Ndua v Waititu & another (Civil Suit 862 of 2017)
[2025] KEELC 7174 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7174 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL SUIT 862 OF 2017

JA MOGENI, J

OCTOBER 21, 2025

BETWEEN

JAMES MBURU NDUA ..... PLAINTIFF

AND

FERDINAND WAITITU ..... 1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU ..... 2ND DEFENDANT

RULING

1. I am considering a Notice of Motion dated 7/06/2024 by the 1st Defendant/Applicant. The Applicant is seeking for:

   a. Spent.

   b. That leave be granted to the firm of Masaviru Ketoo & Company Advocates to come on record for the 1st Defendant post Judgment.

   c. That pending the hearing and determination of this application this Honorable Court be please to issue an order of temporary Stay of execution of the Judgment delivered on 30th April 2024 and all consequential orders emanating thereform.

   d. That this Honorable Court be pleased to Review, Set Aside, Vary and/or Vacate the Judgment delivered on 30th April 2024 by Lady Justice Kemei (Mrs) and any other consequential Decree emanating therefrom.

   e. That this Honorable Court be pleased to recall PW2, PW3, PW4, PW5 and PW6 for cross-examination by the 1st Defendant's Counsel.

   f. That costs of this application be provided for.

2. The Motion is supported by an Affidavit sworn on 7/06/2024 by the 1st Defendant, Ferdinand Ndung'u Waititu, and it was opposed by the Plaintiff vide his Replying Affidavit sworn on 19/06/2024.

3. The Applicant's case was that he was never served with the hearing date and/or notified of the proceedings herein. That it is only fair that the 1st Defendant be accorded a fair chance to present and prosecute his Defence and consequently test the testimony tendered by the Plaintiff through the tool of cross-examination.

4. He deposes that the Summon Pleadings and all Court papers in this matter have never been served on the 1st Defendant. That therefore the Judgment herein was irregularly obtained without notice whatsoever to the 1st Defendant.

5. That on 19/10/2020 long after the 1st Defendant had been impeached, the Plaintiff served him through the County Attorney who was never instructed to act on behalf of the 1st Defendant. Thus, the matter proceeded irregularly on 19/10/2020 in the absence of the 1st Defendant since the 2nd Defendant's Counsel did not inform the 1st Defendant about the hearing.

6. It is the 1st Defendant's contention that he has been condemned unheard contrary to Article 47 of the *Constitution* which enjoins the Court to hear all parties to a dispute.

7. That the evidence rendered in Court is marred by irregularities and should be tested through the rigors of cross-examination.

8. The Plaintiff/Respondent *inter alia* deposed that the application is a shame, misconceived, a wastage of the Court's valuable resources, a gross abuse of the Court process and is entirely based on falsehoods.

9. The Respondent pointed out that as per the Notice of Appointment of Advocate which is annexed to the 1st Defendant's Affidavit, Titus Ranja, Senior Legal Counsel County Government of Kiambu, entered appearance on behalf of both the 1st and 2nd Defendants. This is supported by the annexed copy of the Defence dated 5/06/2018 marked as 'JMN-1'. This being the case, all Court processes were served to the 1st Defendant through the said Counsel. This being the case in terms of the Affidavits of Service, and also from the 1st Defendant's admission then it is misconceived and legally untenable for the 1st Defendant to claim the hearing proceeded without his notice.

10. That according to Order 9 Rule 5 for the County Attorney to cease acting for the 1st Defendant he should have filed an application to cease acting for the 1st Defendant or the 1st Defendant should have filed and served a Notice of Change of Advocates or Notice of Intention to Act in person. No such applications were filed and served upon the Plaintiff/Respondent. Thus Titus Ranja, Advocate continued to be on record for both the 1st and 2nd Defendants upto and after the delivery of Judgment.

11. The Respondent points out that since a suit belongs to the client, the Defendant/Applicant has not annexed any evidence of inquiry into the status of the matter by the 1st Defendant putting to doubt his averment that he was never notified of the proceedings from the time he was impeached.

12. At the same time the Respondent avers that the 1st Defendant is not truthful as the hearing started on 22/07/2019 and not October 2020. Infact that PW2 testified and was cross-examined by the Defendant's Advocate. It is the belief of the Respondent that the instant application is an afterthought brought after unexplained inordinate delay and recalling the witnesses may not be plausible since the Respondent may not trace the witnesses and this application is meant to keep him from the fruits of the Judgment.

13. The Respondent deposes that the 1st Defendant has filed a Notice of Appeal hence the application to review and recall witnesses is not legally tenable and this is evidence by annexure 'JMN-2' which is a copy of Notice of Appeal dated 15/05/2024.

14. That the 1st Defendant does not disclose how he came to know of the Judgment and suit if at all he was not served with Summons and never instructed the Counsel who entered appearance and filed Defence on his behalf. That his action of perusal of the Court file must have been triggered by the Judgment which means he was following the proceedings.

15. The Respondent prayed that the application be dismissed.

16. The 2nd Defendant did not participate in the application and therefore did not file any documents.

17. The application was canvassed by way of written submissions which I have duly considered in writing this Ruling.

18. Having reviewed and evaluated the Application beforehand and having taken into account the Response thereto; and upon consideration of the written submissions filed by and on behalf of the Applicant and the Respondent, the following are the issues for determination;

    i. Whether leave to come on record by the firm of Masavira Ketoo & Company Advocates can issue.

    ii. Whether the Applicant herein has established and/or met the threshold to warrant review of the Judgment of the Court.

    iii. Whether the Applicant is deserving of the orders sought of the impugned Judgment for review, set aside, vary and or vacate.

Determination

19. On the first issue, it is trite that the regulatory legal framework on change of Advocates post-Judgment is contained in Order 9 Rule 9 of the *Civil Procedure Rules* which provides as follows; -

> " 9 (9) when there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate after Judgment has been passed, such change orientation to act in person shall not be elected without an order of the Court—
>
> a. Upon an application with notice to all the parties; or
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> b. Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."

20. This framework was introduced in the *Civil Procedure Rules* to deal with disruptive changes that Litigants and Advocates used to elect, often to unfairly dislodge previous Advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of electing the change of Advocates post-Judgment. Once the consent is executed and filed, a notice of change is filed and the new law firm is deemed properly on record.

21. It is not permissible for a party to simply change Advocates post-Judgment without observation of the said procedure. Otherwise, the intention of Order 9 rule 9 would be lost. Further, the formal adoption of the consent does not in any way prejudice the other parties to the case because a litigant is at liberty to change Advocate.

22. In the case of *Kibai v Permanent Secretary Ministry of Public Health & 3 Others* (Environment & Land Case 145 of 2018) [2023] KEELC the Court held that;

> " The provisions of Order 9 Rule 9 are to be interpreted as free from respect for any offices but regimenting the Court's and litigant's approach to change of representation for the overarching need for setting out a conducive environment for orderly conduct of civil proceedings before Court."

23. Therefore, as per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case, was that Counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before addressing the Court as the Counsel on record.

24. This position was re-affirmed by my sister Justice J.G. Kemei in *Stephen Mwangi Kimote v Murata Sacco Society* [2018] eKLR as follows:

> " 11. As per Order 9 Rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Applicant's Counsel filed a notice of change of Advocates dated 04th April 2018 without leave of the Court, together with an application dated 04th April, 2018 to set aside the dismissal orders of the Court then later on 09th April, 2018 Counsel for the Applicant filed an application to seek leave to come on record. This dearly offends the express provisions of Order 9 Rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard together as per Order 9 Rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.
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> Article 50 (2) (b) of the *Constitution* protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties."

25. Although the Applicant has a Constitutional right to represent yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. It is clear from the above narration of Order 9, Rule 9 of the *Civil Procedure Rules,* a party needs to consent to the change of Advocates in this case the Governor who was represented by a Counsel who also represented the second Defendant is no longer in the employment of the County Government of Kiambu. Therefore, it is in order that he should get another Advocate of his choice to represent him. The Applicant brought an application in the correct prescribed legal manner and it is my humble observation that the 1st Defendant/Applicant by right is entitled to legal representation thereby this Court finds that the firm of Masaviru Ketoo & Company Advocates is hereby admitted as the Counsel for the 1st Defendant/Applicant.

26. On the issue of whether the Applicant has met the threshold for setting aside Judgment and whether the Court can grant an order of varying and or vacating the impugned Judgment. It is pertinent to point out that there are two type of *ex parte* Judgments: regular and irregular. The difference between

the two was highlighted by the Court of Appeal case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another*, Civil Appeal No 6 of 2015 eKLR (Msa), where the learned Judges of Appeal explained: -

> "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 the case. From the outset, it cannot be gainsaid that a distinction has always existed between a 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 appearance 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 ascenario, the Court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account such factors 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; whether on the whole it is in the interest of justice to set aside the default Judgment, among other. 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 v Nzioki* [2004/ 1 KLR 173). In an irregular default 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 issues 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 0100 v Attorney General* [1986-19891 EA 456)".

27. In the present case, the impugned Judgment being a regular exparte Judgment, it is important therefore to consider whether the conditions for setting aside such a Judgment have been met.

28. The hearing date, 22/07/2019, was issued in Court on 19/02/2019 in the presence of both Counsel for the Plaintiff and the 1st and 2nd Defendants, Mr Githu holding brief for Mr Mbabu and Ms Mbugua holding brief for Mr Ranja respectively. On the hearing date, 22/07/2019 the hearing proceeded with the PW 1 and PW2 testifying. Further hearing was done on 19/10/2020 when PW3 to PW5 testified.

29. At no point did the 1st Defendant object to the hearing proceeding through representation of his Counsel.

30. The Applicant has instructed a new Advocate in place of his previous Advocate whom he claims he was not representing him. There is no document filed by the Applicant to act in person nor to alert the Court during the hearing of the case that he had not instructed Mr Titus Ranja Advocates. Advocates do not own the cases of the parties that instruct them. They do it on behalf of the litigants, therefore parties should be vigilant and follow up their cases once they instruct their Advocates. Now

all documents that were filed by the 1st Defendant emanated from the office of Titus Ranja Advocates. If the 1st Defendant had not instructed him, then he should have presented before this Court a protest note to the said Advocate and a letter to Court alerting the Court about the intermeddling of the Advocate in the 1st Defendant's position with regard to representation.

31. Where a regular Judgment has been entered, the Court has discretion under Order 12 Rule 7 of the *Civil Procedure Rules* to set aside such Judgment on such terms that are just. It is trite that a regular Judgment should not be set aside unless the Court is satisfied that the Defence raises triable issues. In the case of *James Kanyita Nderitu & Another v Marios Philotas Ghika & Another* (2016)eKLR, the Court of Appeal set out the criteria to be adopted when exercising jurisdiction to set aside a regular and an irregular ex-parte Judgment as follows:

> " 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 appearance 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 factors 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, whether on the whole it is in the interest of justice to set aside the default Judgment, among others.
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> In an irregular default 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 the party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on it's own motion. In addition, the Court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reasons 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."

32. This Court is also called upon to determine whether the Defendants have shown sufficient cause to enable the Court to exercise its discretion in their favour. The Applicants contended that their Defence raises triable issues which ought to be determined on merit. They further contended that they are the legal proprietors of the suit property. According to the Respondent, the Defence is a sham and does not raise any triable issues.

33. In the case of *Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Micheal Rono* the Court of Appeal defined triable issues as follows:-

> " A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the Court during a full trial. The *Black's Law Dictionary* defines the term "triable" as "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed but just one that warrants further intervention by the Court."

In the case of *Chemwolo & Another vs Kubendi* (1986) KLR the Court of Appeal held that:-

> The concern of the Court is to do justice to the parties and the Court would not impose conditions on itself to fetter the discretion. However, where a regular Judgment has been entered, the Court will not set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go for trial."

34. Following the Judgment delivered on 30/04/2024 the 1st Respondent/Applicant being dissatisfied and aggrieved by the Judgment has also in addition to filing the Application for review, setting aside, varying and or vacating the Judgment filed an Appeal in the Court of Appeal dated 15/05/2024 as per annexure 'JMN-2'.

35. Although this Appeal is yet to be heard and determined by the Court of Appeal it is not lost to this Court that the Applicant/Respondent having exercised its right of appeal against the Judgment is precluded under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* from seeking a review in the same matter. Once a party in a suit exercises the option of Appeal against a Judgment, decree or order, such a party loses the right of seeking a review before the Court that made the Judgment, decree or order. Section 80 of the *Civil Procedure Act* provides as follows:-

> " 80. Any person who considers himself aggrieved—
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or.
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

36. Order 45 Rule (1) of the *Civil Procedure Rules* reiterates the provisions of Section 80(a) and (b) and sets out the conditions that an Applicant seeking review must satisfy to be entitled to a review. Order 45 Rule (1) provides as follows:-

> "(1) Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is hereby allowed; and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay."

37. Other than the fact that the Applicant herein has neither highlighted nor amplified the requisite grounds to warrant an order for review; it is also important to point out that the Applicant herein has sought for the orders of review and at the same time sought for Leave to Appeal against the same decision. Technically when a person who is pursuing review of a particular decision, like in

the instant case pursuing review of the Judgment of the Court rendered on the 30/04/2024; cannot contemporaneously seek for Leave to Appeal against the same decision.

38. Despite the crystal-clear provision contained at the foot of Order 45, the Applicant herein has the brevity and temerity to approach the Honourable Court and seek for both orders in the same Application. It was in my view incumbent upon the 1st Defendant/Applicant to exercise an election and therefore to choose either to pursue Review or Appeal. However, the Applicant cannot pursue both remedies in the same Application or otherwise.

39. In the holding of the Court of Appeal in the case of *Mary Wamboi Njuguna versus William Ole Nabala & 9 Others* (2018)eKLR, which I will rely on, the Court stated and observed thus;

> " (25) As per the appellant, the ELC being a Court of equal status to the High Court, ought to have granted the prayer for abridgment of time to enable the appellant lodge his Notice of Appeal. In disallowing that prayer, the trial Court found the appellant could not pursue both review and appeal simultaneously; that having opted for review, she had effectively abandoned the option of appeal. Under Order 45 rule 2 of the rules, it is stipulated that:
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> "A party who is not appealing from a decree or order may apply for a review of Judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the appellant, or when, being Respondent, he can present to the appellate Court the case on which he applies for the review."
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> We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review."

40. The Applicant's application dated 7/06/2024 seeks to have the Judgment entered against the Applicant on 30/04/2024 reviewed, varied and/or set aside. It follows therefore that, as long as this application seeks to review the Judgment and orders of Lady Justice Kemei (Mrs) delivered on 30/06/2024 and in respect whereof the Applicant has filed an Appeal in the Court of Appeal, the remedy of Review would not be available to the Applicant. The application is without doubt misconceived as the Applicant having exercised its option to Appeal against the Judgment lost the right to seek a Review under Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the *Civil Procedure Rules*. The Applicant cannot Appeal and at the same time apply for Review as that would constitute to conducting litigation by trial and error, hoping somehow one of the efforts will be successful. A party cannot be permitted to have several bites of the Cherry and must stick to a single bite and pursue the same to the end either through the Appellate process or the Review process.

41. Given the foregoing; it is my determination therefore that the Applicant's application dated 7/06/2024 by way of Notice of Motion succeeds partly, by having the law firm of Masaviru Ketoo & Company come on record for the Applicant. However, the application relating to the rest of the prayers is devoid of merit and is dismissed with costs to the Plaintiff/ Respondent.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 21ST DAY OF OCTOBER, 2025.

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MOGENI J

JUDGE

In the presence of:-

Mr. Mugo for the Plaintiff

Mr. Masaviru for the 1st Defendant

2nd Defendant – Absent

Mr. Melita – Court Assistant