Matumbi & another v M'Mugwika & another (Environment & Land Case 74 of 2009) [2025] KEELC 750 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 750 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 74 OF 2009

CK YANO, J

FEBRUARY 20, 2025

BETWEEN

GEORGE MATUMBI ..... 1ST PLAINTIFF

LILIAN KENDI MTHURI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JULIUS MUTHURI (DECEASED) ..... 2ND PLAINTIFF

AND

ISAAC MURIUKU M'MUGWIKA ..... 1ST DEFENDANT

STEPHEN THIURU MUGWIKA ..... 2ND DEFENDANT

RULING

1. The application for determination is the Notice of motion dated 16.10.2024 by the Defendants/ Applicants seeking the following orders:-

    1. Spent

    2. Spent

    3. That pending hearing and determination of this application and the suit, the plaintiffs/ Respondents be restrained for taking possession of and/or entering, cultivating, charging, selling, and/or transferring the parcel of land known as Kiirua/Naari/1270 to any other person/Party.

    4. That the exparte judgement entered herein be set aside and all consequential orders and the Defendants/Applicants be allowed to file their response and the matter do proceed to full hearing on merit.

5. That the parcel of land which has been excised from parcel of land known as Kiirua/Naari/1105 and given number Kiirua/Naari/1270 do revert back to the Defendants/Applicants.

6. That the cost of this application be provided for.

2. The application is brought pursuant to sections 3A and 95 of the *Civil Procedure Act*, order 10 Rule 11 of the Civil Procedure Rules, Article 40 of *the Constitution* and all enabling laws and is based on the grounds on the face of the motion and supported by the affidavit of Stephen Thiuru Mugwika sworn on 16.10.2024 and a further affidavit sworn on 29.11.2024.

3. The applicants averred that parcel of land known as Kiirua/Naari/1105 belongs to them having been given to them by their father way back in the year 1988 and issued with title in the year 1990. That they have developed the land and have been using the same since then. That the respondents misled the court by saying that they stay/live on the said land and therefore entitled to it by the doctrine of adverse possession.

4. The applicants further contended that they were never served with summons to enter appearance, otherwise they would have defended the suit. That upon perusal of the court file, their advocate established that the respondents had sought leave to serve the court documents by way of substituted service, but there is no evidence that they ever served.

5. The applicants also averred that it is also evident that the respondents claimed that they bought the land from the applicants' father, but they never sought for specific performance of the contract in their pleadings.

6. The applicants averred that they have been given notice to vacate the land and pray for the orders sought in orders to preserve the suit land as the matter proceeds for hearing on merit. That no party would be prejudiced if the orders sought are granted as they are merely meant to preserve the suit land.

7. The applicants averred that their sister is currently farming bananas on the land with finance from Agricultural Finance Corporation. That the Respondents had entered into an agreement to purchase a portion of land known as KIIRUA/NAARI/365 from the Applicants late father at agreed purchase price of Kshs 16,250/= or thereabout in the year 1977 and paid a deposit of Kshs 11,400/=, but were unable to complete the transaction despite the Applicants' father having obtained the requisite Land Control Board consent. That vide a letter dated 11.4.1980 from the Advocates who represented the Applicant's father, the Respondents were advised to collect the deposit paid which the applicants believe they did. That their father proceeded to sell the portion of land he intended to sell to the Respondents to one Mbogori Mukindia vide an Agreement dated 12.4.1980.

8. The applicants averred that in the year 1984, the Respondents had trespassed on the land and the applicants father reported them to the area chief who reprimanded them and they promised in writing never to repeat again. The applicants contented that it is clear from the foregoing that the land in issue has a long history and it is only fair and just that the same be preserved, the matter be opened again and the same do proceed for hearing on merit. That no party will be prejudiced in any way if the land is preserved by granting the orders sought as the respondents live elsewhere.

9. The Applicants averred that they have been actively using the suit land, including charging the same to the bank and carrying out farming activities financed by a finance institution. That all these activities clearly demonstrate that the applicants are firmly on the land, and stated that the fact that the Respondents served them with a "Notice to vacate" the suit land through WhatsApp clearly shows that the Respondents had the Applicants numbers and they could have served them with the court

documents through the same means, but they chose not to. That service through Newspaper though legal was meant to deny the applicants the opportunity to respond to the suit as they knew chances of them seeing the advertisement were minimal. It is the Applicant's contention that the Respondents are engaged in an illegality and pray that the originating summons be dismissed and/or the orders be set aside.

10. In the supporting affidavit, the 2nd Applicant annexed copies of the title deed for Title No. Kiirua/Naari/1105, Notice to vacate the land, photographs, letter dated 13/05/2024 from Agricultural Finance Corporation to the Applicant's' sister, one Monica Kanyiri Mugwika, Letter dated 11.4.1980, Agreement dated 12.4.1980 and chief's letter marked "STM1-7" respectively.

11. The application is opposed by the Respondents through a Replying affidavit by Lilian Kendi Muthiri the legal representative of the estate of her father Julius Muthuri, the 2nd Plaintiff herein. She was substituted in place of the 2nd plaintiff vide an order made on 29.9.2020.

12. The deponent averred that it is true that the genesis of this dispute was the sale of 2 ½ acres out of LR. No. Kiirua/Naari/365 which was originally registered in the name of the Defendants' father Mugwika Twaruchiu vide a sale agreement dated 11.2.1977. That the defendants' father refused to transfer the land and the 1st Plaintiff and the deceased 2nd Plaintiff sued the defendants' father in Meru H.C Civil Case No. 39 of 1980 which by an order issued on 24/2/1983, the defendants' father agreed to excise 2 ½ acres out of LR. No. Kiirua/Naari/1105 which was a subdivision of LR. No. Kiirua/Naari/365. That pursuant to the aforesaid court order, a Land Control Board consent was issued for the subdivision of LR. No. Kiirua/Naari/1105 into 2 portions. That that land was surveyed and a mutation form dated 19.4.1983 was prepared and new numbers being 1269 and 1270 were issued and the District surveyor signed the mutation on 30.12.1983 ready for registration. That when the said mutation was forwarded to the Land Registrar Meru to register the same, it was rejected because the defendant's father had stolen a match against the plaintiffs by transferring LR. No. Kiirua/Naari/1105 to the defendants on 3/12/1982. That in view of the foregoing, it meant that a transfer form for P/No. 1270 (which was the number that was meant for the plaintiffs) could not be registered.

13. The deponent averred that unperturbed, the plaintiffs lodged a caution against L.R No. Kiirua/Naari/1105 which was duly registered. That the plaintiffs filed the present suit against the defendants for adverse possession in the year 2009. That the defendants were served with the pleadings via substituted service, and despite service through advertisement, the defendants did not defend the suit and the matter therefore proceeded exparte and a judgement was delivered on 31.10.2018 in the plaintiffs' favour. That the court thereafter issued an order for the Deputy Registrar to sign all relevant documents to ensure the 2½ acres were registered in the plaintiffs' names. That the Deputy Registrar thereafter executed an application for consent to subdivide the suit land and the mutation form and a Land Control Board consent was also issued. That the Deputy Registrar also executed a transfer in favour of the plaintiffs and a title deed was eventually issued on 30.9.2024.

14. The Respondents argued that the defendants' averment at paragraph 10 of the supporting affidavit that "the defendants and their siblings work and reside outside Meru County" buttresses the Respondents' assertion that they do not live on the suit land and especially on the 2 ½ acres. That the bananas alluded to in the supporting affidavit are the Respondents properties.

15. In response to paragraph *14*, *15* and *16*, the 2nd Respondent stated that the full purchase price was paid and that is why the Applicants' father consented to the excise and transfer of the 2 ½ acres. That the applicants knew that the Respondents families have been farming on the land for a very long time. That the applicants in 2014 even issued a demand letter acknowledging that the Respondents were on the suit land, but chose not to sue or defend this suit. That when the applicants learnt that the

Respondents had gotten their title on 30.9.2024, they sent strange people to the land and trespassed on the portion that is the Respondents' property.

16. The deponent averred that the 1st plaintiff is now very old and sickly while the 2nd Plaintiff is now deceased. That in view of the age of the circumstances leading to the filing of the suit, it would be a miscarriage of justice if this suit is re-opened. That the Applicants were served and chose not to defence the suit and are guilty of laches and have not approached the court with clean hands. The respondents therefore pray for the application to be dismissed with costs.

17. In the Replying affidavit, the deponent has annexed copies of an order made on 29.9.2020, agreement dated 11.2.19977, plaint and order in Meru HCCC No. 39 of 1980, application for Land Control Board consent and the resultant consent, mutation, letter dated 24.1.1985, transfer form dated 20.12.1984, application for registration of caution and the caution itself, application for substituted service, order authorising substituted service, Daily Nation Newspaper of 1.12.2015, affidavit of service dated 10.4.2017, judgement delivered on 31.10.2018, application, consent and mutation, title, letter dated 3.1.2014 and a medical report for 1st plaintiff and Death certificate for 2nd plaintiff, marked "LKM 1" – "LKM 24" respectively.

18. Both parties filed written submissions in support of their opposing positions. The Applicants filed submissions dated 29.11.2024 through the firm of M/s Muthuri & Co. Advocates while the Respondents filed theirs dated 10.12.2024 through the firm of M/s Mwririgi Kaburu & Co. Advocates.

19. Learned counsel for the Applicants identified the issues for determination as:-

    i. Whether the service of court documents was proper.

    ii. Whether the plaintiffs were entitled to the orders sought in the Originating summons.

    iii. Whether the Respondents/Applicants have an arguable defence.

20. Regarding the first issue which is whether the service of court documents was proper, it was submitted on behalf of the applicants that according to the Originating summons dated 11th June, 2009, the same was to be served to the Respondent through the Chief Gitimene location which was not to be. That by an application dated 9.7.2014, the Respondents sought leave to be allowed to serve the court documents to the Applicants by way of substituted service and the same was granted on 15.8.2014. That in the said application, there was no affidavit showing the efforts made by the then Advocate or process server to serve the Applicants with the court papers. The applicants submitted that it is clear that the plaintiffs never made any attempt to serve the applicants personally with the court documents and they resulted to substituted service through advertisement in a Newspaper. That as it were, the Applicants never saw the advertisement, otherwise they could have responded to the suit appropriately.

21. The applicants counsel submitted that the issue of land is emotive and very dear to all Citizens of this country, and there is no way the Applicants could have just ignored the court documents to wait for the Respondents to get orders to dispossess them of the land to which they have been holding title to the same since the year 1990. The applicants counsel urged the court to exercise its discretion and set aside the exparte judgement and let the matter proceed to hearing on merit. That if the Respondents are entitled to the land, they will still get it.

22. With regard to the issue whether the Respondents were entitled to orders sought in the originating summons, the Applicant's submitted that in their supporting affidavit, they have annexed a title which they were issued within the year 1990 and pictures of what they are doing on the land, and have gone further and taken loans using the title in issue as security. That they have at one time charged the land to Equity Bank and the farming currently going on is Financed by Agricultural Finance Corporation.

The applicants argued that all these could not be happening if the Respondents are on the land as they claim. That the trees the Respondents alleged they planted were planted by the applicants' father and applicants. That the Respondents cannot even access the land.

23. It was also pointed out by the Applicants that in the originating summons, the Respondents have not mentioned the issue of case No. 39 of 1980. That the order allegedly issued in that case on 24.2.1983 cannot even be enforced over 40 years later by filing a fresh suit. The Applicants' counsel cited the provisions of section 4(4) of the *Limitation of Actions Act*.

24. The Applicants further submitted that they have demonstrated how their father handled the issue of sale agreement entered into between their father, the 1st Respondent and the 2nd Respondent's father. They referred to annextures "STM5", "STM6" and "STM7".

25. On the last issue, the applicants submitted that they have an arguable defence with merits and they should be given a chance to present their case in court. The Applicants invited the court to consider that the plaintiffs failed to complete the purchase price and they were invited to collect the deposit paid, that the land which was being sold to the plaintiffs herein was sold to somebody else who took possession and lives there and evidence has been availed, that the judgement sought to be enforced by the plaintiffs, if any, is time barred, the same having been delivered over 40 years ago, that the plaintiffs have never lived on the suit land, and that the Respondents in filing and prosecuting the originating summons were engaging in an illegality as they wanted to enforce a judgement which was time barred. The Applicants' counsel relied on the cases of ELC No. 9 of 2022 (Machakos): Pina Waithera Kama – Vs- Shmina Mandai and Shaleh Mandai (2022) KEELC 14636(KLR) and ELC case No. E029 of 2022: Festus Nyanje Atsulu –Vs- Wycliff Labby Wanawale (2023) KEELC 19827 (KLR) and urged the court to set aside the exparte judgement entered herein.

26. The Respondents' counsel gave a brief summary of the application and submitted that prayer 4 of the application which is for setting aside an exparte judgement is provided for under Order 10 Rule 11 of the Civil Procedure Rules, 2010 which they cited. That the judgement herein sought to be set aside was delivered on 31.10.2010 which is more than 4 years ago. That the reasons advanced by the Applicants is that they did not receive the pleadings served through substituted service and that the respondents did not indicate any efforts made before embarking on substituted service. It was submitted that the Respondents attempted to effect direct service of summons to enter appearance upon the Applicants without success, and thereafter sought leave to effect substituted service in accordance with order 5 Rule 17 of the Civil Procedure Rules vide the application dated 9.7.2014 which the court allowed after being satisfied that the reasons advanced by the Respondents were convincing. That the Applicants did not challenge the order for substituted service. The Respondents' counsel submitted that there is a rebuttable presumption that the Applicants saw the advertisement in the newspaper. That the Respondents through the supporting affidavit and the entire application never indicated that they did not see the advertisement with respect to these proceedings and the submission by the counsel should be disregarded as evidence is submitted through affidavits and not through submissions. The Respondents' counsel relied on order 5 Rule 17 of the Civil Procedure Rules and the cases of Mary Mbula Mukuyi –v- David Mwose Mwaliko T/A Aderden Properties Limited & 5 others (2015) eKLR and Murtaza Hassan & another v Ahmed Slad Kulimiye (2020) eKLR and submitted that the Applicants despite being served with summons, they neither entered appearance nor filed defences which occasioned the exparte judgement which the court was urged to uphold.

27. Further, it was submitted that the Applicants have not attached a draft defence to prove that it raises triable issues and therefore falling short of the threshold for setting aside as held in the case of Kamau v Maudal & another (2022) eKLR and Patel vs. East Africa Cargo Handling Services Ltd (1974) EA 75. It was submitted that the Applicants would have no triable defence and that is why they attached

none because the Respondents have been in occupation, use and in peaceful possession of the suit land measuring 2 ½ acres since the year 1977, which is a period of over 24 years, with the knowledge of and intimation of and or constructive knowledge of the applicants for a period of over 12 years and by prescriptive rights, that the said possession was given freely, without force, coercion, fraud or mistake and that the applicants do not stay on the suit land as they reside outside Meru County which fact they have not denied.

28. In view of the foregoing, it was submitted by the Respondents that the Applicants have not satisfied the conditions for setting aside judgement which the Respondents contend is regular. It was further submitted that the Applicants have not offered plausible explanation about the delay in filing the application herein, the same having been filed 4 years after judgement making the delay inordinate. Learned counsel for the Respondents relied on the case of Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd (2018) eKLR and submitted that setting aside the judgement herein delivered more than 4 years back without meeting the threshold for setting aside will greatly prejudice the Respondents who have occupied, developed and reside on the suit land together with their entire household since 1977.

29. It was also submitted by the Respondents' counsel that prayer 5 seeking to revert LR. No. Kiirua/Naari/270 excised from LR. No. Kiirua/Naari/1105 into the names of the Defendants/Applicants is unavailable and cannot be granted at interlocutory stage as the court cannot issue determinative declaratory orders at this stage as it was held in the case of Paul Mujera & 6 others v African Israel Church Nineve & 3 others (2011) eKLR. That in any case if the interlocutory judgement is set aside, which the Respondents argued they do not foresee, any orders issued in the judgement including registration of LR. No. Kiirua/Naari/1105 in the names of the Respondents would stand vacated. It was submitted that the Applicants have failed to satisfy the court on the cumulative grounds for granting the orders sought and the court was urged to dismiss the application with costs to the Respondents.

30. I have considered the application together with the affidavits in support and against as well as the submissions made and the authorities relied on. I find that the issue for determination is whether the Applicants have met the threshold of grant of the orders sought.

31. The law on the setting aside of exparte judgement is now well settled. Order 10 Rule 11 of the Civil Procedure Rules provides that exparte judgement in default of appearance or defence may be set aside and reads as follows:-

> " 11. Where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just."

32. It is therefore trite that the court has wide powers to set aside exparte judgement or order save that where the discretion is exercised, the court will do so on terms that are just. In the case of Patel –Vs- East Africa Cargo Handling Services Ltd (1974) EA 74 at 76 Duffus P. stated thus:

> " There is no limit or restriction on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just.... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here, the court will not usually set aside the judgement unless it's satisfied that there is a defence on merits. In this respect defence on merits does not mean in my view a defence that

must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

33. In Shah –v Mbogo (1967) EA 116 at page 123, Harris J. stated.

> " This discretion is intended so to be exercised to avoid injustice or 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."

34. In the case of Thorn PLC –vs- Macdonald (1999) CPLR 660, the Court of Appeal stipulated the following guiding principles:

a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

b. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

c. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

d. Prejudice (or the absence of it) to the claimant also has to be taken into account.

35. Further, in the case of James Kanyiita Nderitu & Another 92016) eKLR, the Court of Appeal stated thus:-

> " From the onset, it cannot be gainsaid that a distinction has always existed between a judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgement. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defence the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgement, and will take into account such factors as the reason for 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 judgement was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgement, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A Cargo Handling Services Ltd (1975) E.A 75, Chemwolo & another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka (2004) IKLR 173.
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> In an irregular default judgement, on the other hand, judgement 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 judgement 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 judgement is irregular; it can set aside the default judgement 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 judgement. The reason why such judgement 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 allegation 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."

36. The Court of Appeal went on and cited the Supreme Court of India which forcefully underlined the right to be heard as follows in the case of Sagram Singh –Vs- Election Tribunal, Kotch, AIR 1955 SC 664, at 771:

> " There must be ever present to the mind the fact that our laws 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."

37. In the originating summons dated 11th June, 2009, the Respondents herein indicated that the summons and other pleadings were to be served upon the defendants through the chief Gitimene location. However, pursuant to an application dated 9th July, 2014, the Respondents sought to serve the pleadings by way of substituted service through advertisement in the newspaper, and on 14th July, 2014, the court ordered the service to be effected through substituted service as aforesaid. Consequently, on 1st December, 2015, an advertisement was placed in the Daily Nation Newspaper. It can therefore be concluded that the Applicants herein were duly served and that the judgement entered was regular. However, the Applicants have stated that they never saw the said advertisement. It is their contention that they only came to know about the existence of the suit when the Respondents through their advocate gave the Applicants notice to vacate the suit land. The applicants further contend that they are the ones in occupation and use of the suit land, and that the Respondents have never been in occupation and that is the reason they issued notice to the Applicants asking them to vacate the land.

38. From the supporting affidavits, the Applicants have in my view given sufficient reason to persuade this court to exercise its discretion in their favour since it may be true they never saw the advertisement. Besides taking into account the reason for the Applicants' failure to file their memorandum of appearance, defence or replying affidavit, I also have to consider whether the defence raised in the supporting affidavits herein raises triable issues. The applicants have denied the Respondents claim for adverse possession and have stated categorically that they are the ones in possession, occupation and use of the suit land, and not the Respondents. That the fact that the Respondents served the Applicants with "Notice to vacate" the suit land clearly shows that it is the Applicants who are on the land and not the Respondents. In my view, the defence raises triable issues which call for trial since a claim of adverse possession is based on actual possession of the land for the statutory period, which is 12 years. The Respondents have not demonstrated that they will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on its merits. The overriding objective of the court would no doubt come to the aid of the applicants.

39. In the result, I find merit in the notice of motion dated 16.10.2024 and the same is allowed in the following terms: -

    1. That the ex-parte judgement entered herein and all consequential orders are hereby set aside.

    2. The Applicants are granted leave to file and serve their response to the Originating summons herein within fourteen (14) days from today's date.

    3. That pending the hearing and determination of the suit, the plaintiffs/Respondents be and are hereby restrained from charging, selling and/or transferring the parcel of Land known as Kiirua/Naari/1270 which was excised from LR. No. Kiirua/Naari/1105.

4. The costs of this application to abide the outcome of the suit in any event.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 20TH DAY OF FEBRUARY, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

No appearance for the plaintiffs/Respondents.

Mr. Muthuri for the Defendants/Applicants.

Court Assistant – Laban.