



**Siminkor v Osiray (Environment and Land Case 136 of 2018)  
[2025] KEELC 6326 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6326 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE 136 OF 2018  
MD MWANGI, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**TURASHA OLE NEKIIPA SIMINKOR ..... PLAINTIFF**

**AND**

**LEKIRA OLE NKEENKI OSIRAY ..... DEFENDANT**

**RULING**

(In respect of the Notice of Motion application dated 24th February 2025 pursuant to Order 10 rule 11 of the Civil Procedure Rules and other enabling provisions seeking to set aside an ex parte judgement)

**Introduction**

1. Before this Court for determination is a Notice of Motion application dated 24th February 2025, in which the applicant seeks inter alia the following orders:
  - a. That the Honourable Court be pleased to grant leave for the firm of T.K. Rutto & Company Advocates to come on record for the Defendant/Applicant in place of the firm of Kipkenda & Company Advocates.
  - b. That pending the hearing and determination of this application, an interim order of injunction do issue restraining the Plaintiff/Respondent, whether by himself, his agents, servants, employees and/or any other person acting under his instructions, from sub-dividing, selling, transferring, evicting or otherwise interfering with the Defendant's possession of parcels Kajiado/Kaputiei-South/1024 and Kajiado/Kaputiei-South/1116.
  - c. That the ex parte judgment entered on 8th February 2021, together with all consequential orders, be set aside.



- d. That the time for the filing of the Defendant's Statement of Defence be enlarged and the same be deemed as duly filed upon payment of the requisite court fees.
  - e. That the costs of this application be in the cause.
2. The application is premised on the grounds that the Defendant/Applicant only became aware of the ex parte judgment herein on 17th February 2025 upon observing survey activities on the suit properties, which are Kajiado/Kaputiei-South/1024, Kajiado/Kaputiei-South/1116, and Kajiado/Kaputiei-South/1312 (hereinafter referred to as the 'suit properties'). It is contended that the Court's findings, which included a declaration that the Defendant was not the absolute and indefeasible proprietor of the said parcels and a directive to the District Land Registrar, Kajiado, to cancel resultant titles and revert the same to the Plaintiff, were made without consideration of the Defendant's position regarding acquisition and ownership of the suit properties.
  3. The Defendant avers that he lawfully acquired the suit properties, has in his possession titles duly issued in his name, and was cleared by investigative and prosecutorial authorities of any wrongdoing. He further asserts that one of the parcels, Kajiado/Kaputiei-South/1312, had been sold to a third party prior to the institution of the suit, and that the third party was consequently condemned unheard. The Applicant maintains that unless the orders sought are granted, the Plaintiff may proceed to execute the judgment, subdivide, and alienate the suit properties, thereby causing him irreparable prejudice.
  4. The Plaintiff/Respondent opposes the application by the Defendant through a Replying Affidavit sworn on 4th March 2025, averring that the decree was already executed and titles issued in his name, save for land parcel Kajiado/Kaputiei-South/1312 whose proprietorship remained unchanged as its occupants were not parties to the suit. He states that the Court, in its judgment, found as a fact that the Defendant neither purchased the property nor involved him in the transfer, and that interlocutory judgment was entered after the Defendant failed to file a defence in time. During formal proof, the Plaintiff claims to have established the pleaded particulars of fraud, since the transfer occurred without his involvement.
  5. The Plaintiff further contends that the present application is unreasonably delayed and the judgment on record is regular, having been obtained upon proof to the requisite legal standard. He asserts that the Defendant is not in possession of the subject parcels Kajiado/Kaputiei-South/1116, Kajiado/Kaputiei-South/1312, and Kajiado/Kaputiei-South/1024 and that he is the one who resides therein. The defence of the Applicant, in the Plaintiff's view, raises no triable issues as the Defendant has provided no credible evidence, such as payments, agreements, consents, or signed transfers, to show how the land passed from the Plaintiff to him. He therefore prays that the Defendant's application be dismissed with costs.

### **Directions**

6. The court directed that the application 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.

### **Issues for Determination**

7. The Court is called upon to determine whether the ex parte judgment entered on 8th February 2021 should be set aside. The prayer for an interlocutory order of injunction had been sought pending the hearing and determination of the main prayer for setting aside the ex parte judgement in favour of the plaintiff against the Defendant.



## Analysis and Determination

8. The Applicant's Advocates sought leave to come on record for the Defendant in place of the firm of Kipkenda & Company Advocates who were previously on record for the Defendant. Evidence of service upon the previous Advocates has been presented in form of an affidavit of service. There is no contestation from the previous Advocates. Consequently, leave is granted to the law firm of Rutto & Company Advocates to come on record for the Defendant in place of the firm of Kipkenda & Company Advocates.
9. On the question of setting aside, the governing provision 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. This rule confers upon the court an unfettered discretion to set aside or vary *ex parte* judgments. Off course such judicial discretion must be exercised judicially and not capriciously, with a view to doing justice to the parties.
11. In *Odwesso v Nyaga alias Jason Nyaga (Civil Appeal E031 of 2020) [2024] KEHC 9123 (KLR)*, the Court emphasized that:

“In considering whether or not to set aside a judgement, a judge has to consider the matter in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed... [It] is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail.”
12. The law further requires the court, in considering whether to set aside a regularly obtained judgment, to interrogate two key questions: first, whether the applicant has provided a reasonable and satisfactory explanation for the failure to file a defence within the prescribed time; and second, whether the proposed defence discloses triable issues that call for a hearing on the merits.
13. In *CMC Holdings Limited v James Mumo Nzioki [2004] eKLR*, the Court of Appeal underscored that even where service is not disputed, the court should nonetheless examine whether the defence on record raises triable issues — noting that a triable issue need not be one that will succeed at trial, but one that calls for interrogation.
14. Similarly, in *Tree Shade Motors Ltd v D.T. Dobie & Co. (K) Ltd & Another [1995–1998] 1 EA 324*, the Court stated that where a draft defence raises even a single triable issue, leave to defend should be granted unconditionally.
15. In the present case, the applicant's explanation is that although his advocate duly entered appearance, no defence was filed due to inadvertence on the part of the Advocate, and that he only became aware of the judgment in favour of the Plaintiff upon encountering intrusion into the suit properties for purposes of survey.



16. It is trite, as restated by the Court of Appeal in Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR, that:

“Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on the merits.”

17. This court is persuaded that the Defendant’s explanation falls within the ambit of an excusable mistake.

18. Further, the draft defence annexed to the application denies the allegations of fraud and annexes sale agreements for the purchase of the suit parcels, together with letters from investigative authorities stating that no fraud was established. This directly challenges the evidence adduced during the formal proof proceedings and raises triable issues on whether the transfers were lawful and with consideration.

19. In Isaac Awuondo v Surgipharm Limited & Another [2011] eKLR, the Court of Appeal reiterated that:

“A triable issue is not one that must succeed, but one that deserves to be heard so that the court may pronounce itself upon it.”

20. I am satisfied that the draft defence meets this threshold. To lock out the Defendant from defending the suit would be to contravene the constitutional guarantee under Article 50(1) of *the Constitution*, which provides that:

“Every person has the right 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.”

21. The prejudice to the Plaintiff, if at all, can be compensated by an award of costs, whereas the prejudice to the Defendant, if denied a hearing, would be irreparable. The court finds merits in the application by the Defendant and allows the prayer for setting aside of the ex parte judgement herein.

22. Finally and for purposes of preservation of the suit property pending the hearing and determination of this suit, this court exercising its inherent jurisdiction bars either party in this case from subdividing, selling, charging, transferring, or otherwise disposing the suit properties parcels Kajiado/Kaputiei-South/1024, Kajiado/Kaputiei-South/1116, and Kajiado/Kaputiei-South/1312 pending the hearing and determination of this suit.

23. For the reasons set out in the foregoing analysis, this Court makes the following orders:

- a. The ex parte judgment entered herein on 8th February 2021, together with all consequential orders, is hereby set aside.
- b. The Defendant/Applicant is granted leave to file and serve his Statement of Defence within fourteen (14) days from the date hereof, upon payment of the requisite court fees.
- c. Pending the hearing and determination of the suit, either party is barred from subdividing, selling, charging, transferring, or otherwise disposing the suit properties parcels Kajiado/Kaputiei-South/1024, Kajiado/Kaputiei-South/1116, and Kajiado/Kaputiei-South/1312 pending the hearing and determination of this suit.
- d. Costs of the application shall be in the cause.



It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24<sup>TH</sup> DAY OF  
SEPTEMBER 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Odoyo h/b for Mr. Rutto for the Defendant/Applicant

N/A for the Plaintiff/Respondent

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

