



Sogomo v Rubber Components Ltd & 2 others (Environment and Land Case E047 of 2022) [2025] KEELC 6258 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE E047 OF 2022
EM WASHE, J
SEPTEMBER 16, 2025**

BETWEEN

RAEL JEBET SOGOMO PLAINTIFF

AND

RUBBER COMPONENTS LTD 1ST DEFENDANT

IBRAHIM ODHIAMBO ADERO 2ND DEFENDANT

ROSEMARY AKOTH MAGWANA 3RD DEFENDANT

RULING

1. The 1st to 3rd Defendants herein (hereinafter referred to as “the Applicants”) filed a Notice of Motion Application dated 17.02.2025 (hereinafter referred to as “the present Application”) seeking the following Orders against the Plaintiff (hereinafter referred to as “the Respondent”); -
 - a. That this Application be certified urgent and interim orders issued in the first instance owing to the urgency disclosed in the Certificate of Urgency. (Spent)
 - b. That this Honourable Court be pleased to grant leave to the firm of Odede & Oduor Advocates to come on record for the Defendants/Applicants. (Spent)
 - c. That this Honourable Court be pleased to stay execution of the ex-parte Judgement and/or Decree entered on the 05.02.2025 against the Defendants/Applicants pending the hearing and determination of this Application inter-parte.(Spent)
 - d. That this Honourable Court be pleased to set aside the *ex parte* proceedings of 14/10/2024, judgment entered against the Defendants/Applicants on 5th February 2025 and the case re-opened and Applicants allowed to defend the suit unconditionally.
 - e. That the Respondent/Applicant be granted 14 days leave within which to file their pleadings.



- f. That costs of this application be in the cause.
2. The facts in support of the prayers outlined hereinabove are contained in the main body of the present Application as well as the Supporting Affidavit thereof and can be summarised as follows; -
- i. The 2nd Defendant/Applicant claims that they instructed the firm of Orego, Odhiambo & Company Advocates to defend the suit, but the said advocates did not appear in the suit at all, but they only became aware of this after judgment had been delivered.
 - ii. He averred that their erstwhile advocate had indicated that he would let them know when the matter was scheduled for hearing, but he never informed them.
 - iii. He explained that their failure to attend court on 14/10/2024 was not due to indolence but because they were unaware of the date.
 - iv. He also explained that their failure to file a Defence and defend the suit was not intentional as they presumed that their advocate was attending to the matter after they had instructed him, and asked that the mistakes of the said advocates not be visited on innocent litigants.
 - v. The 1st Defendant expressed remorse and regret at the turn of events, and prayed that the judgment and *ex parte* proceedings be set aside and the case be re-opened to enable them defend the suit unconditionally.
 - vi. He claimed that their defence has high chances of success and urged the court to grant them a day in court, urging that it is in the interest of justice that the instant application is allowed.
 - vii. He claimed that the application had been brought in good faith and without any delay, and that the Respondent will not suffer any prejudice if the case is re-opened since both parties will have a chance to testify and be cross-examined.
3. The Respondent was served with the present Application and opposed it through a Replying Affidavit dated 27th March, 2025 on the following grounds: -
- i. That the application was made in bad faith, with the intention of delaying and frustrating him from enjoying the fruits of his judgment.
 - ii. She accused the Defendants of deliberate indolence since they refused to file a Defence after receiving her money and failing to honour their end of the bargain.
 - iii. She also claimed that the Defendants have always been evasive and dodgy in resolving her grievances despite receiving her money over a decade ago.
 - iv. She averred that having duly appointed an advocate to act for them, the Defendants remain bound by their advocate's actions and omissions.
 - v. She urged that the Defendants have a recourse in law through which they can hold their advocate accountable, and they are at liberty to take proper legal action against them instead of frustrating her right to enjoy the fruit of judgment.
 - vi. She further averred that the Defendants are not entitled to the unconditional right to defend the suit as they hold both the land and purchase price, and asked that they be ordered to deposit the decretal sum together with costs in court.



- vii. She deponed that the Defendants have no plausible defence since they deny being the registered owners of the land on one hand, and on the other hand, they admit to having sold it to her, and for this reason, the Application herein should be rejected.
 - viii. She asked the court to find the application unmerited, intended to deny her justice and enrich the Defendants at her expense, and that it is in the interest of justice to dismiss it with costs.
4. The Court directed that the present application be canvassed by way of written submissions and the parties complied with the Defendants/Applicants filing their submissions dated 14th July, 2025 while the Respondent's submissions are dated 11th July, 2025.
 5. The Court has perused the present application, the response by the Respondents and the submissions filed and the issues for determination are as follows:-
 - Issue No. 1 - Whether the judgment dated 5th february, 2025 was a regular judgment?
 - Issue No. 2 - Whether the *ex parte* judgment entered on 5th february, 2025 and the proceedings of 14th october, 2024 should be set aside?
 - Issue No. 3 - Who shall bear the costs of this application?
 6. The Court having identified the above issues for determination, the same are discussed below.

Issue No. 1 - Whether the Judgment Dated 5th February, 2025 was a Regular Judgment?

7. With regards to setting aside an *ex parte* judgment, Order 12 Rule 7 of the [Civil Procedure Rules](#) provides that:-

“7. Setting aside judgment or dismissal [Order 12, rule 7]
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.”

8. Courts have held before that there are two type of ex-parte judgments, regular and irregular, and the difference between the two was highlighted in [James Kanyita Nderitu & Another vs Marios Philotas Ghikas & Another](#) (2016) eKLR, where the Court of Appeal explained that: -

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case.

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered.

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, 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

See *Mbogo & Another v. Shah (supra)*, *Patel v. EA. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986/ KLR 492 and *CMC Holdings v. Nzioki* [2004/ 1 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 justitiae*, as a matter of right...”

9. From the record, the Defendants were served with the Summons in this suit on 26th September, 2022 and although there is no Affidavit of Service on the same, there is a copy of the Summons where the 1st Defendant signed accepting service on himself and on behalf of the 3rd Defendant.
10. The Defendants have admitted that they were served and instructed an advocate to handle the suit on their behalf, and it is on record that they entered appearance through the firm of Orego, Odhiambo & Co. Advocates vide a Memorandum of Appearance filed on 6th October, 2022.
11. The record also shows that the Defendants’ said advocate only came to court once in this suit on 19th July, 2023 and thereafter disappeared and never again set foot in court, and notably no defence was filed.
12. Under Order 10 Rule 10, where a defendant has failed to file a defence, rules 4 to 9 shall apply with any necessary modification, while Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10.
13. Essentially, where a Defendant does not file a Defence, the court may on application by the Plaintiff enter interlocutory judgment against the Defendant.
14. Upon failure by the Defendants to file a Defence, the instant suit was set down for hearing on 14th October, 2024 and on the said date, there was no attendance on the part of the Defendants and/or their advocate on record then.
15. The guiding provision of the law with regards to the consequences of non-attendance on the date of the hearing is to be found in Order 12 Rule 2(a) of the *Civil Procedure Rules*, which provides:-
 - “2. When only plaintiff attends [Order 12, rule 2]
If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—
 - a. that notice of hearing was duly served, it may proceed *ex parte*...”
16. This was the case on the said hearing date, and the Court was well within its rights to proceed with the hearing in the absence of the Defendants who had failed to file a Defence within the required time, or at all.
17. The Court then entered Judgment in favour of the Plaintiff on 5th February, 2025 for the sum of Kshs.2,670,000/- being a refund of the purchase price together with interest at court rates from the date of payment.



18. Clearly therefore, in the instant case, service of summons was not disputed, in fact, the Defendants admitted service and that they entered appearance, and consequently, the judgment herein is therefore a regular judgment.

Issue No. 2 - Whether the Judgment Delivered on 5th February, 2025 and the Proceedings of 14th October, 2024 Should Be Set Aside?

19. According to Order 12 Rule 7, an *ex parte* judgment or order may be set aside or varied upon such terms as the court may consider to be just.

20. In *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas* (*supra*), the Court of Appeal prescribed the factors that a court must take into account when considering an application for setting aside of an *ex parte* judgment, which factors are that:-

- i. The reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be;
- ii. The length of time that has elapsed since the judgment was entered;
- iii. Whether the intended defence raises triable issues;
- iv. The respective prejudice each party is likely to suffer;

a. The Reason for the Failure by the Defendants to File their Defence;

21. It is evident that the upon being served with the Summons herein, the Defendants entered appearance as required, but failed to file a defence.

22. The reason for the said failure is said to be a mistake on the part of their erstwhile advocate to act on their instructions and file a defence.

23. The Defendants further accused their former advocates of failing to inform them when the matter was set down for hearing, which is why they were absent on 14th October, 2024 when the matter came up for hearing of the main suit.

24. The Defendants have called upon their right to a fair hearing under Article 50(1) of *the Constitution* and their right to access justice.

25. While I acknowledge that the mistakes of counsel should not be visited on their client, it should be remembered that a case primarily belongs to the litigant, as they are the ones with a legal stake and interest in the suit, not to the advocate who only acts as a representative and/or agent of the litigant.

26. Whereas the advocate provides legal advice and professional legal services to advance their client's position in court, the responsibility for the case's progress, decision-making, and the ultimate outcome rests with the client.

27. The Defendants cite the mistake of their erstwhile advocates, but they did not demonstrate that they took any steps towards following up the matter with their advocate to ensure that their instructions were being acted upon.

28. There is no explanation as to why the Defendants never questioned their advocate or sought updates on the matter for the three years it remained active in this court.

29. Simply put, despite being aware of the suit herein, the Defendants went to sleep on their rights and only woke up after judgment had been delivered and filed the present application to set it aside.



30. In the case of *Tana and Athi Rivers Development Authority vs Jeremiah Kimigbo Mwakio & 3 others* (2015) eKLR, the Court of Appeal, dealing with a similar set of facts held:-

“As stated by this Court in the case of *Habo Agencies Limited vs Wilfred Odiambo Musingo* (2015) eKLR:-

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

It appears that the appellant fell short of this expectation. It bears repeating that no explanation was ever given as to why the particulars to the defence failed to be filed. Yet it is common ground that the appellant was aware of the order to that effect.

While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.”

The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.”

31. The exercise of a Court’s discretion to set aside the *ex parte* judgment and re-open the case is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.
32. There is no doubt that an advocate’s mistake may, on some occasions, constitute a ground for exercise of a court’s discretion, however, this is not one of such occasions.
33. The Defendants’ advocate’s mistake herein coupled with the Defendants’ own careless inactivity is what led to the failure to file a defence and appear in court to defend the suit.
34. That being so, the Defendants have not provided satisfactory or sufficient grounds to necessitate a setting aside of the Judgment of 5th February, 2025.

b. The Length of Time that Has Elapsed Since the Default Judgment Was Entered;

35. On the length of time elapsed after issuance of judgment, the Court delivered Judgment in this suit on 5th February, 2025.
36. The Application for setting aside is dated 17th February, 2025 and was filed on 19th February, 2025 just 14 days after the judgment.
37. In my opinion, the application was made without undue delay.

c. Whether the Draft Defence Filed by the Defendant Raises Triable Issues

38. The Court’s power to set aside a judgment is exercised with a view of doing justice between the parties, however, where a regular judgment has been entered, a Court will not usually set it aside unless it is satisfied that the defence raises triable issues.



39. Going through the draft defence, the Plaintiff is right when she states that the Defendants first denied that they are the registered owners of the suit property herein.
40. Despite this denial, they then admitted in the same document that they had sold the suit property to the Plaintiff as alleged in the Plaintiff, but went on to state that they have not refused to perform their part of the obligations under the agreement because there is a pending case involving the suit parcel.
41. At paragraph 8 of the Draft Defence, the Defendants averred that they had not foreseen any claims/suits in regards to the ownership of the suit land arising after the execution of the aforementioned agreement.
42. I have read the judgment delivered by the Hon. Justice Onyango on 5th February, 2025 and note that she was made aware that there was a pending case over the suit property herein.
43. In declining to issue an order of specific performance, the learned Judge did consider this fact that was raised in the Draft Defence, and at paragraph 16 thereof held:-

“ 16. In the instant case even though there are valid sale agreements couple with evidence of payment, the plaintiff has in her witness statement mentioned that the defendants informed her that they were unable to transfer the suit properties because there was a pending court case in respect of land parcel number Eldoret Municipality Block12/452.

This means that even if this court were to order the defendants to sub-divide and transfer the plaintiff's portion to her, the defendants may not be in a position to do so. Since the court does not act in vain, I decline to grant the order of specific performance.”

44. In reaching the above finding, the court further anticipated the fact that the Defendants would not be in a position to deliver the suit property to the Plaintiff due to the pending suit, which the Defendants have admitted in their Draft Defence is with regards to ownership of the land.
45. Nothing new has been raised in the Defence that the court did not already consider in its *ex parte* judgment.
46. In my view, none of the issues raised in the draft Defence are triable, and for what it's worth, the same have already been considered on merit by this court.

d. The Respective Prejudice Each Party is Likely to Suffer;

47. The final consideration that the Court has to take into consideration is the prejudice that the parties are likely to suffer if the application is allowed.
48. The Defendants aver that the Plaintiff will suffer no prejudice since he will have an opportunity to respond to their Defence, and all the parties will have a chance to testify and be cross-examined on the contents of their evidence and documents.
49. The suit herein was filed in 2022, and the Defendants duly served with the summons, but by their own indolence, the Defendants failed to file a defence and/or attend the hearing of the suit and judgement was entered against them in 2025, three years after the suit was commenced.
50. It is trite that a party has a right to be able to enjoy the fruits of his judgment, and to allow this application would mean a denial of the said right Plaintiff right.



51. This to me is prejudice enough on the part of the Plaintiff, and is contrary to the interests of justice, not to speak of the added expense on the Plaintiff in having to re-litigate the matter if the case is re-opened.
52. In addition, it must be noted that the Plaintiff, as he clearly states, has had a painful journey in trying to seek a resolution over this dispute, despite having paid for the land over a decade ago.
53. At the moment, the Defendants continue to hold the money paid as purchase price over the land as well as continue to own the land, at the expense of the Plaintiff who lost her money, and is yet to gain ownership of the suit parcel of land.
54. In my opinion, contrary to the Defendants assertion, the Plaintiff stands to suffer prejudice if the application herein is allowed.
55. The discretion to set aside an *ex parte* judgment should be exercised in favour of deserving parties, who are able to demonstrate that sufficient cause existed for their failure to file their Defence on time.
56. The Defendants herein have failed to demonstrate that there was any justifiable reason for their failure to defend the suit.
57. Moreover, it is important to remember that equity aids the vigilant not the indolent, which is what the Defendants have proved themselves to be in this case.
58. In view of the foregoing, I am persuaded that the Defendants have not demonstrated that they are deserving of exercise of this court's discretion in their favour.

Issue No. 3 - Who Shall Bear the Costs of this Application?

59. The general principle on costs is that they follow the events, which is the outcome of a suit.
60. In this instance, the Defendants/Applicants lodged the instance Motion, and failed to demonstrate that they were entitled to the orders sought therein.
61. The Application not having succeeded, the Defendants/Applicants are condemned to pay costs thereof to the Plaintiff.

Conclusion

62. In conclusion, the Court hereby makes the following Orders as regards the present Application; -
 - a. The notice of motion application dated 17.02.2025 is not merited and hence dismissed forthwith.
 - b. The applicants are ordered to pay costs of the present application to the respondent herein.

DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC ON THIS 16TH DAY OF SEPTEMBER, 2025.

EMMANUEL M. WASHE

JUDGE

In the presence of:

Court Assistant: Brian

Advocate for Plaintiff/Respondent: Ms.Oduor (N/A)

Advocate for Defendants/Applicants: Mr.kibet

