



**Midland Emporium Limited v County Government of Kisumu & another;
Prime Bank Limited (Interested Party) (Environment and Land Case
E007 of 2021) [2025] KEELC 6252 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE E007 OF 2021
E ASATI, J
SEPTEMBER 25, 2025**

BETWEEN

MIDLAND EMPORIUM LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT

CITY MANAGER, KISUMU 2ND DEFENDANT

AND

PRIME BANK LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Motion application dated 24th February, 2025 filed by the Defendants. The application was expressed to be brought pursuant to the provisions of article 159 of *the Constitution* of Kenya 2010, sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act* Cap 21 and Order 10 Rule I, Order 45 Rule 1 of the Civil Procedure (Revised) Rules (2010).

The application seeks for orders that;

- i. the application be certified as extremely urgent,
- ii. the default judgement issued against the Defendants be set, aside and the Respondents be granted unconditional leave to defend the matter,
- iii. the honourable court be pleased to grant a stay of execution of the judgement and to stay taxation hearing herein dated 25th November, 2024 and/or any further proceedings therefrom pending the hearing and final determination of this application,
- iv. the honourable court be pleased to allow the Defendants' advocate to properly come on record,



- v. the honourable court be pleased to issue further or better orders as shall met the ends of justice,
- vi. the cost of this application be provided for.
2. The application was supported by the grounds on the face of the Notice of Motion and the Supporting Affidavit sworn by Mariella Awuor Advocate, sworn on 24th February, 2025.
 3. The application was opposed vide the averments contained in the Replying Affidavit sworn by Chacha Sammy Advocate on the 7th March, 2025 and the annexures thereto.
 4. Vide directions taken by consent on 25th February, 2025, the application was heard by way of written submissions.
 5. On behalf of the Defendants/Applicants, written submissions dated 17th March, 2025 were file by the Office of the County Attorney Kisumu County and on behalf of the Plaintiff/Respondent, written submissions dated 19th March, 2025 were filed by the firm of M/s Mogeni & Company Advocates.
 6. The substantive relief sought in the application is contained in prayer number (ii) which is a prayer for setting aside of the judgement entered herein and allow the defendants to defend the suit.
 7. The grounds for setting aside an ex – parte orders include firstly, explanation for failure to Enter Appearance, file defence and attend court or participate in the proceedings that led to the ex parte orders/judgement, secondly, a demonstration that that the applicant has a good defence that raises triable issues and thirdly, that prejudice will not be occasioned to the Respondent if the relief sought is granted.
 8. The Applicants do not deny service of court process as the case progressed to hearing and determination. Their explanation for non-participation in the proceedings is that the office was going through human resource transition which involved staff recruitment and reorganization and subsequently the matter came up for sequential hearings and the same was left unattended.
 9. That the sins of the Advocate should not be meted upon the client whom in this case is the greater public.
 10. In paragraph 3, 4, 5, 6 and 7 of the Supporting Affidavit, it is stated on behalf of the Applicant that Counsel who had personal conduct resigned and that this led to the matter being inadvertently overlooked hence non-attendance.
 11. That the office got seized of the matter when they were served with a mention Notice on 18th February, 2025 together with an application dated 25th November, 2024. That failure on their part to act diligently should not be used to deny the Defendants the right to a fair trial which would otherwise lead to immense loss of public funds.
 12. The Applicants in their submissions relied on the provisions of section 19 of the *Environment and Land Court Act*, section 3A of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules.
 13. The Applicants also relied on the case of *Joswa Kenyatta -vs- Civicon Limited* [2020]eKLR, on which Counsel submitted that the court held that;

“the legal threshold to exercising the said discretion is whether the Applicant has demonstrated sufficient cause warranting setting aside of the ex parte decision.



14. Reliance was placed on the case of Karani -vs- Bildard Wachira [2016]eKLR where it was held inter alia, that sufficient cause is a question of fact and that the court has to exercise its discretion in the varied and special circumstances in the case at hand.
15. The Respondent's/Plaintiff's response to the Applicants' explanation for non-participation in the proceedings is as contained in the Replying Affidavit that the application is bad in law and an abuse of the court process. The Respondent states that the Applicants though served with a Notice of Motion application filed with the suit, never responded and that the Notice of Motion was subsequently heard and an order of injunction issued pending hearing and determination of the suit.
16. That inspite of being served with the Summons to Enter Appearance and the pleadings, the Applicant did not file Memorandum of Appearance or defence hence the matter proceeded to formal proof on 25th September, 2023.
17. That the Applicants have been indolent. That the Applicants have not demonstrated why they did not enter appearance or file defence and that they have not explained the delay in filing the present application which is clearly inordinate, to warrant the court to exercise its discretion in their favour.
18. That the fact that Counsel who had conduct of the matter resigned shows lack of interest on the part of the Applicants and not inadvertence. That the issue is not with the advocate conducting the trial but the Office of the County Attorney which has several Counsel who ought to have taken up the trial as a matter of course.
19. It was submitted on behalf of the Respondent that no plausible reason has been advanced by the Applicants to warrant the court to exercise its discretion in their favour. Counsel relied on the case of Prime Bank Ltd vs Paul Otieno (2014)eKLR where it was held that the court must be satisfied that the Defendant offered a very plausible explanation as to why he failed to file his Memorandum of Appearance and defence within the prescribed period.
20. I have read the application, the reply thereto, the rival submissions and the entire court record.
21. Service of the Summons to Enter Appearance and other court process as stated by the Respondent is admitted by the Applicants. The reason given for failure to take the appropriate steps is that Counsel having the conduct of the case resigned from the 1st Defendant's employment.
22. There is however no evidence to support this claim. And if indeed this was the true position, there is no explanation as to why other Counsel was not instructed to take over the conduct of the case. The case was in court for a period of about 2 years before being heard and more than a year from the date of hearing to the date of filing of the application . All this time, the Applicant took no action to replace the Counsel who is said to have resigned.
23. I am in agreement with the Respondent that no plausible explanation has been tendered to warrant exercise of discretion in favour of the Applicant.
24. The second point to consider is whether or not the Applicants have a good defence that raises triable issues against the Respondent's claim. There is no mention in the Notice of Motion, Supporting Affidavit and submissions of whether the applicants have a defence to the Respondent's claim and the nature of the defence. A draft defence ought to be annexed to an application of this nature for the court's perusal in order to be able to determine whether or not the Applicants have a defence and that the same raises triable issues. As matters stand, this point has not been demonstrated.
25. On the third point of whether prejudice will be occasioned, the Respondent has demonstrated that it properly served and notified the Applicants of the existence of the suit and all pleadings and



proceedings in respect thereof. The Respondent finally has judgement in its favour which it seeks to execute to bring the matter to conclusion.

26. The Applicants who remained indolent and unconcerned about the progress of the case now seek the court to exercise discretion, set aside the judgement and start the process all over again. This will no doubt be prejudicial to the respondent. While the remedy of setting aside judgements, orders or decrees of the court is available in law, an applicant must meet the threshold for grant of the remedy in order to be entitled to the same. The Applicants herein have not.

27 The court finds no merit in the application which it hereby dismisses. Costs to the Respondent.
Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Defendants/Applicants

No appearance for the Plaintiff/Respondent.

