



REPUBLIC OF KENYA



KENYA LAW
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**JKK v AMI & another (Environment and Land Appeal E019 of 2022)
[2025] KEELC 6008 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6008 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E019 OF 2022**

AK BOR, J

SEPTEMBER 11, 2025

BETWEEN

JKK APPELLANT

AND

AMI 1ST RESPONDENT

DMM 2ND RESPONDENT

(Appeal was lodged against the judgment of Hon E. Wasike, Principal Magistrate, delivered on 25/3/2021 in Siakago MCL & E Case No. 59 of 2019)

JUDGMENT

1. This appeal was lodged against the judgment of Hon E. Wasike, Principal Magistrate, delivered on 25/3/2021 in Siakago MCL & E Case No. 59 of 2019 - AMI v DMM and JKK, which the 1st Respondent, AMI instituted seeking a refund of Kshs. 380,000/= from the Appellant, JKK and the 2nd Respondent, DMM as well as costs of the suit and interest.
2. In that suit, the 1st Respondent averred that the 2nd Respondent and the Appellant were husband and wife and that by a sale agreement dated 7/6/2016, the 2nd Respondent agreed to sell to him a portion of land measuring 0.10 hectares (ha) out of his 0.20 ha entitlement from the original parcel of land known as Evurore/Nguthi/xxx measuring 1.2 ha, at the agreed consideration of Kshs. 350,000/=. He claimed that the 2nd Respondent acknowledged receipt of the full purchase price on the date of the agreement and that he paid an additional sum of Kshs. 25,000/= being survey fees and Kshs. 5,000/= as fencing fees. That upon subdivision of parcel number 226, the 2nd Respondent's entitlement was designated as parcel no. Evurore/Nguthi/xxx measuring 0.21 ha, which was registered in the name of his wife, the Appellant.



3. He stated that by a further agreement dated 18/1/2017, the Appellant undertook to transfer 0.10 ha out of Evurore/Nguthi/xxx that he was purchasing from the 2nd Respondent to him. However, the Appellant and 2nd Respondent failed to take the necessary steps to effect the transfer, following which the 1st Respondent sought a refund of the amounts he had paid totaling to Kshs. 380,000/=.
4. The 2nd Respondent neither denied the existence of the two agreements existed nor that he was paid the full consideration of Kshs. 350,000/=. However, he denied that the 1st Respondent paid a further sum of Kshs. 25,000/= as survey fees and Kshs. 5,000/= for fencing. The court record shows that the Appellant neither entered appearance nor filed a defence in time and interlocutory judgment was entered against her on 21/6/2019.
5. The case proceeded to hearing. At the trial, the 1st testified that he spent Kshs. 380,000/= on the suit land which the 2nd Respondent acknowledged receipt of. He explained that after making full payment, he waited for the land to be transferred to his name but after the 2nd Respondent obtained the title deed, he instead caused the land to be registered in his wife's name. When he inquired about the matter, the 2nd Respondent failed to provide a satisfactory explanation. Subsequently, he met both couple, and the Appellant confirmed that the title deed of the suit land was in her name.
6. The 1st Respondent stated that at the time, he had withheld another title deed belonging to the 2nd Respondent in respect of Evurore/Nguthi/xxx at the advocate's office where the initial agreement was executed. He stated that the Appellant and 2nd Respondent requested him to release that title deed to facilitate progress on the transfer which he did. That on 18/1/2017, they executed a second agreement vide which they agreed that the suit land would be transferred to him despite being registered in the Appellant's name. He stated that the 2nd Respondent promised to subdivide and transfer the purchased portion to him by the end of April 2017. he transfer was never effected.
7. The 2nd Respondent testified that he is a land vendor in that he buys and sells land and has an office in Siakago. He admitted that he sold the 1st Respondent $\frac{1}{4}$ of an acre of land. He stated that he was in the process of buying the suit land with his wife which was going through succession proceedings. That they were to buy $\frac{1}{2}$ acre of the land and sell $\frac{1}{4}$ acre to the 1st Respondent to sort out some financial issues they had. He admitted that the parties entered into a sale agreement before an advocate and that the 1st Respondent paid them Kshs. 350,000/= as the purchase price and Kshs. 20,000/= for survey.
8. He stated that he agreed with his wife to have the title deed to the suit land bear her name. That he surrendered his title over Evurore/Nguthi/xxx to the advocate as security which was later released to him. However, his wife later became reluctant to transfer the suit portion to the 1st Respondent and filed for divorce and that they were not therefore in good terms at the time of hearing. He sought him time to talk to his wife in order to refund the 1st Respondent his money. On being cross-examined by the 1st Respondent, he stated that he was willing to refund the purchase price and that they would agree on the issue of costs.
9. The trial court in its judgment found that the 1st Respondent had proved his case on a balance of probabilities. The court found that the parties entered into two valid sale agreements for the sale of the suit land to the 1st Respondent whose validity was not challenged and that the Appellant and the 2nd Respondent breached those agreements. The court allowed the 1st Respondents claim.
10. The Appellant raised eight grounds of appeal in her memorandum of appeal. She faulted the trial court for failing to consider that she was condemned unheard and failing to consider that she was never served with summons and pleadings in the suit and that she had a merited defence that raised serious triable



issues. She also faulted the court for failing to consider that by the 1st Respondent's own admission, she was not privy to the sale agreement dated 7/6/2016.

11. She faulted the court for finding that the validity of the sale agreement dated 18/1/2017 was not challenged yet in her defence she challenged the validity of the agreement. She took issue with the trial court for failing to uphold her right to a fair hearing, failing to uphold her right to legal representation by an advocate of her choice and paying undue regard to technicalities contrary to Article 159 of the Constitution. The Appellant urged the court to set aside the judgment of the trial court award her the costs of the appeal.
12. The court directed the parties to file and exchange written submissions. Only the Appellant filed submissions, which the court has considered. The Appellant submitted that the trial court failed to consider her defence, which had merit, despite noting that it was on record. She averred that she only became aware of the suit in January 2021 through a friend of the 2nd Respondent. That she entered appearance and filed a defence on 26/1/2021. She stated that on 28/1/2021 she attended court, she sought leave to instruct an advocate, which was denied. She averred that her defence denied knowledge of the sale agreement between the 1st and 2nd Respondents and made allegations of forgery. She pointed out that the 2nd Respondent signed the agreement without her consent. She contended that a *prima facie* look at the agreement shows similar signatures and the letter "F" indicating the 2nd Respondent signed the agreement on her behalf.
13. The Appellant submitted that after judgment, she applied to set aside the *ex parte* judgment and annexed a draft defence raising the same issues. She averred that in both the judgment and the ruling of 27/1/2022, the trial court neither considered the defence on record nor the draft defence but instead focused on the issue of service and whether the Appellant's former advocates were properly on record. She cited the decision in Hosea Kiplagat v John Allan Okemwa (2018) KECA 667 (KLR) on the point that when determining an application for setting aside an *ex-parte* judgement, the court must consider whether the applicant has a reasonable defence if it is already filed, or whether the draft annexed to the application raises triable issues.
14. She contended that Article 50 of the Constitution guarantees the right to a fair hearing. That despite attending court on the hearing date, her request for time to instruct an advocate was denied, violating her right to a fair hearing and denying her an opportunity to be heard. The Appellant urged the court to set aside the judgment of the trial court and grant her leave to defend the suit and for the suit to be heard afresh.
15. The issue for determination is whether the appeal has merit. The Appellant's main grievance is that she was denied the right to be heard despite having filed a defence. She contended that she applied to set aside the *ex parte* judgment but the trial court failed to consider whether her defence raised any triable issues.
16. In CMC Holdings Limited v Nzioki [2004] KLR 173 it was held that in an application for setting aside *ex parte* judgement, the court must consider not only the reasons why the defence was not filed or why the applicant failed to turn up for the hearing on the hearing date, but also whether the applicant had a reasonable defence which raised triable issues.
17. On reviewing both the judgment and the ruling on the application to set aside the *ex-parte* judgment dated 27/1/2022, it is apparent that the trial court did not address the existence of the Appellant's defence filed on 26/1/2021 or assess its merit. In that defence, the Appellant denied executing any sale agreement with the 1st Respondent, and contended that the agreement dated 18/1/2017 was forged. She urged that the 2nd Respondent signed the agreement without her knowledge or consent. Those



allegations raised substantial triable issues that warranted consideration by the trial court. The trial court's failure to evaluate that defence amounted to a misdirection.

18. The judgment of the trial court is set aside. The matter is remitted back to the Magistrate's Court for a fresh trial. The 1st Respondent is awarded the costs of the appeal to be borne by the 2nd Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2025.

K. BOR

JUDGE

In the absence of the Appellant and the Respondent.

