



**Wamburi v Ndungu & 6 others (Environment & Land Case  
161 of 2017) [2024] KEELC 5030 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 161 OF 2017  
LN GACHERU, J  
JUNE 27, 2024**

**BETWEEN**

**MARGARET WANJIRU WAMBURI ..... PLAINTIFF**

**AND**

**GEOFFREY GITAU NDUNGU ..... 1<sup>ST</sup> DEFENDANT**

**IRENE WANGARI NDEGWA ..... 2<sup>ND</sup> DEFENDANT**

**KIMATHI SILAS KINIU ..... 3<sup>RD</sup> DEFENDANT**

**RACHEL WAMAITHA KURIA ..... 4<sup>TH</sup> DEFENDANT**

**CHRISPIN MUIRURI ..... 5<sup>TH</sup> DEFENDANT**

**JOHN KAMAU NJUGUNA ..... 6<sup>TH</sup> DEFENDANT**

**PURITY WANGARI NJUKI ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion Application dated 8<sup>th</sup> February, 2024, filed before the Court on even date under Certificate of Urgency and premised under Sections 1A, 1B and 3A, of the [Civil Procedure Act](#), Order 9 Rule 9, Order 10 Rule 11, Order 22 Rule 22, Order 45 and Order 50 Rule 6 of the [Civil Procedure Rules 2010](#), the Defendants/Applicants have sought for the following Order;
  - i. That pending the hearing and determination of this Application inter-partes there be a stay of any further proceedings and action in this case, more particularly the evictions.
  - ii. That this Honourable Court be pleased to set aside and/or review the default/interlocutory judgment of this Honourable Court entered on 2<sup>nd</sup> July, 2018, and all other consequential decrees and orders arising therefrom.



- iii. That this Honourable Court be pleased to stay execution of the judgment, consequential decree and any other consequential orders in this suit pending the hearing and determination of this application.
  - iv. That this Honourable Court be pleased to grant leave to the defendants to file their defence out of time and compliance documents.
  - v. That the costs of this application be provided for.
2. The Application is supported by the grounds enumerated on its face as well as the Affidavit of Chrispin Muiruri, the 1<sup>st</sup> Defendant herein, sworn on 8<sup>th</sup> February, 2024, wherein he deposed that his co-applicants invested him with the authority to swear Affidavit on their behalf.
  3. It was 1<sup>st</sup> Defendant/Applicant's contention that a default/interlocutory Judgment was delivered by this Court on 2nd July, 2018, which Judgment required him to vacate land parcel number Mitubiri/wempa Block 2/1206, together with his co-applicants.
  4. He contended that he stands to suffer irreparable damage if the current application is not heard and determined before the aforesaid eviction can issue. Further, that the aforesaid Judgment was entered at the request of the Plaintiff/Respondent and the said request was not on merit.
  5. It was his further contention that he has a plausible and extremely reasonable defence to the claim by the Plaintiff/Respondent herein, which claim raises serious triable issues, therefore, he should be allowed to ventilate his defence.
  6. He stated that his failure to enter appearance and file defence to the suit was neither inordinate nor intentional. Further, that he was only made aware of the existence of the suit and the Judgment dated 2<sup>nd</sup> July, 2018, upon being served with an Order to vacate the suit premises on 4<sup>th</sup> February, 2024.
  7. It was the 1<sup>st</sup> Defendant/ Applicant's further contention that the Process Server who claimed to have effected service of Court process upon him did not make any effort to trace him or his co-applicants. That there was no evidence of Substituted Service available in the Court file, and the directions issued by the court on 8<sup>th</sup> December, 2017, and 26<sup>th</sup> September, 2018, pertaining to service were not complied with by the Plaintiff/Respondent.
  8. He refuted the Plaintiff's claims to the effect that the reasons why Service was effected upon him and his co-applicants through Substituted Service was because they could not be traced. It was his claim that he is employed in the Police Service as a Chief Inspector of Police, and currently stationed at the Inspector General's Office, and he resides on the suit property together with the 3<sup>rd</sup> Applicant herein namely, Irene Wangari Ndegwa, who, is a nurse working at Maragua Sub-County Hospital.
  9. It was his further allegations that an Order for stay of execution will not prejudice the Plaintiff/ Respondent, and that it was in the interests of justice that all parties be heard by the Court. Further, that his right to be heard should be upheld in the particular circumstances of the instant case.
  10. He impugned the Plaintiff/ Respondent's title over the suit land claiming that the Plaintiff was registered as the proprietor of the suit property fraudulently. He annexed a copy of the Green Card in respect of the suit property which he claimed showed the Plaintiff/ Respondent's fraudulent scheme. He affirmed the Respondent's ownership of land parcel number Mitubiri/wempa Block 2/4110, which is different from the suit land.



11. The Application is opposed by the Plaintiff/Respondent through grounds of Objection filed on 16<sup>th</sup> February, 2024. The Plaintiff/Respondent stated that the current Application was bad-in-law, frivolous and an abuse of Court process.
12. The Application was canvassed by way of written submissions. The Defendants/ Applicants filed their written submissions on 8<sup>th</sup> March, 2024, through the Law Firm of Ishmael & Company Advocates. The Plaintiff/Respondent did not file any written submissions; therefore, the Court will rely on her Grounds of Objection.

### **1<sup>st</sup> defendant/applicant's submissions**

13. The Defendants/Applicants reiterated the averments contained in his Supporting Affidavit sworn on 8<sup>th</sup> February, 2024, and submitted that they filed the current Application on 8<sup>th</sup> February, 2024, upon being served on 4<sup>th</sup> February, 2024, with an Order from this Court to vacate the suit property. It was their submission that it was only on 4<sup>th</sup> February, 2024 that they were informed for the first time that a suit had been filed against them and a default Judgment thereof obtained.
14. It was further submitted that they resides on the suit land, and stand to suffer irreparable harm and damage unless this Court grants the prayer for a stay of execution of its judgment issued on 2<sup>nd</sup> July, 2018, and other consequential orders until the final determination of the subject Application.
15. It was also submitted that the Court Process Server who swore the Affidavit dated 23<sup>rd</sup> February, 2016 (which is on record) served only one of the Defendants/Applicants by depositing court documents at Perimu Chemist, and made no effort whatsoever was made to serve the said documents on the other Defendants/Applicants.
16. Further, the Defendants/Applicants sought the Court's leave to file their defence out of time which, he submitted, raises serious and fundamental triable issues.
17. The Applicants identified two issues for determination namely:
  - i. Was substituted service sufficient and as such should the orders sought be granted?
  - ii. Who should bear the costs of this Application?
18. It was submitted that the Applicants were unaware that they had been served through Substituted Service on 23<sup>rd</sup> December, 2019, with a notice of this Court's Judgment dated 2<sup>nd</sup> July, 2018. It was re-stated that the Christmas season is normally a very busy time in the Police Service where the 1<sup>st</sup> Defendant/ Applicant works in the role of Chief Inspector stationed at the Inspector General's Office. Therefore, he could not find time to peruse the newspapers on 23<sup>rd</sup> December, 2019, due to the pressures of work.
19. Reliance was placed in the case of *Philip Mutiso Mulalya V Samuel Dominic Muatbe & 2 Others* [2022] eKLR, to support the proposition that the anticipated outcome of any mode of service is to make the defendant aware of the suit pending against them; and, if that outcome is not achieved, then the subsequent proceedings will not result in substantive justice. It was submitted that the newspaper advert dated 23<sup>rd</sup> December, 2019, was placed in the midst of numerous other advertisements and, therefore, it was not easily noticeable by newspaper readers.
20. Further, that Article 50 (1) of the *Constitution* guarantees the right to a fair hearing which includes the right not to be condemned unheard and that the foregoing is a key element of the rules of natural justice. To buttress this proposition, reliance was placed on the holding of the court in the cases of



*Mandeep Chathan V Kenyatta National Hospital & 2 Others* (2013) eKLR; and, in *Management Committee of Makondo Primary School & Another V Uganda National Examinations Board*, HC Civil Misc. Appl. No. 18 of 2010.

21. On the question of the Court's discretion to set aside its own ex parte judgments, the Applicants relied on the decisions in the cases of: *David Kiptanui Yego & 134 Others V Benjamin Rono & 3 others* [2021] e KLR; *Sebei District Administration v Gasyali* {1968} EA 300, 301 – 302; CMC Holdings Ltd vs. Nzioki [2004] KLR 17; *Patel v E.A. Cargo Handling Services Ltd* {1974} EA 75;
22. Having considered the instant Application, the annexures thereto, the written submissions and cited authorities, the court finds the issues for determination are;
  - i. Are the Applicants entitled to the Orders sought?
  - ii. Who should bear the costs of the Application?
23. The decision which the Applicants seeks to set aside dated 2nd July, 2018, is in respect of the Plaintiff/Respondent's suit filed on 9th June, 2015, seeking for Orders that the Defendants/Applicants deliver vacant possession of the suit property.
24. In his suit dated 9th June, 2015, the Plaintiff/Respondent asserted her rights as the registered proprietor of the suit land pursuant to Section 26 of the *Land Registration Act*, 2012. The essence of her claim was that the Defendants/Applicants had trespassed onto the suit land and settled thereon, vide the strength of a sale agreement executed between themselves and one Margaret Wanjiru Mburu, a person unknown to the Plaintiff/Respondent. She further claimed that the 3<sup>rd</sup> Defendant/ Applicant herein namely, Irene Wangari had constructed a house on the suit property without her consent.
25. The Defendants/Applicants did not enter appearance in the suit notwithstanding the evidence of Substituted Service in the Daily Nation on 10th March, 2017, which was tendered by the Plaintiff/Respondent. Thereafter, the suit proceeded for hearing as a formal proof.
26. Upon a review of the evidence produced by the Plaintiff/Respondent, the Court determined that she had adequately proven her claim of ownership of the suit property. Further, the Court found and held that the letter from Methi & Swani Farmers Cooperative Society dated 17<sup>th</sup> February, 2015, presented by the Plaintiff/Respondent confirmed that she was allotted the suit land based on ballot number 640, and her Membership/Share Certificate Number 311. The Court cited the certificate of Official Search dated 12<sup>th</sup> February, 2015, denoting the Plaintiff/Respondent as the beneficiary of the suit property as forming prima facie proof of her ownership of the same.
27. It is trite that the Courts do retain inherent or residual powers to render justice in every case before them. Further, Section 3A of the *Civil Procedure Act*, donates power to court to issue orders that are necessary for the end of justice to be met.
28. In the case of *Murtaza Hassan & Another v Ahmed Slad Kulmiye* [2020] eKLR, the Court cited *Halsbury's Law of England*, 4th Edition Volume 37 Paragraph 14, addressing the inherent/residual powers of the Court:

“Is a virile and viable doctrine and has been defined as being the reserve or found powers, a residual source of powers which the court may draw upon as necessarily whenever, it is just or equitable to do so, in particular to ensure observance of due process of Law, to do justice between the parties and secure a fair trial between them.”



“As to the construction of Order 10 Rule 11 of the Civil Procedure Rules, where Judgment has been entered under this order the court may set aside it vary such Judgment and any consequential decree or order upon such terms as are just.”

29. The Court’s power to set aside its own *ex parte* judgment was addressed by the Court of Appeal in the case of *CMC Holdings Ltd vs. Nzioki* [2004] KLR 17, where it held as follows:

“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.”

30. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Court held as follows:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

31. In the case of *Evans v Bartlam* {1937} AC 473, the Court stated as follows:

“The principle obviously is that unless and until the court has provided a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power, where that has only been observed by a failure to follow any of the rules of procedure. But in any case, in my opinion, the court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavits of merit could, in no doubt rare but appropriate cases be departed from, it was said that before a Judgment regularly obtained could be set aside, an affidavit of merit was required and when, the application is not so supported, it ought not to be granted except for some sufficient cause shown. I do note however at the same time, that in rare but appropriate cases this requirement could be waived so as not to prevent the court from revoking its coercive powers.”

32. In several other cases, the courts have opined that the discretion of the court to set aside an *ex-parte* Judgment remains unfettered and is exercisable judiciously and in essence for the interest of justice. In the case of *Patel v E.A. Cargo Handling Services Ltd* {1974} EA 75 the Court ruled:

“The court has a very wide discretion under the order and rules and there are no limits and restrictions on the discretion of the Judge except that if the Judgment is varied, it must be done on terms that are just.”

33. The Court in *Shah v Mbogo* {1969} E.A. 116 at 123 held:

“That the discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, 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.”

34. Furthermore, in the case of *Jesse Kimani v McConell* {1966} EA 547 555, the Court held as follows:

“Among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the Judgment which would not or might not have been present had the Judgment not been ex-parte and whether or not it would be just and reasonable to set aside or vary the Judgment, upon terms to be imposed.”

35. In the case of *Sebei District Administration v Gasyali* {1968} EA 300, 301 – 302, it was held:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

36. Informed by the preceding case-law, the Court is bound to consider the reasons advanced by the Applicant in support of the subject Application to set aside its judgment dated 2<sup>nd</sup> July, 2018.

37. The Court has considered, reviewed and analysed the pleadings, submissions and evidence in support of the Application as well the Plaintiff/Respondent’s grounds of objection.

38. Article 50 (1) of the [Constitution](#) provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

39. The Applicants contended and submitted that they became aware of the Judgment which they now seek to be set aside only on 4<sup>th</sup> February, 2024. They stated that the 1<sup>st</sup> Applicant resides on the suit property alongside the 3<sup>rd</sup> Applicant herein namely, Irene Wangari Ndegwa. From the record of the proceedings culminating in the decision of this Court dated 8<sup>th</sup> February, 2018, which the applicants are seeking to be set aside, it is clear that the Plaintiff/Respondent well aware that the 3<sup>rd</sup> Applicant had put up a house on the suit land. However, it is unclear whether the Plaintiff/Respondent was aware that 3<sup>rd</sup> Applicant was occupying the aforesaid house. It is also not clear from the documents on record whether the Plaintiff/Respondent knew that the 1<sup>st</sup> Defendant/Applicant was residing on the suit land.

40. The Defendants/applicants Submitted that they were unaware that this court’s Judgment dated 2<sup>nd</sup> July, 2018, had been served upon them through the newspapers because of the timing of the aforesaid notice which was published on 23<sup>rd</sup> December, 2019. They argued and submitted that the Christmas season in Kenya is a period during which duties as a Police Officer become too pressing thus, leaving little room for the 1<sup>st</sup> Defendant/ Applicant to read the newspapers.

41. The Court holds and finds that owing to the timing publication of the notice of judgment in question on 23<sup>rd</sup> December, 2019, and its placement in the Classified section of the newspaper, it would be unreasonable to expect, the 1<sup>st</sup> Defendant/ Applicant, a Police Officer beset by the demanding needs for enhanced security during the Christmas season to locate the same notice in the newspaper.



42. Further, the Court finds and holds that the 1<sup>st</sup> Defendant/Applicant has furnished the Court with a reasonable explanation as to why the Defendants/ Applicants did not seek for the setting aside of the Judgment dated 2<sup>nd</sup> July, 2018 at an earlier point in time.
43. Further, the subject Application was filed on 8<sup>th</sup> February, 2024, while the Defendants/ Applicants were served with the notice of the Judgment dated 2<sup>nd</sup> July, 2018 on 4<sup>th</sup> February, 2024. It is the holding of this Court that the instant Application was filed before the Court without unreasonable delay. The Defendants/ Applicants have demonstrated good faith and interest in prosecuting the suit.
44. The Applicants further contended that they are in occupation of the suit property and although they have not demonstrated to the Court their occupation of the suit land by either production of photographs or other forms of evidence such as a report from a licensed land valuer, that notwithstanding, the Plaintiff/Respondents claim which was allowed vide the decision of the Court delivered on 8<sup>th</sup> February, 2018, was founded allegedly on trespass by the Defendants/Applicants onto the suit property.
45. On 23<sup>rd</sup> December, 2021 when this Court issued a Decree allowing the Plaintiff/Respondent's Application dated 8<sup>th</sup> September, 2021, seeking for the appointment of the Firm of Bensure Auctioneers to execute the decree of the Court dated 24<sup>th</sup> April 2019, it was on the basis that the Defendants/ Applicants were still occupying the suit property.
46. Subsequently, on 28<sup>th</sup> February, 2022, the Court allowed the Plaintiff/Respondent's Application filed on 23<sup>rd</sup> February, 2022, seeking for Orders directing the Officer Commanding Station at Kenol Police Station (Murang'a) to provide security to Bernard Muriuki Gaturuku/bensure Auctioneers, when carrying out the eviction orders dated 23<sup>rd</sup> December, 2021.
47. The Plaintiff/Respondent's Application dated 23<sup>rd</sup> February, 2022, was informed by the fact that the suit land is located within the jurisdiction of Kenol Police Station (Murang'a) and not Kabati Police Station. A consequential Order flowing from the Judgment dated 2<sup>nd</sup> July, 2018, whose effect is the eviction of the Defendants/Applicants from the suit property was re-issued by the Deputy Registrar of Court as recently as 9<sup>th</sup> January, 2024.
48. In view of the foregoing, the Defendants/Applicants' have established that they hold a "demonstrable stake" in the suit land, as determined in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu* [2014] eKLR.
49. In view of the real possibility that the Defendants/Applicants are in occupation of the suit land, the Court is satisfied that the Defendants/Applicants stand suffer substantial loss in the event that a stay of execution in respect of the Judgment dated 2<sup>nd</sup> July, 2018 is not granted.
50. Furthermore, it is trite that land is an emotive issue and subject and in the interests of justice, it is the holding of the Court that the Defendants/Applicants are hereby granted leave to file their defence out of time within a period of 14 days from the date of this Ruling.
51. The upshot of the foregoing is that Defendants/Applicants Notice of Motion application dated 8<sup>th</sup> February, 2024, is found merited and consequently the said Application is hereby allowed in terms of prayers No., 3, 4, 5 and 6. Prayers 1 and 2 of the said Application are now spent.
52. Further, Costs of this Application shall abide the outcome of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF JUNE 2024**



**L. GACHERU**

**JUDGE**

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

N/A for the Plaintiff/ Respondent

M/s Wairimu H/B for Mr Nguringa for the Defendants/ Applicants.

L.Gacheru Judge

27/6/2024

FURTHER; The Defendants/Applicants to file their Defence within a period of 14 days from the date hereof.

Mention on 22/7/ 2024, before the DR to confirm compliance.

Mention Notice to issue by the ELC Registry.

**L. GACHERU**

**JUDGE.**

**27/06/2024**

