



**Dagome & another (Suing as Legal Representatives of Karei Ole
Dagome) v Le John Enterprises & 3 others (Environment and Land Case
E014 of 2023) [2025] KEELC 6906 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE E014 OF 2023
LC KOMINGOI, J
OCTOBER 9, 2025**

BETWEEN

**PRISCILLA KIPITO KAREI DAGOME 1ST PLAINTIFF
JOSEPH SEKENTO 2ND PLAINTIFF
SUING AS LEGAL REPRESENTATIVES OF KAREI OLE DAGOME**

AND

**LE JOHN ENTERPRISES 1ST DEFENDANT
THE ESTATE OF BEDAN GIKEMBE MBUGUA 2ND DEFENDANT
LAND REGISTRAR KAJIADO LAND REGISTRY 3RD DEFENDANT
THE HON. ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. This Ruling is in respect to the Notice of Motion application dated 30th January 2025 and the Preliminary Objection dated 4th February 2025.
2. The Notice of Motion is brought pursuant to Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules; Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law.
3. It seeks orders that;
 - i. Spent.
 - ii. The Honourable Court be pleased to and hereby sets aside the interlocutory judgment entered against the 1st and 2nd Defendants and also the formal proof hearings held on 14th October 2024.



- iii. The Honourable Court be pleased to and hereby allow the 1st and 2nd Defendants to file their defence to the suit within 7 days of the decision of the court.
- iv. The costs of this application be in the cause.
4. The grounds are on the face of the application and are set out in paragraphs 1 to 11 and supported by the sworn Affidavit of Ouma Macmillan, an Advocate of the High Court of Kenya practicing as a partner in the firm of B.M. Musyoki & Co. Advocates.
5. He states on 28th September 2023, the firm of B.M. Musyoki & Co. Advocates received instructions to act for the 1st and 2nd Defendants after they saw an advertisement on the Newspaper. The firm then wrote to the Plaintiffs advocates on the same day to be provided with the pleadings. Upon receipt of the pleadings, the matter was assigned to Ms. Mwendu to handle it and a Memorandum of Appearance was filed on 16th October 2023. However, soon thereafter, she left the firm without proper handover and the matter went unattended.
6. On 4th December 2024, the deponent while attending a different matter in the same Court saw this matter listed on the cause list and upon logging in found that the Plaintiff had proceeded with formal proof and the matter was awaiting filing of submissions. Upon perusal of the Court file, it was noted that the Plaintiff did not serve them with the hearing for formal proof.
7. As such, the interlocutory judgement was entered out of the Advocates error for inadvertently failing to file a defence and that the mistakes of the advocates should not be visited on the clients. He added that the 1st and 2nd Defendants had raised triable issues in the draft defence and their defence should be heard on merit and were ready to comply with the court's direction to expedite hearing and determination of the matter. He thus prayed that the application be allowed stating that the Plaintiffs would not be prejudiced if the orders are set aside and this would achieve substantive justice.
8. The Plaintiffs in opposition of the Notice of Motion application filed a Preliminary Objection dated 4th February 2025 seeking that the application be struck out on grounds that:
 - i. The application falls short of the Provisions of Order 1 Rule 13 of the Civil Procedure Rules in that the 1st Defendant is a company with a total legal entity from the 2nd Defendant. None of the parties therein has filed an authority to appear for the other.
 - ii. The application falls short of the Provisions of Order 3 Rule 7 of the Civil Procedure Rules in that there is no evidence of administration of the estate of the 2nd Defendant who the Applicant's Counsel claims to have been deceased.
 - iii. The application falls short of the Provisions of Order 4 Rule 1 (4) and (5) of the Civil Procedure Rules in that there is no authority from the 1st Defendant company.
 - iv. The application falls short of the Provisions of Order 10 Rule 7 as read with Rule 10 of the Civil Procedure Rules in that whereas the Applicant seek for the interlocutory judgment to be set aside, there is no interlocutory judgment on record as this is not a pecuniary claim.
 - v. The application falls short of the Provisions of Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act* in that the Applicants have not applied for the Plaintiff's witnesses to be recalled and therefore their testimony remain uncontroverted.
9. In the Replying Affidavit dated 4th February 2025 sworn by Taliti Collins, the Plaintiffs' Advocate on record, stated that the 1st and 2nd Defendant were served summons to enter appearance through substituted service on 26th September 2023. As per the substituted service notice, the Defendants



should have entered appearance by 10th October 2023 and filed a Defence by 25th October 2023. However, the Memorandum of Appearance was filed on 16th October 2023 which was out of time without leave of Court and thus irregular.

10. Counsel also indicated that the draft defence was bad in law because: it fell short of Order 1 Rule 13 of the Civil procedure Rules in that the 1st Defendant is a company with a legal entity from the 2nd Defendant but none of the parties had filed an authority to appear for the other. The application and defence was also contrary to Order 3 Rule 7 of the Civil Procedure Rules since there was no evidence of grant/administration of the estate of the 2nd Defendant who Counsel indicated was deceased. The defence was also contrary to Order 4 Rule 1 (4) and (5) of the Civil Procedure Rules because there was no authority from the 1st Defendant company.
11. Counsel went further to contest the application on grounds that it was brought inordinately late, and that the formal proof hearing was issued by Court after it confirmed that the Defendants were properly served. Since equity aids the vigilant no the indolent, the Plaintiffs should not be made to suffer and the application should be dismissed with costs to the 1st and 2nd Defendants.
12. The application was canvassed by way of written submissions.

The 1st and 2nd Defendants submissions

13. Counsel submitted that the sole issue for determination was whether the Court should set aside the interlocutory (default) judgment and the consequential proceedings and allow the matter to be heard on the merits.
14. It was submitted that the court has unfettered discretion to set aside interlocutory judgements as held in the Court of Appeal case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR. Counsel went on to submit that the mistake of not filing the defence was the Advocate's mistake which should not be visited on the client and that parties should not be locked away from the seat of justice as held in Belinda Murai & Others Vs Amoi Wainaina (1978).
15. On whether the Defendants had raised triable issues, counsel submitted that the issue of ownership of the suit property was a triable issue arguing that the suit property belonged to Le John Company, which was not party to the suit. It was also submitted that at the time of the demise of Karei Dagome in 2004, the suit property did not form part of his Estate, and the Plaintiffs had no right to bring a claim which was already time barred even before the late Karei passed away.
16. Counsel also argued that the Plaintiff's notice of preliminary objection raised the question whether the estate of the Late Bedan Mbugua could be sued in its own name, and judgment entered against it. It is trite that in respect of an estate of a deceased person, the only person with the authority to be sued is the personal representative. In this matter, no personal representative of the estate of the late Bedan Gikebe Mbugua was sued. Can the default judgment therefore be entered against the Estate where the personal representative was not sued?
17. It was also submitted that Plaintiff never served the Defendants with the formal proof hearing date of 14th October 2024 arguing that even after entry of judgment, formal proof hearing date must be served. As such, the proceedings on the said day were irregular, and ought to be set assist ex debito justitiae citing the Court of Appeal in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR.
18. On the issue of inordinate delay in filing the application, counsel submitted that they became aware of the default judgement on the 4th December 2024 as such, it was timeously filed and should be allowed.



19. In response to the Preliminary Objection, counsel submitted that the provisions of Order 1 Rule 13 of the Civil Procedure Rules are inapposite and irrelevant in the circumstances because the firm of advocates on record had knowledge of the mistake that resulted in default judgment being entered against both Defendants, then the advocate could swear affidavit on such matters. And since the advocate was acting for the Defendants, he was an agent of both and could swear an affidavit for both. The said authority, in the plain words of Order 1 Rule 13 would have been necessary only if one defendant had pleaded on behalf of another.
20. On the ground that there was no evidence of administration, counsel argued that it was the Plaintiff who sued "the estate of Bedan Gikebe Mbugua". The Plaintiff being aware that in law, no action can be made against an estate but only be against the administrators or personal representative of the estate, means that the Judgment that was entered was entered against the estate of Bedan Gikebe Mbugua, which has no capacity to be sued was therefore irregular and illegal.
21. On the ground that that the application violates Order 4 Rule 1(4) and (5), counsel submitted that the application was neither a plaint nor counterclaim, and therefore was not accompanied by a verifying affidavit. As such, the ground of objection raised concerning plaints and counterclaims, on a matter touching on application, was frivolous and vexatious.
22. On the objection raised that there was no interlocutory judgment since this was not a pecuniary claim was a misinterpretation of Order 10 Rule 7 as read with Rule 10. This is because an interlocutory judgment is a judgment tendered in a suit, which requires further hearing such as formal proof hearing, prior to the judgment being final. The formal proof hearing was irregular, as the Defendants were never served with the formal proof hearing date. As such, the preliminary objection should be dismissed with costs.

The Plaintiffs' Submissions

23. Counsel for the Plaintiffs submitted on the following issues for determination:
24. On whether the 1st and 2nd Defendants have locus and whether the Application has met the legal threshold, counsel submitted that Order 1 Rule 13 of the Civil Procedure Rules makes it a mandatory requirement for any party appearing, acting or pleading for any other party in a proceeding to have written authority from the said party to appear, act or plead for them with reference to Sonko And Others VS- Haluna & Another (1971) EA 443, John Mungai Njoronge & 8 Others and Kahindi Katana Mwangi & Another V Canon Assurance K. Ltd [2013]eKLR. Counsel went on to submit that the defence was fatally defective and should be dismissed/struck out because the 2nd defendant is said to be deceased and there was no evidence of letters of administration citing Julian Adoyo & Another vs Francis Kiberenge Bondeva and Hawo Shanko v Mohamed Uta Shanko [2018] eKLR.
25. On whether the proceedings of 14th October 2024 should be set aside, counsel submitted that the Defendants had not demonstrated why the same should be set aside pointing out that the Defendant's memorandum of appearance was irregular having been filed out of time without leave with reference to Express (Kenya) Limited v Manju Patel [2001] KECA 154 (KLR).
26. Counsel argued that the period of more than a year since the Defendants were served until the time this application was filed was a lengthy time for a file to be in an advocate's office unattended. As such, the reason for delay was unsatisfactory and they ought to have been diligent in prosecuting their case citing Savings and Loans Limited v Susan Wanjiru Muritu and International Air Transport Association & another v Roskar Travel Limited & 3 others [2022] KEHC 200 (KLR).
27. They thus prayed for dismissal of the application with costs and judgement be entered.



Analysis and Determination.

28. I have considered the Notice of Motion, the affidavit in support, the response thereto, the written submissions and the authorities cited. The issue for determination is whether this court ought to set aside the default judgement and the consequential proceedings.

29. In the case of Philip Keipto Chemwolo & Another Vs. Augustine Kubende (1986) eKLR the Court of Appeal stated thus;

“The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgement set aside who knew at the time and intended that there should be a judgement signed, the two rules would be deprived of most of their efficacy. The principle obviously, is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

I have considered the reasons advanced by the Defendants/Applicants and I find that they are plausible.

30. It is the Defendants/Applicants' case that, the failure to file defence arose after counsel handling the matter left the firm without proper handing over. It was therefore by inadvertence that the defence was not filed.

31. In the case of Patel Vs. E.A Cargo Handling Services Ltd (1974) EA 75 William Dreyffus P at page 76 stated;

“The main concern of the Court is to do Justice to the parties, and the court will not impose conditions on itself to fetter the discretion given to it by the rules. I agree that where it is a regular Judgement, as is the case here, the court will not usually set aside the Judgement unless, it is satisfied that there is a defence on the merits. In this respect, defence on merits does not mean in my view, a defence that must succeed. It means as Sheridan J put it, “a triable issue.” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

I agree with the Defendants/Applicants submission that the draft defence raises triable issues that ought to be determined on the merits.

32. Consequently I find the Preliminary Objection to be without merit.

33. In conclusion I find merit in this application and the same is allowed on the following terms;

- i. That the interlocutory judgment entered against the 1st and 2nd Defendants and also the formal proof hearings held on 14th October 2024 are hereby set aside.



- ii. That the 1st and 2nd Defendants to file their defence to the suit within 21 days from the date of this Ruling.

On Condition that the 1st, 2nd Defendants do pay to the plaintiff throw away costs of Kshs.15,000/= within 21 days from the date of this Ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF OCTOBER 2025.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Taliti for the Plaintiff.

Mr. Ouma for the 1st, 2nd Defendants.

N/A for the 3rd, 4th Defendants.

Peter – Court Assistant.

