

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ELC JUDICIAL REVIEW CASE NO. E003 OF 2021

**IN THE MATTER OF APPLICATION FOR LEAVE TO
COMMENCE JUDICIAL REVIEW PROCEEDINGS PURSUANT
TO ORDER 53 OF THE CIVIL PROCEDURE RULES OF 2010**

AND

**THE MATTER OF THE LAND REGISTRATION ACT NO. 6 OF
2012**

AND

IN THE MATTER OF THE LAND ACT NO. 3 OF 2012

BETWEEN

JULIUS NTENTE KALEIYA (suing as legal representative and
Beneficiary of the estate of the late KALEIYA TUMPES -

AND LESOI KALEIYA
TUMPES.....APPLICANT/RESPONDENT

-VERSUS-

TOM OLE KALEIYA.....1ST
RESPONDENT/RESPONDENT

LAND REGISTRAR, KAJIADO COUNTY....2ND
RESPONDENT/RESPONDENT

AND

DANILE SOLITEI NAMADI.....INTENDED INTERESTED
PARTY/APPLICANT

RULING

***(In respect of the Notice of Motion applications dated 7th July 2023,
9th October 2024, and 15th April 2025, all seeking, inter alia, the
setting aside of the ex parte Judgment entered on 29th November
2021, stay of execution of the consequent decree, and related
reliefs pursuant to Order 10 Rule 11 of the Civil Procedure Rules and
other enabling provisions of the law)***

Introduction

1. Before this Court for determination are three applications arising from the judgment of this Honourable Court delivered on 29th November 2021 and its consequent decree issued on 14th December 2021.
2. The first application being the Notice of Motion dated 7th July 2023 is by AMREF Housing Development Company Limited, in which the Applicant seeks, inter alia, to be enjoined in these proceedings as an interested party; that there be an order of stay of execution of the judgment and decree; and that the said judgment be set aside in so far as it affects land parcel **Kajiado/Kaputiei South/2508** and its subdivisions **Nos. 6316 to 6385.**
3. The second application is the Notice of Motion dated 9th October 2024 by Daniel Solitei Namadi, who similarly seeks orders for joinder as an interested party, stay of execution, and the setting aside of the judgment and decree to the extent that it affects land parcel **Kajiado/Kaputiei South/3156** and its subdivisions **Nos. 8175 to 8178.**

4. The third application is the Notice of Motion dated 15th April 2025 by the 1st Respondent, Tom Ole Kaleyia, seeking that the ex parte judgment of 29th November 2021, the consequent decree and all consequential proceedings be set aside; that he be granted leave to file a replying affidavit and/or defence out of time; that the matter be re-opened and heard on its merits with all parties being accorded an opportunity to tender evidence; and that there be a stay of execution of the judgment and decree pending the hearing and determination of the application. The application further seeks that the costs be in the cause.
5. The three applications are premised on the Applicants' asserted proprietary interests in the parcels of land mentioned, their claims that they were either not parties to the proceedings or were condemned unheard, and their contention that justice demands that they be afforded an opportunity to be heard on the merits.
6. All three applications are opposed by the Ex parte Applicant/Decree-holder, who maintains that the impugned judgment and decree were regularly and lawfully obtained, and urges this Court to dismiss the applications with costs.

Directions

7. The court directed that the applications be heard concurrently and be canvassed by way of written submissions. I have had the opportunity to read the parties' submissions and the same have been considered in the writing of this ruling.

Analysis and Determination

8. It is against the foregoing factual and procedural background that the Court now turns to consider the issues arising for determination. Although presented at different times, all the applications seek substantially the same reliefs, to wit: the setting aside of the ex parte judgment delivered on 29th November 2021, the subsequent decree issued on 14th December 2021, and the consequential orders flowing therefrom, and further that there be preservation of the suit property through stay and maintenance of the status quo pending inter partes hearing of the dispute.

9. The starting point on setting aside default judgments is **Order 10 Rule 11** of the **Civil Procedure Rules** which provides that;

“Where judgment has been entered under this Order the court may set aside or vary such judgment and

any consequential decree or order upon such terms as are just.”

10. The Court of Appeal in ***James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR***, elaborated on the legal position for setting aside in the following terms:

“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 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 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 or defence, 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... 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 case, the default judgment is set aside ex debito justitiae.”

11. The Applicants uniformly assert that they were never served with pleadings and that they only became aware of the judgment belatedly, in one case upon being summoned by the Directorate of Criminal Investigations. On the other hand, the Respondent claims service.
12. On the explanation and delay, the Applicants’ narrative is consistent and uncontroverted. Each of them moved the court within days of discovering the existence of the judgment. This militates against any suggestion of indolence. More critically, all the three motions disclose substantial grounds of defence that

raise bona fide triable issues deserving to be heard on their merits.

13. First, there is the issue of locus standi. The Respondent relies on a 2017 limited grant ad colligenda bona to justify the institution and maintenance of the suit, while the Applicants maintain that the limited grant is confined to collection and preservation of estate assets and does not authorize the institution of substantive proceedings. Whether the 2017 grant expressly authorized the institution of this suit, and whether it remained efficacious notwithstanding the dismissal (and or reinstatement) of **Succession Cause No. 9 of 2018**, are threshold questions that go to the very competence of these proceedings.

14. Secondly, there are serious controversies surrounding the title and tenure of the suit property. The Applicants assert that the property was held in a joint tenancy from 1996 and that upon the death of one of the joint tenants, the right of survivorship operated to vest full ownership in the survivor. The Respondent challenges that position and further contends that subsequent

subdivisions and transfers were effected after death and without any grant of representation, amounting to intermeddling with the estate of a deceased person. These competing narratives raise substantial questions of law and fact, including whether the joint tenancy was ever severed, the legal effect of post-death dealings absent a grant, and the probative value of documentary evidence showing the dates of death vis-à-vis the impugned transactions.

15. Thirdly, there is the issue of third-party purchasers. The Applicants state that parts of the suit property were transferred to purchasers for value. Whether such purchasers exist, whether they were bona fide without notice, and whether they are necessary parties for the effectual and complete determination of this dispute, are issues which can only be resolved upon hearing.

16. These matters are not fanciful or contrived; they are serious controversies which deserve to be ventilated inter partes. As was observed in ***Patel v E.A. Cargo Handling Services Ltd [1974] EA 75***, the main concern of the court is to do justice to the parties and avoid hardship resulting from strict adherence to procedural defaults.

17. This court is further guided by the holding of Odunga J (as he then was), in the case of **Victory Construction - vs- BA, (a minor suing through next friend - one PNM), 2019, eKLR,** which I find appropriate in this instance, where he opined that courts' decisions should be propelled by the need for the advancement of justice and the overriding objective. The learned Judge stated that;

“What is expected of the court is to ensure that the aims and intendment of the overriding objective as stipulated in Section 1A as read with Section 1B of the Civil Procedure Act are attained. It is therefore important that the court takes into consideration the likely effect of granting the stay of proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality

of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

18. The Respondent’s interest in the finality of his judgment can be compensated by an award of costs and or by imposing strict timelines for compliance with pre-trial directions aimed at expedient disposal of the matter. On the other hand, denying the Applicants a hearing on these weighty issues would risk irreversible prejudice not only to them but also to third parties whose property rights may be implicated.

19. Article 50(1) of the Constitution enshrines the right of every person ‘to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial

tribunal or body.’ That constitutional imperative reinforces the discretionary inclination to set aside the judgment and to reopen the case.

20. In the end, and for the reasons set out above, the three applications dated 7th July 2023, 9th October 2024 and 15th April 2025 are hereby allowed.
21. Accordingly, the Interested Parties/Applicants are hereby joined into these proceedings as such and the ex parte judgment of this Court delivered on 29th November 2021, together with the subsequent decree issued on 14th December 2021 and all consequential orders, is hereby set aside.
22. The Applicants are granted leave to file and serve their respective responses and all supporting documents within twenty one (21) days from the date hereof, and the Ex parte Applicants shall be at liberty to file and serve any replies within twenty one (21) days of service.
23. Pending the hearing and determination of the suit there shall be maintenance of the prevailing status quo on the ground, in that no further subdivisions, transfers, alienations or evictions in respect of the suit property shall take place.

24. The costs of the three applications shall abide the outcome of the main suit.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 30th Day of September 2025.

**M.D. MWANGI
JUDGE**

In the virtual presence of:

Ms. Wangari h/b for Mr. Mahinda for the Interested Parties/Applicants

Mr. Shem Dickson for the 1st Respondent/Applicant

Mr. Gichunge for the 2nd Interested Party/Applicant

Mr. Maina for the Ex Parte Applicants/Respondents

Court Assistant: Mpoye

**M.D. MWANGI
JUDGE**