



**Letura v Kispán & another (Environment & Land Case  
915 of 2017) [2025] KEELC 4218 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4218 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 915 OF 2017**

**MD MWANGI, J**

**MAY 29, 2025**

**BETWEEN**

**ELIZABETH KISPAN LETURA ..... PLAINTIFF**

**AND**

**CHRISPUS KISPAN ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KAJIADO DISTRICT ..... 2<sup>ND</sup> DEFENDANT**

*(In respect of the notice of motion dated 25th September 2024 seeking to set aside the default judgment entered against 1st Defendant/Applicant on 12th October 2021 and unconditional leave to defend the suit)*

**RULING**

**Background.**

1. The application under consideration is by the 1<sup>st</sup> Defendant/Applicant who seeks orders to set aside the default judgment entered on 12<sup>th</sup> October 2021 against him and all consequential orders thereto. He further prays that the court grants him unconditional leave to file his defense within 14 days from the date of the order.
2. The application is based on the grounds on the face of it and on the supporting affidavit of Chrispus Kispán sworn on 30<sup>th</sup> September 2024
3. The first Defendant avers that he had initially instructed the law firm of G. Morara & Company Advocates to have the conduct of this matter on his behalf. The said advocate however, merely entered appearance but failed to file a statement of defence within the statutory timelines. The 1<sup>st</sup> Defendant states that he has reliably learnt that his then advocate was diagnosed with a mental health related illness that caused him to be admitted into a rehabilitation center and the eventual closure of his offices at Kajiado Town.



4. The 1<sup>st</sup> Defendant deposes that he was totally unable to get in touch with his former advocate and was therefore not aware of the position of the suit including the entry of default judgment until when he was summoned by the Land Registrar over a boundary dispute with respect to a parcel of land known as L.R. No. Kjd/Lorngusua/1XX5. It was only then that he learnt about the default judgment entered against him on 12<sup>th</sup> October 2021; the court had declared his title null and void and directed the same to be transferred and registered in the name of the Plaintiff.
5. The 1<sup>st</sup> Defendant/Applicant pleads that the mistake of the Advocate should not be visited upon him. He affirms that he wishes to defend the suit and have it determined on its merits. He further alleges that his intended statement of defence which he has annexed to the supporting affidavit raises triable issues and it is in the wider interest of justice for the court to set aside the default judgment against him and allow him unconditional leave to defend the suit. He urges the court to exercise its discretion in his favour. He further claims that unless the court sets aside the default judgment, he stands to suffer untold hardship and will have been condemned unheard.

#### **Response by the Plaintiff/Respondent.**

6. The Plaintiff responded to the 1<sup>st</sup> Defendant's application by way of her replying affidavit sworn on 19<sup>th</sup> February 2025. She asserts that the judgment in question has already been executed through the decree issued on 1<sup>st</sup> November 2021 and a title deed issued in her name which she has attached as an annexure marked EKL-2.
7. The Plaintiff further asserts that the 1<sup>st</sup> Defendant's previous advocate actually attended court on 8<sup>th</sup> February 2018, when the matter came up for hearing and requested for 14 days to file a statement of defence and accompanying documents. The request was granted causing an adjournment of the hearing to 19<sup>th</sup> March 2018. The advocate did not however attend court on the next date and subsequently thereafter in spite of being served with hearing notices. The matter eventually proceeded to hearing in the absence of the 1<sup>st</sup> Defendant and his advocate and judgment was entered in favour of the Plaintiff.
8. The Plaintiff asserts that the 1<sup>st</sup> Defendant was the owner of the suit and the prosecution of the suit was his responsibility. It is therefore not enough for him to simply blame his advocate. He has not demonstrated the tangible steps he took, if any, to follow up on the matter. The reasons advanced for his failure to attend the hearing of the case are not sufficient to justify the setting aside the default judgment.
9. The Plaintiff further pointed out that there was delay in the filing of the application to set aside the judgement; a delay of 5 years which is not only inordinate but unexplained and therefore inexcusable. She urges the court to dismiss the application with costs to herself.

#### **The Applicant's further affidavit.**

10. The Applicant filed a further affidavit sworn on 20<sup>th</sup> March 2025 reiterating the assertions in his application and supporting affidavit. He urges the court to exercise its discretion in his favour to avoid hardship and injustice on account of inadvertence and mistake of his Advocate.
11. The Applicant further points out that the dispute herein is primarily over the suit property which was validly bequeathed to him by his late father.



### **Directions by the court.**

12. The direction by the court were that the application be canvassed by way of written submissions. The 1<sup>st</sup> Defendant/Applicant and the Plaintiff/Respondent duly filed their submissions.. The 2<sup>nd</sup> Defendant did not file submissions. It did not in fact participate in the proceedings at all.

### **Issues for determination.**

13. In the court's view, the sole issue for determination is whether the 1<sup>st</sup> Defendant/Applicant has made a case for setting aside of the default judgment in this case. The prayer for stay of execution was sought pending the determination of the main prayer which is the setting aside of the default judgment.

### **Analysis and determination.**

14. The Court of Appeal's decision in James Kanyiita Nderitu & another –vs- Marios Philotas Ghikas & another (2016) KECA 470 (KLR), laid down the factors that a court should consider in arriving at a determination whether to set aside a regular default 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 a defence resulting in a 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 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 of defence as the case may be; the length of time that has lapsed 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.”

15. The case before me is one where a regular default judgment has been entered. The 1<sup>st</sup> Defendant had indeed entered appearance but failed to file a statement of defence. The 1<sup>st</sup> Defendant blames the failure on his then advocate who was (according to the 1<sup>st</sup> Defendant) diagnosed with a mental related illness that led to his admission in a rehabilitation center and eventually closure of his offices in Kajiado Town. That was the reason why the 1<sup>st</sup> Defendant was unable to get in touch with him for an update on the status of his case.
16. No doubt there has been a delay on the part of the 1<sup>st</sup> Defendant/Applicant in filing the application to set aside the default judgment. The considerations then that the court in this particular case should consider, as outlined in the James Kanyiita case, are the reason for the failure of the 1<sup>st</sup> Defendant to file his statement of Defendant, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment.
17. Whereas, it is generally agreed, as extensively submitted by the Plaintiff in her submissions, that the court cannot set aside a default judgment solely on the ground of the mistake failure of an advocate, each case must be determined on its own unique circumstances.
18. In this case, in addition to blaming the advocate for the failure to file a statement of defense, the 1<sup>st</sup> Defendant/Applicant further invites the court to consider its proposed statement of defense asserting that it raises trial issues.



19. The dispute herein is over family land and between family members. As the land policy 2009, states in its preamble, land is a sensitive subject in this country. It is critical to the economic social and cultural development of Kenya. It further notes that land issues remain politically sensitive and culturally complex.
20. It is absolutely necessary that land disputes be justly and conclusively settled. This is only possible when all disputants are afforded an opportunity to be heard before a final decision is made.
21. With this in mind, and taking into account the circumstances of this case and the nature of the dispute (between family members); on the whole, it is my considered view that it is in the interest of justice that the default judgment be set aside and the 1<sup>st</sup> Defendant/Applicant be allowed an opportunity to defend the suit. The default judgment entered against the 1<sup>st</sup> Defendant on 12<sup>th</sup> October 2021 is hereby set aside.
22. However, in order to mitigate the prejudices on the part of the Plaintiff/Respondent, the 1<sup>st</sup> Defendant/Applicant shall pay her thrown away costs of Kshs. 60,000/- in the next 30 days. Further the title to the suit property which has already been transferred to the Plaintiff shall remain as such pending the hearing and determination of this suit.
23. The 1<sup>st</sup> Defendant/Applicant shall file and serve his statement of defence and accompanying documents in the next 21 days from the date of this ruling. The Plaintiff is granted corresponding leave to file any further necessary documents/witness statements in 21 days upon service of the 1<sup>st</sup> Defendant's documents.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 29<sup>TH</sup> DAY OF MAY 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Akinyi for the Plaintiff/Respondent

N/A for the 1<sup>st</sup> Defendant/Respondent and the 2<sup>nd</sup> Defendant

Court Assistant: Mpoye

