaintiff/ respondent deposed that the defendant/applicant was duly served with the summons to enter appearance and the pleadings which culminated to the memorandum of appearance filed by the firm of Gacau Kariuki & Co. Advocates dated 6<sup>th</sup> December, 2016. That upon entering appearance, the defendant/applicant and her advocate failed to attend court and the matter proceeded exparte which resulted into judgment delivered on 19<sup>th</sup> July, 2018.
6. The plaintiff/respondent further deposed that the defendant/ applicant was sent a draft decree in line with Order 21 Rule 8 (2)(3)(4)(5) and (6) of the Civil Procedure Rules for approval, and thereafter, a decree dated 11<sup>th</sup> October, 2024 was issued. It was further deposed that the defendant/ applicant is a stranger to the family of Titus Mutiga Wamwea, as it can be seen from the certificate of confirmation of grant issued to the plaintiff/ respondent and Anne on 27<sup>th</sup> July, 2015 and 18<sup>th</sup> April, 2018 in Milimani High Court Succession Cause No. 3110 of 2014. She further deposed that the defendant/applicant filed objection proceedings dated 7<sup>th</sup> March, 2017 and the same was dismissed with costs for non-attendance on 29<sup>th</sup> November, 2023. Further, that the succession proceedings is not an active case as the suit was concluded and the file closed.
7. The plaintiff/respondent filed the notice of motion dated 13<sup>th</sup> January 2025, expressed to be brought under Article 40 of the Constitution, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules seeking the following orders: -
  1. Spent.
  2. That a mandatory order of injunction be issued ordering an immediate granting of possession of all that property known as residential house number U14E, Uhuru Estate Phase III LR. No. 209/7388/182 by the defendant to the plaintiff, in default of which the plaintiff be and is hereby at liberty to take over possession of the said suit property known as Residential House number U14E, Uhuru Estate Phase III LR. No. 209/7388/182.
  3. That a mandatory order of injunction be and is hereby issued ordering the immediate eviction of the defendant/ respondent from all that property known as Residential House Number U14E, Uhuru Estate Phase III LR. No. 209/7388/182.
  4. That the officer commanding Buruburu Police Station do ensure peace and order compliance with the orders in prayer 2 and 3 hereinabove.
  5. That the defendant/respondent do bear the costs of this application and the repossession process of all that property known as Residential House number U14E, Uhuru Estate Phase III LR. No. 209/7388/182.



8. The application is premised on the grounds inter alia that the plaintiff/applicant is the administrator of the estate of Titus Mutiga Wamwea (deceased) who was the registered proprietor of the suit property. That vide the judgment of this court delivered on 19<sup>th</sup> July, 2018, this court ordered the defendant/applicant to vacate the suit property with immediate effect, and despite the notice to vacate, she has blatantly refused to vacate the same and continues to enjoy possession and occupation.
9. The application was supported by the affidavit of Anne Wanjiru Mbogori, the co-administrator of the estate of Titus Muthiga Wamwea (deceased) who was the registered owner of the suit property. The plaintiff/respondent deposed that there exists no landlord/tenant relationship between the plaintiff and the defendant, and that they are in dire need to utilize and administer the property with immediate effect. She deposed that the facts presented in this case are clear and undisputed thus meriting the grant of the prayers sought. That unless the orders sought are granted, together with the estate of the deceased, they stand to suffer irreparable injury and loss.
10. The application was opposed vide the replying affidavit of the defendant/applicant sworn on 28<sup>th</sup> January, 2025. The defendant/applicant deposed that the judgment was obtained irregularly as she was not served with the pleadings. She deposed that the suit property is her matrimonial home, and that she has the right to enjoy possession and occupation without paying rent. Further, that the plaintiff respondent has failed to disclose material facts as a widow of the deceased, and a co-administrator of the estate of the deceased. The defendant/applicant deposed that the orders sought in this application contradict the provisions of Section 12(4) of the *Matrimonial Property Act*, and that it is clear that the application is based on ill motive with the intention of denying her of her statutory rights as a widow of the deceased.
11. The plaintiff/respondent filed a supplementary affidavit sworn on 4<sup>th</sup> February, 2025. The averments contained in this affidavit are similar to the replying affidavit sworn on even date in response to the notice of motion dated 2<sup>nd</sup> January, 2025. I need not reproduce the same save to note its contents.
12. Both applications were canvassed by way of written submissions. The defendant/applicant filed her written submissions dated 24<sup>th</sup> February, 2025, with regard to both applications, and she raised two issues for determination as listed below: -
  - a. Whether this court should set aside the interlocutory judgment and all consequential orders.
  - b. Whether the defendant should be evicted from the suit property.
13. On the first issue, the defendant/applicant submitted that the court has wide discretion to set aside an ex-parte judgment, and that this court is to focus on substantive justice rather than procedural technicalities. While relying on the cases of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, and *Kenya Commercial Bank Ltd v Nyatange & Another* [1990] KLR 443, the defendant/ applicant submitted that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system. The defendant/ applicant further relied on the cases of *John Peter Kiria & Another v Pauline Kagwiria* [2013] eKLR, *Kenya Pipeline Company Limited v Mafuta Products Limited* [2014] eKLR, and *Tree Shade Motors Limited v DT Dobie 7 Company (K) Limited and Joseph Rading Wasambo* CA 38 of 1998.
14. On the second issue, the defendant/applicant submitted that the suit property is her matrimonial home which she has lived since the year 1980 when she was married to the deceased without objection or interference from the plaintiffs. As a widow, her matrimonial rights are protected under the *Law of Succession Act* and that since there are exceptional circumstances, evicting her from the same will be



- great injustice. She urged the court to exercise discretion and allow her application dated 2<sup>nd</sup> January, 2025.
15. With regard to the notice of motion dated 2<sup>nd</sup> January, 2025, the plaintiff/respondent filed her written submissions dated 20<sup>th</sup> February, 2025 and she raised two issues for determination as follows:-
    - a. Whether the court should set aside the *ex parte* judgment entered against the applicant on 17<sup>th</sup> July, 2018.
    - b. Who should bear the costs of the application and the suit.
  16. On all the issues, the plaintiff/respondent submitted that there being no statement of defence filed in the matter, the judgment of the court is regular and she ought to be allowed to enjoy the fruits of the judgment. Further, she submitted that there is no justifiable reason why the defendant/applicant's advocates failed to file a statement of defence or raise the issue of non-service of the pleadings. Further, that the defendant/applicant has not explained why seven years later she has approached the court to set aside a regular judgment when the matter was not defended and she had knowledge of the same. She submitted that while the decision to set aside judgment is discretionary, the defendant/applicant is guilty of laches and that the delay is inordinate by all means. The plaintiff/respondent relied on the cases of *Langer v Mutambu & another* (Civil Case 303 of 2011) [2023] KEHC 25372 (KLR) (Commercial and Tax)(17 November 2023) (Ruling), *Price & another v Hilder* [1984] KECA 29 (KLR), *Yooshin Engineering Corporation v Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), *Josephat Muthui Muli v Ezeetec Ltd* [2014] eKLR, *Lucy Bosire v Nyankoni Manga Robi* [2016] KEHC 5460 (KLR) and *Josephat Nderitu Kariuki v Pine Breeze Hospital Ltd* [2006] eKLR.
  17. In conclusion, the plaintiff/respondent submitted that costs follow event and this instant application is unmerited and ought to be dismissed with costs.
  18. With regard to the notice of motion dated 13<sup>th</sup> January, 2025, the plaintiff/respondent filed her written submissions dated 20<sup>th</sup> February, 2025 and she raised three issues for determination as follows: -
    - a. Whether a mandatory order of injunction should issue ordering an immediate granting of possession of the suit property by the defendant.
    - b. Whether a mandatory order of injunction should issue ordering immediate eviction of the defendant from the suit property.
    - c. Who should bear the costs of the application and the suit.
  19. On all the issues raised above, the plaintiff/respondent submitted that pursuant to the judgment delivered on 19<sup>th</sup> July, 2018, the court ordered the defendant/applicant to vacate the suit property with immediate effect, and that this judgment has never been set aside or appealed against. She further submitted that it is clear that there is a binding judgment of the court, and that she is entitled to benefit from the fruits of the judgment. To buttress further, the plaintiff/respondent relied on the cases of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] KEELC 132 (KLR), and *Kipiel Sum v Philip Kipkorir Samich & 3 others* [2014] KEELC 203 (KLR).
  20. I have considered both applications, the responses, and the written submissions filed by both parties. The two issues for determination are as follows: -
    - a. Whether the *ex parte* judgment delivered on 19<sup>th</sup> July, 2018 ought to be set aside.
    - b. Whether the plaintiff/ respondent is entitled to the orders of eviction.



21. First and foremost, it is necessary to deal with the representation of the defendant/applicant in this matter. It therefore follows that pursuant to Order 9 Rule 9 of the Civil Procedure Rules, the firm of Bob Okumu & Co. Advocates is allowed to come on record for the defendant/applicant. In dealing with the first issue, the defendant/applicant contended that she was not served with the pleadings in this matter, and she only learnt of the same when she was served with an unsigned decree. She maintained that the judgment was irregular and ought to be set aside. She urged the court to exercise discretion in her favour and ensure that substantive justice prevails over technicalities. The plaintiff/respondent on the other hand argued that the judgment was regular owing to the fact that the defendant/applicant was served, entered appearance through the firm of Gacau Kariuki & Co. Advocates as it can be seen from the memorandum of appearance dated 6<sup>th</sup> December, 2016, but failed to file a defence.

22. In *Shah v Mbogo & another* [1967] E.A, it was held that:-

“The court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused.”

23. I have perused the pleadings in this file, and it appears that seven years since judgment was delivered on 19<sup>th</sup> July, 2018, and upon service of the decree that the defendant/applicant has awoken from slumber and realized that execution is imminent. The question then is, was the judgment regular or irregular?

24. The Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu v Maries Philotas Ghika & Another* [2016] eKLR held as follows:-

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances 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 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 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 rules 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.”

25. Looking at the circumstances of this case, and based on the above cited authority, I am persuaded that the judgment delivered on 19<sup>th</sup> July, 2018 was a regular judgment. The defendant/ applicant was served with the pleadings in this matter. That explains the filing of the memorandum of appearance. Service of the pleadings was not disputed, and quite so she has not distanced herself with the firm of Gacau Kariuki & Company Advocates. It appears that she entered appearance and failed to file a defence, as it is recorded in the judgment. While the court retains the discretion to set aside a regular judgment, are there sufficient reasons to enable this court exercise such discretion? In my view, I find not, the defendant/applicant has not explained the delay in bringing this suit, seven years since judgment was delivered. Also, she was dishonest in denying service yet the record bears witness.
26. On the above issue, this court finds that the judgment entered was regular. However, no plausible explanation has been given for bringing this suit seven years since judgment was delivered, and thus there is inordinate delay that would occasion an injustice on the part of the plaintiff/respondent if allowed.
27. On the second issue, the plaintiff/respondent contends that despite notice to vacate the suit property, the defendant/applicant has refused to do so yet the judgment was clear that she ought to vacate the suit property with immediate effect. In contending with this application, the defendant/applicant urged that she is a widow to the deceased, that she has lived on the suit property for forty years and that there is an active succession matter going on before the succession court. Again, the plaintiff/ respondent challenged this ground by supplying evidence to the contrary. As per the court records on the e-filing platform the information available is that the suit is terminated/struck out and the case is closed.
28. The plaintiff/respondent is now seeking orders which are mandatory in nature for the realization of the judgment of this court. In the case of *Malier Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR, the court stated as follows:-

“The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the court of appeal in the case of “*Kenya Breweries Ltd v Washington Okeyo* (2002) EA 109” had occasion to discuss and consider the principles that govern the grant of mandatory injunction was correctly stated in volume 24 Halsbury Laws of England 4th Edition paragraph 948 which states as follows;“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and a summary one which can be



easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

29. It is not without a doubt that a mandatory injunction is issued in exceptional circumstances and in the clearest of cases. A mandatory injunction amounts to making a conclusive determination of a matter without according the parties a right to be heard. In this case, there is judgment on record delivered on 19<sup>th</sup> July, 2018. The decree was issued on 11<sup>th</sup> October, 2024. It is clear to me that there was both procedural and substantive justice in this matter, and being quite clear, I see no reason why I should not grant the plaintiff/respondent the orders sought.
30. From the above, the notice of motion dated 2<sup>nd</sup> January, 2025 partially succeeds in terms of allowing the firm of Bob Okumu & Co. Advocates to come on record for the defendant/applicant. The defendant/applicant has failed to provide sufficient reasons to enable this court set aside the judgment delivered on 19<sup>th</sup> July, 2018. The notice of motion dated 13<sup>th</sup> January, 2025 has merit and it is hereby allowed in the following terms: -
- i. The defendant/ applicant is hereby directed to give vacant possession of all that property known as residential house number U14E, Uhuru Estate Phase III LR. No. 209/7388/182 within the next seven (7) days from the date hereof.
  - ii. Failure to comply with order i. above, a mandatory order of injunction is hereby issued ordering the immediate eviction of the defendant/ applicant from all that property known as Residential House Number U14E, Uhuru Estate Phase III LR. No. 209/7388/182.
  - iii. The officer commanding Buruburu Police Station do ensure peace and order compliance with the orders ii. hereinabove.
  - iv. The defendant/applicant to bear the costs of the eviction exercise.
  - v. With regard to costs on both applications, each party to bear their own costs.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

**02/09/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Ms. Nafula for the Plaintiff/Applicant

Ms. Aroni holding brief for Mr. Okumu for the Defendant/Applicant

