



REPUBLIC OF KENYA



**Karai v Onger & another (Land Case E014 of 2024)  
[2024] KEELC 7433 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7433 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
LAND CASE E014 OF 2024  
E ASATI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**GEORGE WAKAHIA KARAI ..... PLAINTIFF**

**AND**

**MESHACK ONGER ..... 1<sup>ST</sup> DEFENDANT**

**KENNEDY OMONDI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion application dated 9<sup>th</sup> April, 2024 brought by the Defendants pursuant to the provision of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51, Order 10 Rule 11, Order 22 Rule 11, Order 22 Rule 22 and Order 40 of the *Civil Procedure Rules* Cap 21 Laws of Kenya.

The application seeks for orders that;

- a. the honourable court do certify this application as urgent and place the same to be heard on priority basis and service of the same be dispersed with in the first instance.
- b. That the court be pleased to joint Nicholas Wakahia as substituting George Wakahia as the Plaintiff in this matter;
- c. That the honourable court be pleased to set aside and or vary its interlocutory judgement entered on the 21<sup>st</sup> March 2006 for the plaintiffs against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only in default of entering appearance and filing a defence together with any consequential decree and orders of the court as the court may deem fit and just.
- d. That upon prayer (c) being granted the court be pleased to allow the Defendants to file their defence in terms of the annexed draft defence.



- e. That there be a stay of execution of the judgement delivered on 21<sup>st</sup> of March 2006 pending the hearing and determination of this application.
  - f. That an interim order of injunction do issue restraining the Defendants either by themselves, their servants and or agents or anyone whomsoever claiming title, deriving authority or acting on his behalf from entering, remaining in, occupying/continuing to occupy, cultivating, constructing on, alienating, selling or doing any act on land parcel known as Kisumu/Kasule/914 pending the hearing and determination of this application.
  - g. That the cost of this application be in the cause.
2. The grounds upon which the application was brought as contained in the Notice of Motion are that the applicants herein are the legal owners of land parcel known as Kisumu/Kasule/914, that the plaintiff herein filed a suit against the Defendants vide a plaint dated 24<sup>th</sup> November 2004, that judgement was delivered on 21<sup>st</sup> of March 2006 in the absence of the defendants, that the defendants were never served with any pleadings and/or documents from court, that the defendants only came to realize that there was a matter in court regarding the suit property when the DCI and the plaintiff's daughter visited the Defendant's home on 10/12/2023 telling them that the suit property belongs to someone by the name George Wakahia who is now deceased, that the defendants stand to lose the only land they own, that the applicant herein is desirous that the judgement delivered on 21<sup>st</sup> March 2006 be set aside and that it is in the interest of justice that the orders sought herein be granted.
  3. The application was supported by the contents of the Supporting Affidavit sworn by the 1<sup>st</sup> Defendant on 9<sup>th</sup> April, 2024.
  4. The application was opposed vide the grounds contained in the Replying Affidavit sworn by Nicholas Wakahia on 30<sup>th</sup> September, 2024. It was the Respondent's case that the application is incompetent frivolous, vexation and has no stand in law. That the applicants had been served, attended court but chose not to file their papers hence the matter was heard and determined. That the Applicants have only come to court to delay execution of the decree.

The application was argued by way of written submissions.

5. I have considered the application, grounds of opposition thereto and the written submissions filed by both parties. Prayers a), e) and f) of the application which meant to secure interim orders pending hearing of the application are spent. The substantive prayers outstanding are prayers b) for joinder, c) for setting aside of the judgement and d) for the Defendants to be allowed to file defence.
6. The explanation tendered by the Applicants for failing to file defence and prosecute it and generally participate in the proceedings that led to the entry of the judgement sought to be set aside is that they were not aware of the existence of the suit as they were never served with any pleadings or documents and that the Affidavit of Service filed is totally false and fabricated.
7. I have perused the proceedings in the court file. They show that the Defendants did participate in suit from the very onset.
8. The proceedings show that on 28<sup>th</sup> February, 2005, Meshack Onger had appeared in court in person and addressed the court as follows;  

“I was served on 16<sup>th</sup> February, 2005. I need a date to prepare myself and file proper documents.”
9. His request was allowed and the matter was stood over to 18<sup>th</sup> April, 2005.



10. Again, on 25<sup>th</sup> May, 2005, the Defendant attended court for hearing of an application and submitted  
“Nobody is working on the parcels of land”  
Where upon the court proceeded to allow the application.
11. The record further shows that on 6<sup>th</sup> March, 2006 the Defendant was present in person. The judge recorded the Defendant’s submissions as follows;  
“I have received the hearing notice only yesterday, so I seek for another date to prepare myself”
12. The proceedings show that the court granted the Defendants’ request, adjourned the matter to 14<sup>th</sup> March, 2006 and ordered the Defendants to file and serve Defence within 5 days from then.
13. The proceedings of 14<sup>th</sup> March, 2006 show that the Defendants did not attend court in spite of the date having been given in their presence and at their request. The defendants had also not filed the Defence as ordered. So, the suit proceeded to hearing.
14. The Defendants are therefore not being truthful in their averments in the Supporting Affidavit. It is clear that the Defendants are lying when they depose that they were never served with pleadings or documents and were never aware of the existence of the suit till the year 2023.
15. I find that the application is not made in good faith the same is not merited. The application is hereby dismissed with costs to the Respondent.

Orders accordingly.

**RULING DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Otieno for the Plaintiff/Respondent.

Mwamu for the Defendants/Applicants.

