



**Cherekweny v Cherekweny (Environment and Land Miscellaneous Application
E003 of 2023) [2025] KEELC 1394 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1394 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2023
LA OMOLLO, J
MARCH 20, 2025**

BETWEEN

LILIAN CHEMUTAI CHEREKWENY APPLICANT

AND

RUTH CHELANGAT CHEREKWENY RESPONDENT

RULING

1. This ruling is in respect of the Respondent/Applicant's Notice of Motion application dated 31st May, 2024. It is expressed to be brought under Articles 50(1) and 159 of *the Constitution* of Kenya, Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*.
2. The Respondent/Applicant seeks the following orders;
 - a. Spent
 - b. Spent.
 - c. Spent
 - d. Spent
 - e. That this Honourable Court be pleased to set aside and or vary the orders issued on 25th January, 2024.
 - f. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of one Ruth Chelangat Chepkweny sworn on 31st May, 2024.



Factual Background.

4. The Applicant/Respondent commenced the present proceedings vide the Notice of Motion application dated 27th June, 2023.
5. The Applicant/Respondent sought the following orders;
 - a. That this application be certified urgent and be heard forthwith and ex-parte in the first instance.
 - b. That this Honourable Court be pleased to confirm the eviction notice dated 26th January, 2023 and order the Respondent to remove herself, her children and/or any other person that she may have placed on all that parcel of land known as Kericho/Kipchimchim/4420 forthwith and in default the Respondent, her children and/or any other person/s be forcibly evicted and vacant possession be given to the Applicant.
 - c. That Mercy Chelangat Boiyan T/A Razor Sharp Auctioneers do effect and execute the above eviction orders.
 - d. That a permanent injunction do issue against the Respondent, her children, agents, servants, heirs or any other person claiming through her from trespassing into parcel No. Kericho/Kipchimchim/4420.
 - e. That the Officer in charge of Ainamoi Police Post do offer security in ensuring compliance of prayers 2 and 3 above.
 - f. That this Court be pleased to grant any other order as it deems necessary.
 - g. That costs of this application be provided for.
6. No response was filed to the said application.
7. This Court in its ruling delivered on 25th January, 2024 issued the following orders;
 - a. The Eviction Notice dated 26th January, 2023 is herein confirmed. The Respondent shall remove herself, her children and/or any other person that she may have placed on all that parcel of land known as Kericho/Kipchimchim/4420 forthwith and in default she, her children and/or any other person be forcibly evicted therefrom in compliance with the provisions under Section 152G of the [Land Act](#), and vacant possession be given to the Applicant.
 - b. Mercy Chelangat Boiyan T/A Razor Sharp Auctioneers shall effect and execute the said eviction orders under the security of the Officer in charge of Ainamoi Police Post who shall ensure compliance in a peaceful manner. After the removal of the Respondent from the suit land, there is ordered a permanent injunction issued against her, her children, her agents, servants, heirs or any other person claiming through her from trespassing into parcel No. Kericho/Kipchimchim/4420.
 - c. The Respondent shall shoulder the costs of the application dated 27th June, 2023 as well as the costs that the Applicant may incur in executing the eviction order.
8. The application under consideration first came up for hearing on 3rd June, 2024 when the Court directed that it be served upon the Applicant/Respondent. The Court also granted a temporary stay of execution of the orders issued on 25th January, 2024 pending the hearing and determination of the application.



9. On 1st July, 2024 the Court granted prayer 2 of the application which allowed the firm of E.M Orina & Co Advocates to come on record for the Respondent/Applicant. The Court also gave directions that the application be canvassed by way of written submissions.
10. After numerous mentions to confirm filing of submissions, on 24th October, 2024, the application was reserved for ruling.

The Respondent/Applicant's Contention.

11. The Respondent/Applicant contends that she is the first wife of Raphael Kipkemoi Cherekweny while the Applicant/Respondent is his fourth wife.
12. The Respondent/Applicant also contends that she has established her matrimonial home on land parcel No. Kericho/Kipchimchim/4420 the suit property and adds that she has lived on the said land for over fifty years. She adds that this position was admitted by Raphael Kipkemoi Cherekweny and acknowledged by the Court at paragraph 6 of the judgement delivered in Kericho ELC case No. 56 of 2013.
13. The Respondent/Applicant further contends that when the Applicant/Respondent was married, she lived in her (Respondent/Applicant) matrimonial house which is constructed on the suit parcel until their husband constructed another house for her (Applicant/Respondent) on the same land.
14. It is her contention that their husband subdivided land parcel No. Kericho/Kipchimchim/1702 into land parcel No's Kericho/Kipchimchim/4420 measuring 1.88 Ha and Kericho/Kipchimchim/4421 measuring 1.92 Ha. She adds that the Court in its judgement delivered in Kericho ELC Case No. 56 of 2013 found that the said parcels were matrimonial property.
15. It is also her contention that she filed Kericho ELC Case No. 56 of 2013 after realizing that their husband intended to dispossess her of her matrimonial home where she has lived for over fifty years without providing for her an alternative which is contrary to the Kipsigis customs. She adds that this was captured under paragraph 16 of the judgement delivered in Kericho ELC Case No. 56 of 2013.
16. It is further her contention that the Court in its judgement delivered in the said suit acknowledged that the issue of whether or not her matrimonial home was on the parcel of land registered in the name of the Applicant/Respondent was not disputed.
17. She contends that the Court made a declaration that the suit parcels were matrimonial properties and directed the said parcels be re-surveyed and subdivided to provide separate titles for both the Applicant/Respondent and herself. She adds that this was to preserve her long-standing home. This was captured under paragraph 21 of the judgement.
18. She also contends that she was never served with the pleadings in this matter and neither was she informed about the basis of the eviction orders.
19. She further contends that she became aware of the pending eviction on 23rd May, 2024 when police officers from Ainamoi Police Post visited her home and informed her that they had been served with eviction orders.
20. It is her contention that she was also informed of the case number and she immediately instructed her son to peruse the file and upon perusal he confirmed that indeed eviction orders had been issued.



21. It is also her contention that the process server who allegedly served the application upon her should be summoned to Court for examination on oath as no proper service was effected.
22. It is further her contention that the eviction Notice dated 26th January, 2023 was not served in compliance with Section 152E of the Land Act which provides that it must be served upon the Deputy County Commissioner in charge of the area as well as the Officer Commanding the police station of the area where the subject parcel of the land is located.
23. She contends that she has no association with the postal address of P.O Box 162 Kericho as she has never owned it or transacted through it. She adds that the allegations that she was served with the eviction notice through the said address is not only misleading but also untrue.
24. She also contends that the Applicant/Respondent relied on the judgement delivered in Kericho ELC Case No. 56 of 2013 to try to evict her.
25. She further contends that she is informed by her Advocates on record that her right to a fair hearing that is guaranteed under Article 50(1) of the Constitution encompasses several aspects.
26. It is her contention that a party must be informed of the case against them, a party must be given an opportunity to present their side of the story or challenge the case against them and that a party must have the benefit of a public hearing before a Court or other independent body.
27. It is also her contention that the laws of procedure are grounded in the tenets of natural justice which provides that a litigant should not be condemned unheard and that proceedings affecting their lives and properties should not be continued in their absence and neither should they be precluded from participating in the proceedings.
28. She ends her deposition by stating that she stands to suffer irreparable loss and damage if the orders sought are not granted. She adds that it is in the interest of justice and equity that her application be allowed as prayed.

The Applicant/Respondent's Response.

29. In response to the Respondent/Applicant's application the Applicant/Respondent filed Grounds of Opposition dated 28th June, 2024 and a Replying Affidavit sworn on the even date.
30. The grounds of opposition are as follows;
 - a. That the Notice of Motion is misconceived, frivolous, incompetent, and vexatious and otherwise a gross abuse of the Court process and should be summarily dismissed with costs.
 - b. That the issue of the Respondent's proprietary interest in Kericho/Kipchimchim/4420 raised in the instant application was exhaustively dealt with in the judgement of this Honourable Court in ELC 056 of 2013 delivered on 30th May, 2018 hence the same is Res Judicata within the meaning of Section 7 of the Civil Procedure Act.
 - c. That in the said suit, the Respondent/Applicant had sought orders to bar the registration of the Applicant/Respondent as the proprietor of the suit land which orders were not granted for lack of merit.



- d. That subsequently the Applicant/Respondent was registered as the absolute proprietor of Kericho/Kipchimchim/4420.
 - e. That the issue of form and mode of service of the eviction notice was judiciously considered by this Court on merit and once again the principle of Res Judicata within the meaning of Section 7 of the Civil Procedure Act applies.
 - f. That in sum the application is an invitation to this Court to sit on appeal from its own case.
 - g. That moreover the Respondent/Applicant has her own land Kericho/Kipchimchim/4421 which she has deliberately refused to move to.
 - h. That essentially the Respondent/Applicant does not have a plausible defence and justifiable reason for staying in the suit land hence her desperate attempt to rely on technicalities and continue denying the Applicant/Respondent quiet possession of her land.
 - i. That for the foregoing reasons, the Notice of Motion dated 31st May, 2024 has no merit and should be dismissed with costs to the Applicant/Respondent.
31. In her replying affidavit she admits that she and the Respondent/Applicant are wives of Raphael Kipkemoi Cherekweny who was the registered owner of land parcel No. Kericho/Kipchimchim/1702.
 32. She deposes that their husband decided to subdivide the said parcel of land into land parcel No's Kericho/Kipchimchim/4420 and 4421.
 33. She also deposes that land parcel No. Kericho/Kipchimchim/4420 was registered in her name and when their husband sought to register land parcel No. Kericho/Kipchimchim/4421 in the name of the Respondent/Applicant, she filed ELC Case No. 56 of 2013 against him.
 34. She further deposes that in the said suit, the Respondent/Applicant sought for an order of cancellation of the titles of the two parcels of land and that their husband be restrained from registering the other parcel in her name.
 35. It is her deposition that the Respondent/Applicant also sought for an order restraining their husband from allocating land parcel No. Kericho/Kipchimchim/4420 to her (Applicant/Respondent) or any other person.
 36. It is also her deposition that their husband filed a defence denying that the registration of the suit land in the name of Applicant/Respondent was fraudulent. He stated that the suit property was matrimonial property and since he was a polygamous man, he divided his land among his wives equitably in accordance with Kipsigis customary law.
 37. It is further her deposition that the Court in its judgement delivered on 30th May, 2018 dismissed the Respondent/Applicant's suit for lacking merit.
 38. She deposes that the Respondent/Applicant was to move to her portion of land as she is in occupation of land parcel No. Kericho/Kipchimchim/4420 but she became adamant and unleashed violence against her (Applicant/Respondent) together with her adult children.
 39. She also deposes that she was then compelled to issue the Respondent/Applicant with an eviction notice and when she failed to comply, she commenced the present proceedings.



40. She further deposes that the Court was satisfied with the form and mode of service before it issued an eviction order on 19th March, 2024.
41. It is her deposition that the issue of the Respondent/Applicant's proprietary interest in land parcel No. Kericho/Kipchimchim/4420 raised in the application under consideration was exhaustively dealt with in the judgement delivered on 30th May, 2018 in ELC Case No. 056 of 2013. She adds that this issue is therefore res judicata within the meaning of Section 7 of the *Civil Procedure Act*.
42. It is also her deposition that the issue of form and the mode of service of the eviction notice was judiciously considered by this Court and the issue is therefore res judicata and this application is inviting this Court to sit on appeal from its own decision.
43. She reiterates that the Respondent/Applicant has her own land which is land parcel No. Kericho/Kipchimchim/4421 which she has deliberately refused to move to.
44. She ends her deposition by stating that the Respondent/Applicant does not have a plausible defence and justifiable reason for staying in the suit land hence her desperate attempt to rely on technicalities and continue to deny her quiet possession of her land. She urges the Court to dismiss the application for being an abuse of the Court process and allow the eviction order to be executed.

Issues for determination.

45. The Respondent/Applicant filed her submissions on 5th August, 2024 while the Applicant/Respondent filed her submissions on 15th October, 2024.
46. The Respondent/Applicant submits on the following issues;
 - a. Whether the Court should set aside and or vary the orders issued on the 25th January, 2024 based on the following sub-issues;
 - i. Whether the eviction notice and the application were served upon the Respondent.
 - ii. Whether the purported eviction notice complied with the process as per the provisions of Section 152E of the *Land Act*.
 - iii. Whether the subject property is matrimonial property.
 - iv. If (iii) above is on the affirmative, whether a spouse can be evicted from her matrimonial home at the instance of the other spouse.
 - v. Whether the Applicant is holding the subject parcel of land in trust for the Respondent.
 - vi. Whether the matter herein is res judicata.
47. On whether the Court should set aside and/or vary the orders issued on 25th January, 2024, the Respondent/Applicant relies on Sections 1A, 1B & 3A of the *Civil Procedure Act*, the judicial decisions of Wachira Karani v Bildad Wachira [2016], Shah v Mbogo [1967] EA 116, Philip Chemowolo & another v Augustine Kubende [1986] KLR and submits that in the present matter the Court was misled to believe that she (Respondent/Applicant) had been served with the eviction notice as provided for under Section 152E of the *Land Act*.
48. The Respondent/Applicant refers to paragraphs 15 and 16 of the judgement delivered in Kericho ELC Case No. 56 of 2013 and reiterates that the Court was led to believe that the eviction notice had been served upon her which was not the case.



49. The Respondent/Applicant submits that she sought to cross examine one Robert Maina who is the alleged process server but was informed that he has since passed on.
50. The Respondent/Applicant also submits that at paragraph 3 of the affidavit of service, the process server stated that she (Respondent/Applicant) hailed from Kapkwen village which position was not true as she comes from Kipchimchim village.
51. The Respondent/Applicant further submits that the process server did not attach his certificate to confirm that he was authorized to effect legal service and it is therefore clear that she was not served with the application.
52. It is the Respondent/Applicant's submissions that the Applicant/Respondent averred in her application that the eviction notice was served through the following address; P.O Box 162 Kericho.
53. The Respondent/Applicant submits that she has never owned or transacted with the said address and that the Applicant/Respondent did not adduce any evidence to show that the said address indeed belonged to her.
54. The Respondent/Applicant reiterates the averments in her affidavit in support of the application and relies on the judicial decisions of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR, Nyamodi Ochieng Nyamogo & another v Kenya Posts & Telecommunications Corporation [1994] eKLR in support of her submissions. The Respondent/Applicant also relies on Halsbury's Laws of England (4th Ed) Vol 9 on p37 para 61.
55. On whether the eviction notice complied with Section 152 E of the Land Act, the Respondent/Applicant submits that the purported eviction notice dated 26th January, 2023 does not specify the terms of removal of buildings, reaping of crops which are on the suit property and neither was evidence adduced to show that the said notice was served upon the Deputy County Commissioner.
56. On whether the suit property is matrimonial property, the Respondent/Applicant reiterates her averments in her supporting affidavit and submits that she filed Kericho ELC case No. 56 of 2013 and the Court made a finding that the suit properties were matrimonial property.
57. The Respondent/Applicant submits that the Court in its judgement delivered in the said suit did not issue eviction orders but it instead directed that the property be re-surveyed and subdivided in order to give each party a separate title.
58. The Respondent/Applicant also submits that the suit property is matrimonial property and she has no alternative property to relocate to.
59. The Respondent/Applicant relies on Sections 12 (3) & (4) of the Matrimonial Property Act and Section 93 of the Land Registration Act and submits that a spouse cannot be evicted from her matrimonial property.
60. The Respondent/Applicant relies on Section 3(1) of the Judicature Act, Section 28(b) of the Land Registration Act, the judicial decision of Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR and submits that since she (Respondent/Applicant) has constructed her matrimonial home on the suit property customary trust has been established on the land.
61. The Respondent/Applicant submits that the Applicant/Respondent is holding the suit parcel in trust for her.
62. On whether the suit is res judicata, the Respondent/Applicant relies on Section 7 of the Civil Procedure Act, the judicial decision of Okiya Omtata Okoiti v Communications Authority of Kenya & 14 Others



- Petition 59 of 2015 and submits that for a matter to be res judicata the issues in the current suit must be similar to the issues in the previous matter, the matter in dispute must be similar and the parties in both suits must also be similar.
63. It is the Respondent/Applicant's submissions that the issues raised in Kericho ELC Case No. 056 of 2013 were on cancellation of title while in the present application the main issue is eviction. The issues raised in both suits are therefore not similar.
 64. It is also the Respondent/Applicant's submissions that the parties in the previous suit are Ruth Chelangat Cherekweny and Raphael Kipkemoi Cherekweny while in the present matter the parties are Lilian Chemutai Cherekweny and Ruth Chelangat Cherekweny.
 65. It is further the Respondent/Applicant's submissions that since the parties in the said suits are different, the matter cannot be said to be res judicata.
 66. The Respondent/Applicant therefore urges the Court to allow her application as prayed.
 67. The Applicant/Respondent in her submissions gives a summary of each of the parties' pleadings and submits on the following issues;
 - a. Whether this suit is res judicata.
 - b. Whether the Applicant was served and as such whether the judgement obtained was regular; in the premise
 - c. Whether the orders sought should be granted.
 68. It is the Applicant/Respondent's submissions that the issue of res judicata arises in the present proceedings on two grounds;
 - a. That the issue of the Respondent/Applicant's proprietary interest in Kericho/Kipchichim/4420 that was raised in the application under consideration was exhaustively dealt with in the judgement of this Court delivered in ELC Case No. 056 of 2013.
 - b. The issue of form and service of the eviction notice was considered by this Court on merit.
 69. The Applicant/Respondent relies on Section 7 of the *Civil Procedure Act*, the judicial decisions of Benard Mugo Ndegwa v James Nderitu Githae and 2 Others [2010] eKLR, James Njuguna Chui vs John Njogu Kimani [2017] eKLR as was cited in Mukesh Kumar Kantilal Patel v Charles Langat & 4 Others [2021] eKLR and urges the Court to dismiss the Respondent/Applicant's application for being res judicata.
 70. On the issue of whether the Respondent/Applicant was served, the Applicant/Respondent relies on the judicial decisions of Fidelity Commercial Bank Limited v Owen Amos Ndung'u & another HCC No. 241 of 1998 (UR), James Kanyita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR and submits that there are two affidavits of service sworn on 12th October, 2023 and 17th October, 2023 which show that the Respondent/Applicant was served.
 71. On whether stay of execution orders can be granted, the Applicant/Respondent relies on Order 42 Rule 6(2) of the Civil Procedure Rules, the judicial decision of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR and submits that the Respondent/Applicant has not demonstrated that she will suffer substantial loss for the said orders to be granted.
 72. On the issue of the orders being set aside, the Respondent/Applicant relies on Order 12 Rule 7 of the Civil Procedure Rules, the judicial decision of Rayat Trading Co. Limited v Bank of Baroda & Tetezi



House Ltd [2018] eKLR and submits that the setting aside of an ex parte judgement is an exercise of judicial discretion which exercise must be judicious and should not be exercised to assist a party who is bent on derailing the cause of justice.

73. The Applicant/Respondent then urges the Court to dismiss the Respondent/Applicant's application.

Analysis and Determination.

74. Having considered the application, the response thereto and the submissions, my view is that two issue arises for determination

- a. Whether or not this suit is res judicata.
- b. Whether the orders issued on 25th January, 2024 should be set aside and/or varied.

A. Whether or not this suit is res judicata.

75. The Applicant/Respondent filed grounds of opposition wherein she states that this suit is res judicata. The arguments on res judicata are summarised as follows:

- a. The Respondent/Applicant's proprietary interest in Kericho/Kipchimchim/4420 was exhaustively dealt and determined in ELC 056 of 2013 wherein judgement was delivered on 30th May, 2018.
- b. That in ELC 056 of 2013 the Respondent/Applicant sought orders to bar the registration of the Applicant/Respondent as the proprietor of the suit land which orders were not granted and the suit dismissed.
- c. That the issue of form and mode of service of the eviction notice is res judicata having been considered by this Court on merit.

76. Section 7 of the *Civil Procedure Act* provides as follows;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

77. The Court of Appeal in *Salama Beach Hotel Limited & 3 others v Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates* [2019] eKLR stated thus;

- " 32. It follows therefore, in determining whether a suit or application is res-judicata, whichever the case may be, all the elements outlined in Section 7 must be satisfied conjunctively. That is:
 - a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.



- e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

78. In the judicial decision of Salama Beach Hotel Limited & 3 others v Christopher Orina Kenyariri t/ a Kenyariri and Associates Advocates (supra) cited above, the Court held that for any defence of res judicata to be successful, it must be proved that the issue was substantially in issue in the former suit, the former suit was between the same parties, the parties were litigating under the same title and that the issue was heard and finally determined.
79. It is the Respondent/Applicant’s contention that the land the Applicant/Respondent intends to evict her from is her matrimonial property and that she lives on it. She admits that she instituted proceedings in Kericho ELC Case No. 56 of 2013 where the Court held that the suit parcel was indeed matrimonial property.
80. In response the Applicant/Respondent contends that the Respondent/Applicant’s application is res judicata as the issue of whether or not the suit property was matrimonial property was already determined in Kericho ELC Case No. 56 of 2013.
81. The Applicant/Respondent also contends that the Respondent/Applicant has her own property which she has refused to move to which has necessitated her (Applicant/Respondent) to seek eviction orders as she is the registered owner of the parcel of land that the Respondent/Applicant is in occupation of.
82. It is not in dispute that the Respondent/Applicant instituted Kericho ELC Case No. 56 of 2013. I have taken the liberty of perusing the said file which contains a judgment that has been referred to in the ruling of 25th January, 2024.
83. Kericho ELC Case No. 56 of 2013 was filed by the Respondent/ Applicant against Raphael Kipkemoi Cherkweny the husband to the parties herein.
84. The Respondent/Applicant herein who was the Plaintiff in the said suit sought the following prayers;
- a. Cancellation of the title deeds issued fraudulently and illegally in respect of pieces of land registration numbers Kericho/Kipchimchim/4420 and Kericho/Kipchimchim/4421 the same be registered in her names.
 - b. Order restricting the Defendant from allocating LR No. Kericho/Kipchimchim/4420 to Lilian Cherekweny or any other party without the consent of the Plaintiff.
 - c. Costs of the suit and interest thereon at Court rates.
85. The Learned Judge in the judgement delivered on 30th May, 2018 framed the following issues determination;
- a. Whether the suit parcels of land are matrimonial property.
 - b. Whether the suit parcels of land constitute the Plaintiff’s matrimonial home.
 - c. Whether the Defendant’s registration of land parcel number Kericho/Kipchimchim/4420 in the name of Lilian Cherekweny was fraudulent and unlawful.
 - d. Whether the Plaintiff is entitled to the orders sought.



86. The Learned Judge in her judgement delivered on 30th May, 2018 observed and held as follows as follows;

“ 12. It is common ground that the Plaintiff’s matrimonial home is on land parcel number Kericho/Kipchimchim/4420 which is registered in the name of her co-wife Lilian Cherekweny although the Plaintiff is in possession of the both (sic) land parcel number Kericho/Kipchimchim/4421 and a big chunk of land parcel No. Kericho/Kipchimchim/4420. The Plaintiff testified that she has lived on this parcel of land since she got married in the early 60s...

20. I have carefully considered the pleadings, the evidence as well as the rival submissions and even though I sympathize with the Plaintiff I am not persuaded that she has proved her case on a balance of probabilities and I dismiss it.

21. Perhaps what the Defendant might want to consider is to re-survey and subdivide his land in such a way that the Plaintiff remains with her house on it while his 4th wife retains her house with each wife having a separate title for their share of the suit land.” [Emphasis mine]

87. It is evident that the issue of whether or not the suit parcel is matrimonial property was addressed and determined in Kericho ELC Case No. 56 of 2013 and therefore the issue as raised in the present proceedings is res judicata.

88. The second limb of res judicata as set out by the Applicant/ Respondent in the grounds of opposition is that in Kericho ELC Case No. 56 of 2013 the Respondent/Applicant sought orders to bar the registration of the Applicant/Respondent as the proprietor of the suit land which orders were not granted and the suit dismissed.

89. It is evident, from the judgment that the Judge expressed sympathy for the Plaintiff but was not persuaded that the Plaintiff had proved her case on a balance of probabilities. The suit was, therefore, dismissed. This means that orders to bar the registration of the Applicant/Respondent as the proprietor of the suit land was not granted.

90. I also note that the Respondent/Applicant contends that this Court made a declaration that the suit parcels were matrimonial properties and directed the said parcels be re-surveyed and subdivided to provide separate titles for both the Applicant/Respondent and herself. This is a misrepresentation. In the Judgment, the statement at paragraph 21 is persuasive rather than declaratory. The Judge is prevailing upon the Defendant to consider a resurvey to sub-divide his land in a manner that the Plaintiff (Respondent/Applicant herein) remains with the portion on which her house is built. Paragraph 21 of the judgment is reproduced as hereunder;

“ 21. Perhaps what the Defendant might want to consider is to re-survey and subdivide his land in such a way that the Plaintiff remains with her house on it while his 4th wife retains her house with each wife having a separate title for their share of the suit land.”

91. It would seem that this persuasion fell on deaf ears as the Respondent/Applicant’s husband went ahead to sub-divide his land without taking into account the fact that the Respondent/Applicant’s house fell on the Applicant/ Respondent’s land i.e. the suit land.



92. The Applicant/Respondent is the registered proprietor of the suit parcel. As a registered Proprietor, the Applicant/Respondent had/has every right to seek eviction of persons who are illegally in occupation of the suit parcel. It is upon this background that this suit was instituted- A Miscellaneous Application seeking orders of eviction against the Respondent/Applicant.
93. The third aspect of res judicata as raised by the Applicant/ Respondent is that the issue of form and mode of service of the eviction notice is res judicata having been considered by this Court on merit.
94. This Court in its ruling delivered on 25th January, 2024 observed as follows;
- “ 15. The Applicant has beseeched this Court to grant eviction orders against the Respondent on the basis that there is already judgement in her favour as the registered proprietor of LR No. Kericho/Kipchimchim/4420. Coupled with this and having also noted that there had been an eviction notice served upon the Respondent through her postal address, wherein the Respondent has refused to vacate from the suit land, I am satisfied that the process as per the provisions in Section 153E of the Land Act have been complied with.
16. Service of the application having been effected upon the Respondent as (sic) an opportunity to respond but she chose not to respond. I have no reason to decline this application.” [Emphasis mine]
95. A reading of paragraph 15 of the ruling shows that the Court, on material placed before it, was persuaded that proper service had been effected upon the Respondent/Applicant and that the Respondent/Applicant chose not to respond. This Court went ahead to allow the application.
96. The Applicant/ Respondent, on account of this ruling, is of the view that the question whether service was proper is not open for determination. While I agree with this position, I need to point out that the law pertaining to setting aside judgment and/ or orders of the court is discretionary and it is up to the Applicant to persuade the court that she is deserving of the discretion of the court.
97. This leads me to an analysis and determination of the question whether the orders of this court issued on 25th January, 2024 should be set aside and/varied.

B. Whether the orders issued on 25th January, 2024 should be set aside and/or varied.

98. Order 51 of the Civil Procedure Rules provides for rules for hearing of applications.
99. Order 51 Rule 14 (1) sets out the documents that a Respondent who wishes to oppose any application may file. Subrule (2) states that the said documents shall be filed not less than 3 clear days before the hearing date. Subrule (4) provides that if a respondent fails to comply with subrule (1) and (2), the application may be heard ex parte.
100. Order 51 Rule 15 of the Civil Procedure Rules provides as follows;
- “ 15. The court may set aside an order made ex parte.”
101. The Court of Appeal in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR held as follows;
- “ [18]. We agree with those noble principles which go further to establish that the Court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or



error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.” (Emphasis mine)

102. In the judicial decision of *Nyamu v Mugambi* (Civil Case E005 of 2021) [2022] KEHC 405 (KLR) (21 April 2022) (Ruling) the Court held as follows;

“The power to set aside *ex parte* orders is discretionary and the Court must use its discretion judiciously while also ensuring that justice has been done. In exercising its discretion and deciding whether to grant the orders sought, the Court should also be guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed. The burden is on the applicant to prove that he had sufficient cause for not attending Court. The reason given by the applicant to attend Court must therefore be considered. The applicant should therefore satisfy the Court that none attendance was due to want of proper service or that there was sufficient cause.” [Emphasis mine]

103. As was held in *Nyamu v Mugambi* (Civil Case E005 of 2021) (*supra*) cited above, the Court may exercise its discretion and set aside *ex parte* orders if it is satisfied that there was sufficient cause for not attending and whether injustice will be caused if the application is allowed. Want of proper service has been cited as sufficient cause.

104. It is the Respondent/Applicant’s contention that she was never served with the pleadings in the present proceedings and neither was she served with the eviction notice. She narrates that on 23rd May, 2024 police officers from Ainamoi Police Station visited her home with eviction orders which were issued on 25th January, 2024.

105. The Respondent/Applicant also contends that she was surprised to learn that eviction orders had been issued and so she sent her son to peruse the file and he found that eviction orders had been issued without service being effected upon her.

106. The Respondent/Applicant further contends that from the said pleadings, she learnt that the Applicant/Respondent had alleged that she served her with the said eviction notice through the Post Office Box No. 162 Kericho which address she has never owned.

107. It is important to note that the contention by the Respondent/Applicant that the address on the eviction notice does not belong to her has not been rebutted.

108. The Respondent/Applicant also states that at paragraph 3 of the affidavit of service in respect of service of the application upon her states that she (Respondent/Applicant) hails from Kapkwen village which position was not true as she lives in Kipchimchim village.

109. The Respondent/Applicant states that she would have wished to cross examine the process server - Robert Maina- but learnt that the said process server had since passed on.

110. In response, the Applicant/Respondent avers that the issue of service was substantively addressed by the Court in its ruling delivered on 25th January, 2024 and therefore the Respondent/Applicant’s application has no merit.

111. It is common ground that the orders of 25th January, 2024 were issued *ex parte*. The fact of service has been rigorously contested. The Respondent/Applicant states that the process server who served the application pursuant to which eviction orders were granted is deceased. The Applicant/Respondent does not refute the said contention and she merely states that as per the affidavit of service, the Respondent/Applicant was served.



112. My view is that the Respondent/Applicant has demonstrated that she was not served with the application dated 27th June, 2023.
113. The Respondent/Applicant has not addressed the Court on any prejudice that allowing this application may cause to her.
114. The Respondent/Applicant craves opportunity to respond to the application pursuant to which the orders of eviction were issued against her. I do not see any prejudice that will be occasioned to the Applicant/Respondent if the instant application is allowed.

Disposition.

115. Taking the foregoing into consideration, the application dated 31st May, 2024 is allowed in the following terms:
 - a. The orders issued by this court on 25th January, 2024 are hereby set aside.
 - b. The Respondent/Applicant shall file and serve her response to the application dated 27th June, 2023 within 14 days from the date hereof.
 - c. Leave is hereby granted to the Applicant/Respondent to file a supplementary affidavit if need be.
 - d. A mention date for directions on the hearing of the application date 27th June, 2023 shall be taken in the registry.
 - e. The costs of this application shall abide the outcome of the suit.
116. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 20TH DAY OF MARCH, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Okok for the Respondent

Miss Cherono /for the Applicant

Court Assistant; Mr. Joseph Makori.

