



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Enforce Limited v Muntet & another (Environment & Land Case
E008 of 2023) [2025] KEELC 4415 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E008 OF 2023
LN GACHERU, J
JUNE 12, 2025**

BETWEEN

ENFORCE LIMITED PLAINTIFF

AND

TATAI OLE MUNTET 1ST DEFENDANT

THE LAND REGISTRAR, NAROK 2ND DEFENDANT

RULING

1. The 1st Defendant/ Applicant herein Tatai Ole Muntet , brought this Notice of Motion Application dated 11th February 2025, and sought for the following orders;
 1. Spent
 2. That this court be pleased to grant leave to the applicant’s advocate herein to come on record for the 1st Defendant after Judgement.
 3. Spent
 4. That the court be pleased to vary, set aside and/or rescind the Judgement of the court entered against the 1st Defendant on 30th January 2025, together with all the consequential orders thereto.
 5. That the court do grant leave to the 1st Defendant/ Applicant to file his statement of Defence and/ or requisite pleadings out of time, in terms of the draft annexed statement of Defence.
 6. Costs of this Application be borne by the Plaintiff/ Respondent
 7. Such further and/ or other orders be made as the court may deem fit and expedient.



2. This Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit of the Applicant, Tatai Ole Muntent, who averred that he was not served with the Summons to Enter Appearance and file his Defence.
3. These grounds are; the suit herein was filed on 28th March 2023, and the Plaintiff/Respondent was supposed to serve him with Summons to Enter Appearance, but he failed to do so. Further that the Plaintiff/ Respondent proceeded to file fraudulent and fictitious Affidavits of Service to the effect that he had served the 1st Defendant/ Applicant.
4. Further, that the Service through Advertisement in the Daily Star never reached him, as he was residing with his other relatives in Tanzania, and thus he failed to file his Defence as he had no knowledge of the suit herein. That the proceedings and subsequent Judgement were entered in his absence, and without his knowledge, and therefore the Judgement entered against him was irregular, and/or illegal, and the proceedings against him were fraudulent and a nullity.
5. That the 1st Defendant has a triable Defence and he deserves an opportunity to defend himself and be heard; and it is in the interest of justice that the 1st Defendant be afforded an opportunity to be heard so that the case can be heard on merit; as the Plaintiff/ Respondent will not suffer any prejudice if the application herein is allowed; that the application was made timeously, in good faith and with due promptitude.
6. In his Supporting Affidavit, the Defendant Tatai Ole Muntet reiterated the contents of the grounds in support of the Application and further averred that; the Plaintiff/ Respondent obtained an irregular Judgement on 30th January 2025, since the proceedings were conducted without his knowledge and presence. Due to the said irregular judgement, the Plaintiff/Respondent is in the process of executing the same, and thus might move into the suit land, and prejudice his family. Further that he has a Draft Defence with triable issues and he deserve a chance to be heard by the court, and matter decided on merit. He contended that the interlocutory judgement is a violation of the rule of natural justice as provided by Article 50(1) of *the Constitution*, and it is in the interest of justice that the application herein be allowed Ex Debito justitiae.
7. The Application herein is opposed through the Replying Affidavit of Peter Leshao Tunai, the Director of the Plaintiff/ Respondent, who averred that the 1st Defendant /Applicant is underserving of the orders sought, as he has approached the court with unclean hands while seeking the Orders of stay of execution, and setting aside of the judgement herein. He also averred that it was false for the 1st Defendant / Applicant to allege that he had no knowledge of the suit herein, because it is evident he had such knowledge.
8. On service of Summons to Enter Appearance, he averred that the 1st Defendant was served through substituted service on 20th April 2023. Further, the 1st Defendant was served again through advertisement on 17th October 2023 and an Affidavit of Service was filed to that effect.
9. It was his further averments that the court was satisfied with the mode of service and service to the 1st Defendant, and allowed the matter to proceed exparte. However, on 13th December 2023, the Defendant appeared in person and sought for time to allow him instruct an advocate. Further, that the sought adjournment was granted, but the 1st Defendant/Applicant failed to take action and did not file any pleadings in response.
10. Further, that though the 1st Defendant/Applicant alleged that he was in Tanzania, he did not provide any evidence to prove that he had travelled to Tanzania. Therefore, it was evident that the 1st Defendant



was aware of this matter and proceedings, but he failed to exercise of his right of defending the suit, and this application is only meant to frustrate the performance of the contract, and subverting justice.

11. On the issue of triable issues in the Draft Defence, the deponent averred that the filed Draft Defence raises no triable issues that would require further interrogation by this court. He argued that the applicant merely denied the claims of breach of contract, without providing material facts and/ or evidence to contradicts them.
12. On prejudice likely to be suffered, the Respondent averred that he paid ksh 30, 000,000/= for purchase of the suit land, Cis Mara/ Oldonyo Rasha/ 527, and he stands to suffer irretrievably by not utilizing the property for the purpose it purchased it for. Further, that the Applicant had not demonstrated existence of sufficient security to guarantee compliance with the Decree of Specific Performance, and justice cut in a two way, and thus the Applicant's right to be heard is not superior to the Respondent's right to enjoy the fruits of its judgement, and it should not be unjustly denied the benefits of a lawful judgment. He urged the court to deny the 1st Defendant/ Applicant's Application.
13. The Application was canvassed through written submissions. The Applicant filed his submissions dated 9th April 2025, through O.H Odira & Co Advocates, and urged the court to allow the Application as the same is merited and was filed without undue delay. Reliance was placed on various decided cases among them the case of Patel vs Cargo Handling Services Ltd (1974) EA 75, where the court held;-

“ there are no limits or restrictions on a judge discretion except that he does vary the judgement he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter wide discretion given to it by the rules. The principles obviously unless and until court pronounces a judgement upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any rule of procedure.”

14. The Plaintiff/ Respondent filed its written submissions dated 29th April 2025, through Kithinji Marete & Co Advocates, and urged the court to dismiss the instant Application. Further, it relied on various decided cases and set out three issues for determination being;
 - i. Whether the 1st Defendant /Applicant was effectively served;
 - ii. Whether the 1st Defendant /Applicant's Defence raises triable issues;
 - iii. Whether the Applicant stands to suffer prejudice if judgement is not set aside.
15. It was the Plaintiff/ Applicant's submissions that the 1st Defendant was properly served through substituted service by advertisement in the Daily Star of 20th April 2023. Further, that the 1st Defendant voluntarily appeared in court on 13th December 2023, and he cannot allege that he was not aware of the suit.
16. Reliance was sought in the case of Philip Mutiso Mulaya vs Samuel Dominic Muathe & 2 Others (2022) eKLR, where the court held; -

“In the instant case, there is no dispute that the 2nd and 3rd Defendants were duly served with summons to enter appearance by way of substituted service by advertisement in the Newspaper and they neither entered appearance nor filed defence as required by law; hence the judgement entered against them was lawful and regular.”



17. On whether the Draft Defence raises triable issues, it was submitted that it does not, and it relied on the case of *Job Kiloch vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rioro* (2015) eKLR where the court held; -

“A bonafide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial..... it is therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

18. On whether the 1st Defendant/ Applicant will suffer prejudice, if the Judgement is not set aside, it was submitted that he will not suffer any prejudice as he has already received the full purchase price for 70 acres, out of 140 acres; Further, that on the contrary, it is the Plaintiff/Respondent who will suffer prejudice as a result of breach of the sale agreement. Again, since setting aside a regular judgement is an equitable remedy, then it is not available to the 1st Defendant/Applicant who slept on his right and only seeks to assert the rights after judgement, which was lawfully entered.

19. The court has considered the instant Application, the grounds in support, and against, the rival written submissions, the cited authorities and relevant provisions of law and finds as follows;

20. The Applicant anchored his Application On Order 9 Rules 9,10 and 11 of the Civil Procedure Rules, which deals with the issue of change of advocate after judgement has been passed. The 1st Defendant has sought in prayer 2 for leave for the advocate to come on record for the him after Judgement. However, this provision on law applies where a party had been represented by an advocate, and wishes to change the said advocate after Judgement. The aim is to protect the advocate who has conducted a matter, and after judgement, he is sacked or fired without being paid. See the case of *S. K. Tarwadi vs Veronica Muehlmann* [2019] eKLR the judge observed as follows:-

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

21. However, in this case, the 1st Defendant/Applicant never entered appearance through any advocate, and he did not participate in the proceedings which are sought to be set aside, and thus he needs not to seek for leave of his advocate to come on record after Judgement.

22. Further, the Application is anchored on sections 1A, 1B and 3A of the *Civil Procedure Act*, which deal with overriding objective of the Act, and the power of the court to issue orders that are necessary for the end of justice to be met.

23. The main prayer herein is the one of varying, setting aside and or rescinding the Judgement of the court delivered on 30th January 2025. The proceedings herein that led to the judgement in issue proceeded in the absence of the 1st Defendant, who alleges that he was never served, with Summons to Enter Appearance, and had no knowledge of the suit herein. That allegation has been denied by the Plaintiff/ Respondent herein and is thus the subject of this determination.

24. Order 12 Rule 7 of the Civil Procedure Rules provides: -

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”



25. Therefore, from the above provisions of law, it is clear that court has discretion to set aside an ex parte judgement , and such discretion must be exercised judiciously. See the case of Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976 , where the court I held that:

“It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge’s exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions.”

26. Courts in this Country have variously held that an ex parte judgment can be set aside if it's irregular, meaning the defendant was not properly served or did not have a chance to be heard, or If the judgment is regular, but the defendant missed court due to an excusable mistake, inadvertence, or other sufficient cause, it can also be set aside. In such instances, the court’s discretion is to prevent injustice and hardship.
27. If the Defendant was not properly served with the Summons to Enter Appearance, or if there was no service at all, the judgment is considered irregular and will be set aside ex debito justiae (as a matter of right). In an irregular judgement, the court does not need to be moved by the Defendant; it can act on its own. The Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, stated that: -

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement 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 default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; 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, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or



whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

28. Even in regular Judgement, where the Defendant was properly served, the Defendant can still seek to set aside the judgment if he can show that he were prevented from attending court by a "sufficient cause," such as an excusable mistake, inadvertence, accident, or other valid reason. In such situation, the court will consider whether the Defendant's intended Defence raises a triable issue. The Court of Appeal in the case of CMC Holdings Ltd vs. Nzioki [2004] KLR 173, held;

“In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit.”

29. Before the court determines whether the 1st Defendant/ Applicant herein is deserving or not deserving the orders sought, it will first determine whether the judgement of the court of 30th January 2025, is a regular or irregular judgement.
30. Though the 1st Defendant alleges that he was not served with Summons to Enter Appearance, and did not have knowledge of this suit, it is clear that the Summons to Enter Appearance were served through an advertisement in the Daily Star Newspaper of 20th April 2023.
31. Further, from the court record, it is evident that on 13th December 2023, the 1st Defendant appeared in court in person and sought for adjournment so that he could engage an advocate. After 13th December 2023, the 1st Defendant did not appear in court again until after the judgement was entered. Having appeared in court on 13th December 2023, the 1st Defendant cannot allege that he was not aware of the suit herein.
32. Having been served with the Summons to Enter Appearance, and file Defence, and or engage an advocate to represent him as he claimed on 13th December 2023, the 1st Defendant failed to exercise his right to appear in court, and file his Defence, and advance his case. The law is very clear on what happens if a defendant fails to attend court. Order 10 rule 9 of the Civil Procedure Rules provides that where a party is properly served and does not appear in court, the Plaintiff may set the suit down for hearing. That is what happened herein and after exparte hearing, the judgement was entered against the Defendants who failed to appear in court. Therefore, the judgement entered herein was a regular judgement.



33. This court having found that the judgement entered on 30th January 2025, was a regular judgement, then the court turns to Order 10 Rule 11 of the Civil Procedure Rules which provides that:-

“where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”

34. The 1st Defendant/ Applicant has a duty to convince this court to set aside a regular justice on such terms. The main allegations made by the 1st Defendant/ Applicant is that he was not served with the Summons to Enter Appearance, and the matter proceeded in his absence. However, the court has found that the 1st Defendant was aware of the suit, and that is why he appeared in court on 13th December 2023. The Applicant did not allude to a regular judgement. However, he annexed a draft Defence, which he averred has triable issues.

35. Further, courts have often held that the decision whether or not to set aside ex parte judgement is discretionary, and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs. Mbogo & Another* [1967] EA 116, where the court held: -

“Applying the principle that the Court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause by justice, the motion should be refused.”

36. The judgement of the trial court was to the effect that an order of specific performance be issued to compel the 1st Defendant to transfer 70 acres, which would be subdivided out of the property comprised of Cis Mara / Oldonyo Rasha/ 527, and a permanent injunction to restrain the 1st Defendant with dealing with the said suit property.

37. This Judgement was issued without the input of the 1st Defendant, and its implementation might cause hardship to him. He might have failed to enter appearance , and file Defence, which is a mistake, but the 1st Defendant should not be allowed to face hardship due to the said mistake. See the case of *Philip Chemowolo & Another –vs- Augustine Kubede* [1982-88] KAR 103 at 1040:, where the court held;

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

38. Indeed mistakes do occur in the process of litigation was appreciated by the Court of Appeal in the case of *Murai vs. Wainaina* (No. 4) [1982] KLR 38 , where it was held that:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought



certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

39. Though the 1st Defendant had not appointed an advocate, this court finds that the same holding applies herein wherein the 1st Defendant failed to Enter Appearance and file his Defence. The 1st Defendant should not be let to suffer hardships due to that inadvertent mistake.
40. The court finds and holds that the judgement entered herein is regular, however, the court still retains the wide discretion to set the same aside depending on the circumstances of the case, and it may do so on conditions that are just. That discretion, being wide, the main concern of the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement, and such conditions, if appropriate, must be just to all the parties herein. See the case of *Patel vs E.A Cargo holding Services Ltd* [1974]EA 75
41. Even if the Applicant has failed to convince the court on reasons as to why he failed to appear in court, the court should consider the draft Defence and determines whether it raises triable issues. As submitted by the Respondent, a Defence with triable issues means; -

A bonafide triable issues is any matter raised by the defendant that would require further interrogation by the court during a full trial.....it is therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

42. In the case of *Kenya Power & Lighting Co Ltd v Abdulkhakim Abdulla Mohamed & another* [2017] eKLR, the Court of Appeal held;-

“The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the Appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties...There was not even a remote suggestion that the Appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective...”

43. A Defence with triable issues need not be the one that would succeed at the end of the trial, but one that has been brought to the attention of the court, and raises reasonable defence. See the case of *Sebei District Administrator v Gasyali* [1968] EA 300 where the court held: -

“the nature of the action should be considered, the defence if one has been brought to the notice of the Court, however, irregularly, should be considered, the question whether the plaintiff can be reasonably compensated by costs for any delay occasioned should always be remembered that to deny a subject a hearing should be the last resort of the Court.”



44. The court has considered the DRAFT Defence, attached to the Application and it indeed raises triable issues. , and the 1st Defendant/ Applicant should be allowed to advance it. In the case of Job Kiloch vs Nation Media Group ltd, Salaba Agencies ltd & Michael Rioro (2015) eKLR, the court held: -

“ what then is a defence that raises triable issues? A bonafide triable issues is any matter raised by the defendant that would require further interrogation by the court during a full trial.....it is therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court”

45. The other issue to be considered in an application for setting aside an ex parte judgement, is whether the application was filed timeously. The Judgement in issue was delivered on 30th January 2025, and this Application was filed on 11th February 2025. Therefore, the application was filed promptly and there was no delay at all in filing the instant application.

46. Consequently, this court finds and holds that the Application herein is merited, and the same is allowed entirely in terms of prayers Nos 4 and 5 with costs to the Plaintiff/ Respondent. Further, the 1st Defendant / Applicant to pay the Plaintiff/ Respondent throw away cost of ksh 30, 000/= before the next Court Appearance date.

47. The Defence to be filed within the next 14 days from the date hereof, failure of which, the orders granted herein will automatically lapse.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 12TH DAY OF JUNE 2025.

L. GACHERU

JUDGE

In the presence of:

Elijah Meyoki – Court Assistant

M/s Mwendwa holding brief for Marete for the Plaintiff/Respondent

Mr. Nchoko holding brief for Mr. Oyugi for the 1st Defendant/Applicant

N/A for 2nd Defendant/Respondent

L. Gacheru

Judge

12/6/2025

