



Republic v Attorney General & 6 others; Wilson (Ex parte Applicant) (Suing on behalf of the residents of Chepchoina Phase 111 in Trans Nzoia County) (Environment and Land Judicial Review Case E005 of 2024) [2025] KEELC 6068 (KLR) (17 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2024
CK NZILI, J
SEPTEMBER 17, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE CABINET SECRETARY , MINISTRY OF LANDS HOUSING & PHYSICAL PLANNING 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

COUNTY LAND ADJUDICATOR TRANS-NZOIA 5TH RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT SCHEME 6TH RESPONDENT

LAND SETTLEMENT FUND BOARD OF TRUSTEES 7TH RESPONDENT

AND

LOSHAKEP CHUMEL WILSON EX PARTE APPLICANT

SUING ON BEHALF OF THE RESIDENTS OF CHEPCHOINA PHASE 111 IN TRANS NZOIA COUNTY

RULING

1. The application for determination is the one dated 1/7/2025. It seeks an interim stay of execution, setting aside, variation, and or review of the judgment dated 18/6/2025. The reasons are set out on the



face of the application and in a supporting affidavit of Joyce Lumite Chilaka, a State Counsel, sworn on 1/7/2025.

2. Learned counsel for the applicant deposes that the judgment dated 18/8/2025 did not capture the reply by her clients, the respondents. The deponent states that the Hon. Attorney General opened the Kitale branch in February 2025, after which she was forwarded all the Kitale files for further handling from the Eldoret office, but unfortunately, she was not informed of the hearing date for this particular file, hence was waiting to be served with the same, only to see the file listed for judgment on 18/6/2025.
3. Learned counsel deposes that she was not allowed to attend the hearing and or inform the court that their replying affidavit was on record, hence the judgment was delivered without the participation of the respondents because of the said error or mistake.
4. The applicant deposes that the replying affidavit dated 6/12/2025 was filed and served on 11/12/2024, attached as annexure JLC-2. The applicant deposes that due to the nature of the suit and public interest involved, there is a need to reopen the suit, set aside the judgment, admit the replying affidavit for the respondent to ventilate their defence, and eventually come up with a just and fair determination of the suit.
5. The application is opposed by a replying affidavit of Loshakep Chumel Wilson, sworn on 2/7/2025, on behalf of the residents of Chepchoina Phase III Settlement Scheme, for being conceived, lacking merits, and as an abuse of the court process, since the respondents were granted ample opportunity to file their responses to the notice of motion dated 3/10/2024 as evidenced by orders issued on 9/10/2024, 16/10/2024, and 12/2/2025, within specified timelines. The applicant never complied with the said orders, by placing the response in the court file as listed in paragraph 12 of the judgment, hence the same does not constitute a new and important matter or evidence, under Order 45 Rule 1 of the Civil Procedure Rules.
6. The deponent deposes that the failure to attend the hearing and ensure the responses were properly before the court constitutes negligence and that the applicant cannot benefit from their own inaction, as held in Union Insurance Co. (K) Ltd -vs Ramzan Abdul Dhanji Civil Appeal No. 179 of 1999, especially where a party had reasonable opportunity to be heard but failed to utilize it, only to turn around and complain.
7. The deponent states that the court has since held that the failure to ensure documents are properly before the court reflects negligence and should not be used as a basis for setting aside a substantive judgment.
8. The deponent states that the failure by the court to consider such replies does not constitute a mistake or error apparent on the face of the record, as the court to order a de novo hearing, the allocation process was based on substantive findings of illegalities, contrary to Sections 134 and 135 of the [Land Act](#), Sections 33, 34, 35, 37 and 38 of the [Land Registration Act](#) 2017, and not solely the absence of the respondents' replies.
9. The deponent states that the applicant's reliance on any other sufficient reason under Section 80 of the [Civil Procedure Act](#) is misplaced, as this ground is not a latch all for litigating decided issues, since it is trite law, that such a ground must be compelling, otherwise the applicant has not met the threshold to upset a judgment affecting over 700 households, rendering the ground set flimsy and insufficient.
10. The deponent states that the applicant's claim of public unrest and the need for security measures as a consequence of their own procedural failure in complying with the law on [the constitution](#) and of vetting of the sub-county committee, which led to irregular allocation and trespass on a parcel occupied by over 700 households, cannot be justified in law.



11. The deponent states that the judgment was made after considering the merits of the matter, including the public interest implications for over 700 households, whose rights to property and housing under Articles 43 and 47 of *the Constitution* were violated.
12. Further, the deponent states that the opening of the Hon. Attorney General's office in Kitale in February 2025 is untenable, for the respondents were duly served with all various court documents and hearing notices, as evidenced by the affidavit of service filed in the court record. Further, it is deposed that the applicant cannot rely on Order 53 of the Civil Procedure Rules, public interest, or their own administrative oversight to challenge the judgment that addressed systematic illegalities in Chepchoina Phase 111 Settlement Scheme decisions of 11/6/2021 and 13/4/2022, which were ongoing, culminating in the publication of the list of beneficiaries on 11/8/2023.
13. The deponent seeks to delay a judgment addressing a significant public interest concern, without providing new or compelling grounds, based on vexatious grounds, and a lack of diligence on the application. The deponent states that granting the application would undermine the public interest, perpetuate injustice for over 700 households entitled to a lawful allocation process, now remedied by the judgment, and that, in the interest of justice, the court should dismiss the application.
14. The applicant relies on written submissions dated 3/7/2025 and oral submissions made on 3/7/2025. It is submitted that the discretion of this court to set aside the judgment is wide and unfettered, so long as it is exercised on such terms as are set and held in *Mbogo & Another -vs- Shah* [1968] I EA 93.
15. It is submitted that whereas it is not confirmed that counsel appeared in the matter and made oral submissions, she was not aware at the time that a reply had been filed, as the matter was previously handled by another counsel who had been transferred to Nairobi and it was only after the judgment was delivered that the 5th respondent disclosed that a replying affidavit had been filed on 11/12/2024.
16. It was submitted that the discretion to set aside, as held in *Patel -vs- East Africa Cargo Handling Services Ltd* [1974] EA 75 and *Tree Shade Motor Ltd -vs- DT Dobie* CA 38 of 1998 and *Mania -vs- Muriuki* [1984] KLR 407, is to avoid injustice or hardship resulting from an accident, inadvertence, or an excusable mistake or an error.
17. It was submitted that the applicant should not suffer out of a mistake of counsel as held in *Lee G. Muthoga -vs- Habib Zurich Finance (K) Ltd & Another* CA Nairobi No. 236 of 2009 and *Winnie Wambui Kibinge & Others -vs- Match Electricals Ltd* Civil Case No. 222 of 2010.
18. Through oral submissions, Miss Chalaka, learned state counsel, availed the original replying affidavit attached as annexure JLC-2. It was her submission that the stamp appearing on its face, unfortunately, is that of the office of the Hon. Attorney General and not one for the court. Learned counsel submitted that she had tried to call in vain the previous counsel on record, Mr. Odongo. Learned counsel submitted that the said replying affidavit had also been served upon the law firm on record for the exparte applicant on 8/1/2025 through email, a position that, unfortunately, Miss Jeruto, the advocate, had yet to confirm whether she ever received a copy with a court stamp. Learned counsel submitted that there was a mistake on the advocate's part which should not be visited upon a client.
19. The court record shows that on 9/10/2024, the court made an order that this matter relates to ELC No. E014 of 2024, which was due for a mention on 16/10/2024, and the applicant was to elect whether to proceed with that file or this file, and issued a mention date of 16/10/2024.
20. The exparte applicant relies on written submissions dated 2/7/2025. Reliance is placed on Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules, *Paul Mwaniki -vs- NHIF* [2020] eKLR, *Pancras T. Swai -vs- KBL Ltd* [2014] eKLR, *Nyamongo & Nyamongo -vs- Kogo* [2001] EA



- 174, Sanitam Services (EA) Ltd -vs- Rentokil (K) Ltd & Another [2019] eKLR, Fred Otieno Outa -vs- Jared Odongo Okello [2017] eKLR, James Bosire Mchogu -vs- John Kipkurui Chepkwony [2022] eKLR, Republic -vs- Public Procurement Administrative Review Board & Others Exparte Rongo University [2018] eKLR, Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributions Ltd [1970] EA 469, Aly Khan Satchu -vs- Capital Markets Authority [2019] eKLR, and Republic -vs- National Land Commission & Others; Joyjaa Cleaning & Forwarding Ltd & Others [2019] eKLR.
21. Come 16/10/2024, learned counsel for the respondents, Mr. Odongo, appeared and, after a notice of appointment had been filed dated 14/10/2024, sought 14 days to file a response. The court granted the Hon. Attorney General 14 days to file a response. Parties were also directed to file written submissions, since ELC No. E014 of 2024 had been marked as withdrawn. The hearing was listed for 10/12/2023.
 22. It appears that on 6/12/2024, Mr. Odongo told the court that he had forwarded the response to the County Land Adjudication Officer for perfection, and he therefore needed 7 or 14 days to enable him to follow up.
 23. Miss Obino, for the 4th respondent, appeared and sought 21 days to file a response. The court granted both the Attorney General and the National Land Commission 30 days to file and serve their responses and a corresponding leave to the exparte applicant to file a supplementary affidavit in 14 days. The hearing of the notice of motion was fixed for 12/2/2025.
 24. The court record shows that on 12/2/2025, Miss Jeruto appeared for the exparte applicant, while Miss Chilaka came on record for the Hon. Attorney General. Learned state counsel told the court that she had just set up the Kitale office under her charge and needed 14 days to respond to the notice of motion. The court granted the respondents 30 days to file the responses and for all the parties to canvass the notice of motion by way of written submissions, before the hearing date on 1/4/2024. A hearing notice was to be issued to the 4th respondent, the National Land Commission.
 25. The record for 1/4/2025 shows that Miss Jeruto appeared for the exparte applicant, while Miss Chilaka and Miss Obino were present. Learned counsel Miss Chilaka told the court that they had not filed a response and requested 7 days within which to do so. Equally, Miss Obino said that she was not aware of the hearing date. She requested five minutes to pull out the file. The court ordered the matter to proceed.
 26. Learned counsel for the applicant argued that the notice of motion dated 3/10/2024 did not allude to or mention any replying affidavit having been filed and served upon the exparte applicant by the respondents, the applicant herein.
 27. Learned counsel Miss Chilaka submitted that, though there was no response filed by her clients, the application offended Order 53 Rule 2 of the Civil Procedure Rules. Miss Obino submitted that they were yet to put a response. A judgment date was given for 18/6/2025.
 28. From the Case Tracking System (C.T.S), what the record shows as of 1/4/2025 was an affidavit of service by Yvonne Jeruto of the hearing notice for 1/4/2025, the 4th respondent's submissions dated 3/4/2025, and written submissions by the exparte applicant dated 24/3/2025. The C.T.S. or court file did not contain evidence of an uploaded or filed response by the Hon. Attorney General, sworn by Nyanga C.A. on 6/12/2024.
 29. The court has nevertheless carefully looked at the said affidavit. The original stamp on its face is that of the Hon. Attorney General Chambers. Paragraph 10 thereof refers to 3rd, 7th, 81st, 62nd, 34th and 69th plaintiffs. The notice of motion dated 3/10/2024 does not refer to any plaintiffs. Indeed, the exparte applicant is solely suing on behalf of the residents of Chepchoina Phase 111.



30. None of the said residents' names appear in the body of the notice of motion and in the statement of facts dated 3/10/2024, or in the verifying affidavit thereto. Be that as it may, and given that learned counsel for the applicant has admitted that there is no evidence of any filing of the said reply, though it may have been served on 8/1/2025 to the ex parte applicant's advocate on record, the question is whether the applicant deserves the reliefs sought.
31. What the applicant is seeking is the right to be heard, which, unfortunately, was not exercised for reasons adduced in the affidavit by J.C. Chilaka. The court, on the circumstances, is asked to stay execution of the judgment, set aside, review, reopen, and allow the intended replying affidavit to be filed and the matter to be heard and determined on the merits; otherwise, the applicant stands to be condemned unheard.
32. One of the critical issues raised by the applicant is that the replying affidavit was served upon the ex parte applicant on 8/1/2025. The replying affidavit, sworn on 2/7/2025 by Loshakep Chumel Wilson, is silent on whether or not the reply by Nyanga C.A. was brought to their attention, even if the same was not filed before the court.
33. The court has carefully perused the written submissions by the ex parte applicant dated 24/3/2025. From paragraphs 11 – 15, the court is left with no doubt that the ex parte applicant was specifically referring to the contents of the replying affidavit. Specifically, paragraphs 20 and 21 thereof refer to an alleged response by the respondents that the due procedure was followed in establishing a vetting committee. Paragraph 24 refers to a list of beneficiaries.
34. Paragraph 27 refers to a further affidavit dated 10/2/2025. From the C.T.S, there is no evidence that the ex parte applicant sought leave after 10/2/2025 to put in a supplementary affidavit and or brought it to the attention of the court on 1/4/2025, that there was a further affidavit dated 10/2/2025 in relation to a replying affidavit sworn on 6/12/2024, on behalf of the 1st, 2nd, 3rd, 5th, 6th, and 7th respondents.
35. The court has found attached to the ex parte applicant's written submissions an unfiled further affidavit sworn by Loshakep Chumel Wilson on 10/2/2025. It lacks a barcode or evidence of being uploaded to the C.T.S to form part of the court record. It, however, lends credence to the applicant's claim that the ex parte applicant knew of the replying affidavit as of 8/1/2025, whether or not it had been filed before the court.
36. One of the cardinal principles of the rule of law is the right to be heard and to be allowed to offer a defence. See Joseph Mbalu Mutava -vs- Attorney General [2014] eKLR. The audi alteram partem rule obligates a judge to listen to both sides and to give equal opportunities to each side. In Githiga & Others -vs- Kiru Tea Factory Co. Ltd [2023] KESC 41 [KLR] (16th June 2023) (Judgment), the court held that the Court of Appeal overlooked a miscarriage of justice by convicting the 1st and 2nd appellants in violation of the appellants' right to a fair hearing. The court observed that Article 50 (2) of *the Constitution* imposes a duty on the court to guarantee the parties' procedural justice, by evaluating the evidence brought forth by all parties and also by giving them a reasonable opportunity to present their cases.
37. In this application, the ex parte applicant is blaming the respondents for inaction, yet at the same time commented on the replying affidavit and purported to rely on a further affidavit and written submissions in response to that replying affidavit. Two wrongs do not make a right. A party cannot blow both hot and cold at the same time. Approbate and reprobate at the same time. The sword of justice cuts both ways.



38. In Republic -vs- Vice Chancellor Moi University & Others Ex parte Benjamin P. Gikenyi Magare [2018] eKLR, the court said that some of the reasons to consider in an application for setting aside an order or decree include non-disclosure, misrepresentation, and concealment of material facts. The ex parte applicant cannot escape the reality that he was aware of the replying affidavit but did not disclose the same to the court, or at the very least, seek leave to put in a further affidavit or bring it to the attention of the court that it had placed the same on record, though not filed.
39. The primary duty of the court, as reiterated in Patel -vs- E.A. Cargo Handling Services (supra), is to do justice to the parties. The same was reiterated in David Bundi -vs- Timothy Muthee [2022] eKLR, that parties should be given a proper opportunity to put their case upon merit.
40. The replying affidavit by the applicant raises arguable grounds. Where there is a defence that discloses triable issues, a court cannot shut out such a defence. For instance, the replying affidavit has raised issues regarding a previous determination by this court in ELC Petition No. 2 of 2014, the completion of the process, and the issuance of offer letters.
41. All these issues were commended upon by the ex parte applicant in the written submissions and the further affidavit. They are not idle issues. They require ventilation at the main hearing.
42. Public interest is not one of the main considerations on whether or not to set aside, vary, or review a judgment. The discretion to do so is unfettered. Evidence that the judgment herein has been executed is missing. Substantial loss or damage likely to be suffered by the applicant, by being condemned unheard, outweighs that to be suffered by the respondents if the judgment is set aside.
43. To my mind, the existence of the replying affidavit, whether properly filed or not, amounts to new and important information which, had it been brought to the attention of the court, would have necessitated the applicant being allowed an opportunity to be heard on merits.
44. The upshot is that I set aside the judgment delivered on 18/6/2025. The replying affidavit is directed to be filed and served within 14 days from the date hereof. Equally, the further affidavit by the ex parte applicant is directed to be filed and served within 21 days upon service with the replying.
45. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF SEPTEMBER 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant – Dennis

Chilaka for the respondents present

Langat for Jeruto for the applicant present

Serebe for proposed interested party present

