



Kiguru & another v Charo & another; Mutiso (Interested Party) (Environment & Land Case 33 of 2016) [2025] KEELC 4288 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 33 OF 2016**

EK MAKORI, J

JUNE 5, 2025

BETWEEN

EDWARD MARENJE KIGURU 1ST PLAINTIFF

LILIAN MUTHEU TIMOTHY 2ND PLAINTIFF

AND

NYEVU KILANGO CHARO 1ST DEFENDANT

**KAVUE KILANGO ALIAS KAVUMBE KILANGO CHARO
CHARO 2ND DEFENDANT**

AND

JOSEPHINE MWENDE MUTISO INTERESTED PARTY

RULING

1. Two motions are currently pending for the court's determination. The first application, dated August 9, 2024, seeks to set aside the ex parte judgment dated March 28, 2019 (Olola J.) and requests that the applicant be permitted to defend the suit on its merits. The second motion, presented as an objection to eviction dated January 31, 2024, contests the intention to evict the objector from part of the suit property, with the objector asserting a purchaser's interest.
2. The motions were canvassed through written submissions; notably, the plaintiffs and the objector filed their submissions, but the 1st defendant did not.
3. Considering the materials presented, the affidavits sworn by the parties, and the written submissions, the issues I frame for the court's determination are as follows: whether to set aside the ex parte judgment and allow the 1st defendant to defend the current suit on the merits, whether to allow the objection raised, as well as the matter of costs concerning the two motions.



4. The 1st Defendant in the motion dated August 9, 2024, asserts that the ex parte judgment was entered without formally hearing her side of the story and that her previous advocate, Maranga Maosa, passed away. She engaged another counsel, Ragira Gideon, who filed an application dated April 7, 2024, which remains unprosecuted. She contends that she has a strong defense with reasonable probabilities of success.
5. The plaintiffs, however, assert that service was duly executed on the 1st defendant. There is no evidence in the record indicating that, after the passing of Maranga Maosa, she retained another advocate to represent her.
6. The determination of whether to vacate an ex parte judgment is a matter of significant discretion. This discretion is not to be taken lightly, as it is intended to prevent injustice and hardship arising from accidents, inadvertence, excusable mistakes, or errors. However, it is not intended to assist an individual who has intentionally sought, whether by evasion or other means, to obstruct or delay the administration of justice. See *Shah v Mbogo & Another* [1967] EA 116.
7. As established by the Court of Appeal in *CMC Holdings Ltd v Nzioki* [2004] KLR 173, in an application for setting aside ex parte judgment, the court exercises its discretion to either allow or reject such application. This discretion must be exercised based on reasoned grounds and must be applied judiciously. In law, the discretion afforded to a court is intended to safeguard a litigant from experiencing injustice or hardship due to, among other factors, an excusable mistake or error. It would not constitute an appropriate exercise of such discretion for the court to disregard a litigant who demonstrably illustrates an excusable mistake, inadvertence, accident, or error. The exercise of discretion in such a manner would be founded on an erroneous principle.
8. In the current matter, we are dealing with a judgment entered on March 28, 2019, reported as *Edward Marenye Kiguru & another v Nyevu Kilango Charo & another* [2019] KEELC 3735 (KLR). Regarding service, this is what Olola J. said about it:

“On the date fixed for hearing, neither the Defendants nor their Advocates attended Court. Being satisfied that they were duly served, this Court allowed the Plaintiffs to proceed with their case.”
9. The judge expressed satisfaction that appropriate service had been executed on the defendants and their counsels prior to proceeding to hear the matter ex parte.
10. The record indicates that no information is available regarding the date of death of Maranga Maosa, specifically whether it occurred before or after the ex parte hearing. Additionally, the record contains no evidence to suggest that the firm of Ragira Gedion was appointed as a replacement for Maranga Maosa.
11. Moreover, since the entry of the ex parte judgment on March 28, 2019, various proceedings have taken place, including the issuance of an eviction notice to the 1st defendant. The current application was submitted on August 9, 2024, indicating a delay of over five years.
12. I cannot exercise discretion to set aside the ex parte judgment, which was obtained following proper procedures, as there was appropriate hearing notice served to the defendants who chose not to attend court to defend. Furthermore, the 1st defendant's actions suggest a lethargic litigant intent on penalizing and creating hardship for the plaintiffs in these proceedings.
13. The law is now well established that in applications for setting aside ex parte judgments, the court must not only assess the reasons for the failure to file a defence or the absence of the applicant at the designated hearing date but also whether the applicant possesses a reasonable defence, commonly



referred to as whether the defence, if already filed or if a draft defence is provided with the application, raises triable issues. The court possesses broad discretion in these matters to set aside ex parte judgments and is dedicated to safeguarding litigants from experiencing injustice.

14. In the ex parte judgment, Olola J. acknowledged the defenses filed and remarked:

“From the material placed before me, it is apparent that the Plaintiffs entered into a contract with the 1st Defendant for the purchase of a portion of land measuring two acres which portion was to be excised from a parcel of land known as Kilifi/Mtwapa/393 measuring approximately 4.55 Ha. That parcel of land was previously registered in the name of Kilango Charo Chula who had died by the time the parties executed the agreement dated 4th May 2010 Pexh. 1(a).

11. According to the Plaintiffs, the said Kilango Charo Chula (deceased) left behind the two widows named as the Defendants herein. It is apparent from the sale agreement (Pexh 1(a) that it is the 1st Defendant who had entered into a sale agreement with the Plaintiffs to sell to them the two acres from her side of the large parcel of land as marked on a sketch plan/map that was attached to the Agreement.
12. The said contract, which was also signed by the 1st Defendant's sons-Kitsao Kilango, John Kilango, and Joseph Kilango, stipulated that the sellers would obtain the consent to sub-divide the larger parcel of land into two portions from the Bahari Divisional Land Control Board, after which the seller and the purchaser would obtain consent to transfer the two-acre portion that was sold to the Plaintiffs. This must have been in recognition of the fact that the two herein controlled distinct portions of the land that was being sold.
13. This is confirmed by a Replying Affidavit of the 2nd Defendant, Karue Kilango, that she filed in opposition to the Plaintiffs' application for injunction dated 16th February 2016, in which she deposes at paragraphs 4-6 as follows: -
 4. That it is true my co-wife and I were the legal and beneficial owners of property Plot No. Kilifi/Mtwapa/393A (hereinafter referred to as “the Land), the same having devolved to us as the wives of Kilango Charo Chula, the deceased.
 5. That it is true that the said land has since been sub-divided and Title Numbers Kilifi/Mtwapa/3413, 3414, and 3415, respectively, issued by the Land Registrar Kilifi;
 6. That whereas the subdivisions above mentioned in clause 5 above were registered in both our names as tenants in common, each of us, together with our respective families, owns their particular parcels where we also reside.”
14. The above arrangement being the case herein and given the clearly marked sketch map showing the position of the land that the Plaintiffs were purchasing, it is difficult to appreciate the 1st Defendant's contention in her Statement of Defence that there was no valid Sale Agreement herein.



15. As it were, she does not deny that she did with her sons execute the Sale Agreement. Neither does she deny that they received the instalment payments as evidenced by the subsequent Sale Agreements dated 31st July 2010(Pexh 1(b) and 21st February 2011(Pexh 1(c).
16. As Onguto J stated while citing a decision of the Supreme Court of the United Kingdom in Marita Peeush Mahajan –vs Yashwant Kumani Mahajan (2017) eKLR: -

.... Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

17. A review of the conduct of the parties herein, in my view, can only lead to the inference that there existed an objective intention by the parties to have a mutually binding contract. That must be the reason the Plaintiffs paid and the 1st Defendant received and accepted various sums of money paid as instalments towards the purchase of the two acres of the 1st Defendant’s parcel of land.
18. As it were, however, the 2nd Defendant neither executed any contract with the Plaintiffs nor did she receive any money from them pursuant to the sale. In that regard, I think the suit as filed against the 2nd Defendant was without basis.
19. I am otherwise satisfied that the Plaintiffs have proved their case as against the 1st Defendant. As it were, however, the Plaintiffs only paid a sum of Kshs 800,000/-, which sum in their own admission was equivalent to the purchase price of one acre of the said parcel of land. The original parcel of land Kilifi/Mtwapa/393 has also since been sub-divided into parcel Nos. 3414(for the 1st Defendant) and No. 3415 (for the 2nd Defendant) as can be discerned from paragraphs 7 and 8 of the 2nd Defendant’s Replying Affidavit afore cited.”

15. From the foregoing, it will become apparent that the 1st defendant in this matter, even if given the opportunity to defend, possesses no meritorious defense in light of the analysis provided by Olola J. Viewed holistically, the 1st defendant, having been duly served, entered an appearance and filed a defense, which she subsequently failed to pursue. Given that this pertains to a judgment rendered in 2019, and that the application to set aside was initiated in 2024, it is evident that the 1st defendant intends to cause undue hardship to the plaintiffs, who should rightfully be enjoying the benefits of the judgment currently in effect.

16. Consequently, the motion application dated August 9, 2024, is hereby dismissed with costs.



17. In the objection dated January 31, 2024, the objector asserts that she is the legal purchaser of a portion of the suit property in question, Kilifi/Mtwapa/5234, as indicated by the sale agreement and the title document, which were lawfully transferred to her by the applicant, who is the 1st Defendant in this matter.
18. She claims that the transfer was executed prior to the plaintiffs' alleged purchase of the share he claims from the 1st defendant.
19. Furthermore, she asserts that she has resided on the property and has made developments thereon; thus, she cannot be adversely affected by the purported eviction instigated by the plaintiffs.
20. Furthermore, she asserts that she has fulfilled the burden of proof necessary to establish a legal and/or equitable interest adequate to justify the orders sought in the objection proceedings, as articulated in the case of Krep Bank v Basilio Pascal Kiseli and 2 others [2012] eKLR.
21. In contrast, the plaintiffs contend that the sale agreement made by the objector and the 1st defendant was fraudulent, asserting that the objector was aware of the ongoing court action and that the 1st defendant had already sold one acre to her.
22. Consequently, the plaintiffs argue that the available remedy is to seek indemnity from the 1st defendant.
23. According to the records, the sale agreement between the plaintiffs and the 1st defendant was executed on May 14, 2010, while the agreement between the 1st defendant and the objector was entered into on October 17, 2017. The title was issued to the objector on March 21, 2018.
24. While I concur with the judicial authority cited by the objector – the Krep Bank case (supra)- which articulates that:

“.....the main question that this court needs to consider, which is whether the Objector has proved to this Court that it has a legal and equitable interest over the goods proclaimed. It is a well-settled principle that the objector must prove on a balance of probabilities that he is entitled to or has legal or equitable interest in the whole or part of the property attached. In the case of AKIBA BANK LTD VS JETHA & SONS LTD (2005) eKLR, Waweru J. held that for an objector to succeed in his objection, he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree. To that end, the Objector has exhibited receipts which show, inter alia, that it owns the concrete mixer machine. There is a receipt attached bearing the name of the Objector as the purchaser. The said property should therefore be released forthwith to the Objector.”
25. The situation at hand indicates that the objector has shown she acquired a portion of the suit property from the 1st defendant, who, notably, was fully aware that she had previously sold one acre to the plaintiffs. Additionally, the objector was aware or should have been aware through due diligence of a pending matter before the court concerning the same suit property. It is essential for the objector to have conducted due diligence prior to her purchase. According to the principle of first in time, the plaintiff holds a superior claim to the subject property, having acquired it earlier. In my opinion, as proposed by the plaintiffs, the objector should seek indemnity from the 1st defendant.
26. Having reached that conclusion, the objections presented herein are hereby dismissed with costs.



27. I would like to extend my apologies to the parties for the delay in delivering this ruling. The reason for the delay is that the parties involved submitted conflicting applications consecutively and did not provide the court with their submissions in a timely manner.

DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON THIS 5TH DAY OF JUNE, 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Kyalo for the Plaintiff

Happy: Court Assistant

In the absence of:

Mr. Olwande for the 1st Defendant

Mr. Gathuthi for the Objector

