



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ELC NO. E020 OF 2021

**JONATHAN
 KIRUI.....PLAINTIFF/RESPONDENT**

KIMETET

VERSUS

SAMUEL KIPKOECH ROP.....1ST
DEFENDANT/APPLICANT

NAROK LANDS REGISTRAR.....2ND
DEFENDANT

NAROK DISTRICT SURVEYOR.....3RD
DEFENDANT

RONO KIPROTICH HILLARY (*Applying as the Legal representative of the Estate of the late Kiprop Arap Rono*).....PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. There are ***two Notices of Motion Applications*** before this court for determination; The one dated ***3rd October 2023***, and the other dated ***3rd November 2023***. The Application dated ***3rd November 2023*** is filed by the Proposed interested party **Rono Kiprotich Hillary (*suing as the***

Legal Representative of the estate of Kiprop Arap Rono), which application is brought under *Articles 159* and *50* of the *Constitution* of Kenya, *Sections 1A, 1B,* and *63(e)* of the *Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules, Order 36 Rules 2, 7 & 10 order 51 Chapter 21, order 8 rule 3 and Rule 10(2) of the Civil Procedure Rules* seeking the following orders: -

a. That pending the hearing and determination of this application there be a stay of execution of the Judgment delivered on 23rd September 2023 and any subsequent orders herein.

b. That this court be pleased to enjoin the Proposed Interested Party/Applicant to these proceedings.

c. That the judgment delivered on 26th September 2023 by this court against the Defendants and all other proceedings consequential thereto be set aside.

d. That the court to order a re-hearing of the suit herein as defended suit by the proposed interested party on such terms that may be imposed by this court.

2. The application is premised on the grounds *inter alia* that: -

a) That the application herein seeks to set aside the Judgment of this court delivered on 26th September 2023.

- b) That the Plaintiff has extracted a decree arising from the said Judgment and seeks to execute the decree against the estate of the late Kiproop Arap Rono.***
- c) That the estate of the deceased was not aware of any matter before this court and no citation had been done by the Plaintiff to notify the estate of the existence of this suit or made aware of these proceedings.***
- d) That the suit property was un-procedurally excised from Land Parcel No.352, which property belongs to the estate of the late KIPROP ARAP RONO, hence the gist of the appeal to the Minister and the impugned Minister's decision and proceedings relate to the later Kiproop Arap Rono and not the 1st Defendant herein and the estate has never been made aware of the existence of this suit.***
- e) That if the judgment is not set aside and/or stayed the Plaintiff will proceed to execute the decree arising from the said judgment to the substantial detriment of the estate of the late Kiproop Arap Rono which estate has discreetly been excluded from these proceedings.***
- f) That the estate of the deceased stands to lose the said property should the Plaintiff proceed in execution of the said judgement.***

g) That the proposed interested party presence before this court is necessary in order to enable the court effectually and entirely adjudicate upon and resolve all questions involved in the suit.

h) That the Proposed Interested Party/Applicant has sufficient interest in the suit filed by the Plaintiff and he is apprehensive that adverse decision has already been made and pending execution which may have great impact on the estate of the late Kiprop Arap Rono.

3. The Application is further supported by the Affidavit of the Proposed Interest Party/Applicant, **Rono Kiprotich Hillary** sworn on even date. The Applicant deposed that he is the Proposed Interested Party/Applicant herein and the legal representative of the estate of the late **Kiprop Arap Rono**, and is well versed with the facts of this matter and therefore competent to swear this affidavit.
4. The Proposed Interested Party/Applicant further deposed that he was issued with **Letters of Administration Ad litem** of the Estate of the deceased on the **23rd October 2023**, for the purpose of filing and defending this suit against the Plaintiff/Respondent herein.
5. The Applicant also stated that the suit property was **un-procedurally** excised from Land **parcel No.352**, which

property belongs to the estate of the late **Kiprop Arap Rono**, hence the gist of the appeal to the Minister and the impugned Minister's decision and proceedings relate to the late **Kiprop Arap Rono**, and not the 1st Defendant herein, and the estate has never been made aware of the existence of this suit.

6. The Proposed Interested Party/Applicant deposed that the estate of the deceased was not aware of any matter before this court and no citation had been done by the Plaintiff to notify the said estate of the existence of this suit, and was not made aware of these proceedings. The Applicant went ahead and averred that if the judgment is not set aside and/or stayed, the Plaintiff/ Respondent will proceed to execute the decree arising from the said judgment to the substantial detriment of the state of the late **Kiprop Arap Rono**, which estate has discreetly been excluded from these proceedings.
7. The Proposed Interested Party/Applicant also deposed that the estate of the deceased stands to lose property should the Plaintiff/Respondent proceed in execution of the said judgment, and that the Applicant's presence before the court is necessary in order to enable the court effectually and entirely adjudicate upon and resolve all questions involved in the suit.

8. The proposed Interested Party/Applicant further stated that he has sufficient interest in the suit filed by the Plaintiff and he is apprehensive that **adverse decision** has already been made, and pending execution which may have great impact on the estate of the late **Kiprono Arap Rono**. The Proposed Interested Party/Applicant concluded by stating that in the interest of justice the Application ought to be allowed and the prayers sought therein be allowed.
9. The 2nd Application dated **3rd October 2023** is brought by the 1st Defendant **Samwel Kipkoech Rop**, under the same provisions of law, and has sought for these orders.
- i) That there be a stay of the judgement delivered on 26th September 2023, and any subsequent orders herein, pending the hearing and determination of this application;***
 - ii) That the court Process Server who swore the Return of service on 27th January 2022, and being the person who allegedly effected service of the court process in this matter be ordered to attend court for purposes of his cross examination;***
 - iii) That the judgement of the court delivered on 26th September 2023 against the 1st Defendant and all consequential Orders thereto be set aside;***

- iv) That the court does order a re-hearing of the suit herein as a defended suit, by the 1st Defendant on such terms that may be imposed by this court;**
- v) That the 1st Defendant be at liberty to apply for such further orders and / or directions as the court may deem fit to grant and just to grant in the circumstances;**
- vi) That costs of this application be in the cause.**

10. The Application is premised on the grounds set on its face, and on the supporting affidavit of **Samwel Kipkoech Rop**, the 1st Defendant herein. These grounds are;

- i) The court entered judgement on 26th September 2023, against the 1st Defendant without his knowledge,**
- ii) The 1st Defendant was not aware of any matter in court and the Return of Service sworn on 27th January 2022, was false, because he was never served,**
- iii) That the suit property belongs to the estate of the late Kiprop Arap Rono, the 1st Defendant father's and the estate has never been made aware of the existence of the suit**

nor cited for the purposes of these proceedings;

- iv) That the 1st Defendant was not aware of the suit in question and had not been served with any hearing notices in this suit,***
- v) That the judgement against the 1st Defendant /applicant is improper, irregular and was obtained without serving the 1st Defendant with the Summons to enter appearance or hearing notice,***
- vi) That if the judgement against the 1st Defendant /applicant is not set aside and/ or stayed , the plaintiff will proceed to execute the decree arising from the said judgement to the substantial detriment of the 1st Defendant,***
- vii) That the 1st Defendant has a good, valid and cogent and reasonable Defence raising triable issues with a high degree of success,***
- viii) That the 1st defendant stands to be deprived of the property as a beneficiary of the estate of the late Kiprop Arap Rono, should the plaintiff proceed in execution of the said judgement of the court.***

- ix) That the Plaintiff/ Respondent will not suffer any prejudice that cannot be compensated by way of damages if the court orders for the retrial or set aside the judgement, and consequential orders thereto,*
- x) That if the application is not allowed, the 1st Defendant /Applicant will have been condemned unheard,*
- xi) That it is in the interest of justice and fairness to grant the orders sought for the end of justice to be met.*

11. In his supporting Affidavit, the 1st Defendant/ Applicant reiterated most of the grounds in support of the Application and further averred that after the said Judgement, the Plaintiff/ Respondent has extracted the Decree arising from the said Judgement, and now seeks to execute it as is evident from **annextures SKR1**.

12. It was his allegation that he was not aware of the suit herein, since he was not served, and that the suit property was excised from land Parcel **No 352**, which belonged to the estate of the late **Kiprop Arap Rono**, who was his father, and the estate has never been made aware of the existence of this suit or citation made to the estate.

13. He reiterated that the Judgement against him and in extension the estate of the late **Kiprop Arap Rono** his late

father is **improper, irregular** and was obtained without service of Summons to Enter Appearance or hearing notice.

14. It was his averment that he has a **good, valid, cogent** and **reasonable Defence** which raises triable issues with high probability of success, as is evident from annexure **SKR2(DRAFT DEFENCE)**.
15. He reiterated that if the Judgement is not set aside, he stands to be deprived of the property as the beneficiary of the estate of the late **Kiprop Arap Rono**, if the Plaintiff proceed to execute the said judgement.
16. He urged the court to allow the application as he was condemned unheard.
17. The two Applications are opposed by the Plaintiff/ Respondent herein **Jonathan Kimetet Kirui** vide his Replying Affidavit dated **24th November 2023**, wherein he averred that the 1st Defendant was served with the court documents and hearing notices for purposes of attending court, but he failed to honour the said court documents.
18. He further averred that he has been informed by his advocate on record which information he believes to be true that this application for setting aside of the judgement is **not merited**, as there are no compelling reasons as to why the 1st Defendant/Applicant did not Enter Appearance and defend the suit, when there is clear evidence he and the

other two Defendants were served as per the Affidavit of Service.

19. It was his contention that the 1st Defendant disobeyed the court orders and has remained on the suit land even after judgement, thus interfering with the Plaintiff/Respondent peaceful occupation and denying him quiet enjoyment of the fruits of his judgement.
20. It was his allegations that the two Applications are mere waste of time meant to deny justice to the Plaintiff/Respondent and delay the matter. He urged the court to reject the said claim and dismiss the instant applications with costs to him.
21. The proposed interested party **Rono Kiprotich Hillary** filed a further Affidavit dated **3rd May 2025**, and averred that the late **Kiprop Arap Rono** is the registered proprietor of the suit land, and on **29th April 1992**, the said **Kiprop Arap Rono**, filed an appeal to the Minister which was registered as Appeal **No. 32 of 2015**, against the Plaintiff herein in reference to the land parcel No. 354. The said Appeal was heard on **4th June 2015**.
22. He also averred that the Appeal was heard and determined in favour of the late **Kiprop Arap Rono**, in a judgement delivered on **12th August 2015**, wherein it was resolved

that the land parcel No 354, remains to the Plaintiff , but to measure **2 acres**, and the rest to be merged to Parcel **No 352**, which belonged to the said **Kiprop Arap Rono**, as is evident annexure **RKH1**.

23. Further, that on **14th July 2016**, the Director of Land Adjudication & Settlement wrote to the Sub County Surveyor, Narok North to implement the Minister's decision on land Parcel **No 354**, and the said decision has never been set aside.
24. It was his claim that the Plaintiff/ Respondent herein selectively chose to sue the 1st Defendant and excluded the estate of the late **Kiprop Arap Rono** from the proceedings. Further, that the Plaintiff/ Respondent is appealing against the Minister's decision through these proceedings by extending the acreage of his parcel of land No 354 into land parcel No 352, which is owned by the late **Kiprop Arap Rono**.
25. He also averred that the Plaintiff/ Respondent deliberately excluded the verdict in the Appeal to the Minister case no 32 of 2015, which decision overturned the decision of 18th March 1992, which the late **Kiprop Arap Rono**, successfully invalidated.
26. It was his further allegations that the Plaintiff / Respondent has not sustained the allegations of forgery and that the

estate of the late **Kiprop Arap Rono**, was not party to the alleged proceedings.

27. The court directed the parties to canvass the two Applications by way of written submissions. Further, the Process Server who allegedly served the **Summons to Enter Appearance** was summoned to court for cross examination on the mode of service, by the advocate for the 1st Defendant and proposed Interested party. Therefore, **prayer No.3** of the Notice of Motion Application dated **3rd October 2025** is now spent.
28. **Stephen K. Chebochok**, from Mulot area in Narok, confirmed that he is a Process Server who was licenced while working in the Judiciary, which employment he left in 2004.
29. While being cross examined by **Mr. Kamwaro** for the 1st Defendant/ Applicant and Proposed Interested Party, he informed the court that he was supposed to renew his licence annually, and that when he served the summons on **27th November 2021**, his licence was valid, though he had not attached it to his Affidavit of Service.
30. It was his further testimony that he received the Summons to Enter Appearance from **Mr. Koech Advocate**, but he did not indicate when the Summons were dated. The said Summons indicated that the Defendants were to Enter

Appearance within a period of **15** days, and he served the said Summons in November 2021.

31. He claimed that he was taken to the home of the 1st Defendant by one **Wesly Ngetich**, whom he met on his way, and he took him to the 1st Defendant's homestead at **Olposimoru** area, at a village called **Olorien**, and he went to the compound of the 1st Defendant, which was not far from the main road. That the 1st Defendant welcomed him to the house, and he effected service upon him, on **27th November 2021**.

32. However, he filed the Affidavit of Service on **27th January 2022**, but the 1st Defendant had not signed the said Summons to Enter Appearance, as said the land in dispute was under succession proceedings, and thus the decline in signing the Summons to Enter Appearance.

33. Upon being re-examined by Mr **Koech** for the Plaintiff/ Respondent, he confirmed that he served the 1st Defendant when he was identified to him by **Mr Wesley**, and the 1st Defendant was friendly, and not hostile at all. He showed him the documents, served him, but he failed to come to court. It was his conclusion that the 1st Defendant/Applicant failed to come to court because he alleged that there was a succession matter, over the suit land.

34. After the above cross examination of the Process server, parties were directed to file written submissions in

respective of the two applications dated **3rd October 2023** and **3rd November 2023**. However, by the time of writing this Ruling, only the Law Firm of **Kamwaro & Co Advocates** for the 1st Defendant and Proposed Interested party/Applicant had filed the submissions. The Plaintiff/ Respondent's advocates did not comply with the court's directions and his written submissions were missing.

35. Be that as it may, the court has considered the instant application, the Reply by the Plaintiff/ Respondent, the impugned Judgement, the written submissions and the cited authorities and finds the issues for determination are;

- I. Whether the 1st Defendant herein was properly served,***
- II. Whether the draft defence raises triable issues,***
- III. Whether the 1st Defendant is entitled to the orders sought.***
- IV. Whether the Proposed Interested party should be joined in these proceedings.***
- V. Who should bear costs of the two applications.***

36. Before delving into the above identified issues for determination, the court should point out that the two Applications are anchored under various provisions of the law. The Applications are anchored under **Article 159** of the Constitution, which article enjoins the court to be guided by various principles while exercising judicial authority, among

them ensuring the purpose of the Constitution shall be protected and promoted.

37. Further, the Applications are anchored under **Article 50** of the Constitution, on the right to **fair hearing**, which Article grants every person right to have any dispute resolved by the application of the law decided in a fair and public hearing.
38. The Applicants also employed the provisions of section **1A, 1B** and **3A** of the **Civil Procedure Act**, which sections of law deal with the **overriding** objective of the Act which is the **facilitate just** and **proportionate resolutions** of disputes governed by the said Act. Further, the court has unfettered power to issue orders that are necessary for the end of justice to be met. **Section 63(e)** allows the court to make such other interlocutory orders as may appear to the court to be just and convenient in order to prevent the end of justice from being defeated.
39. While bearing the above provisions of law in mind, the court will proceed to determine the issues set out above.
40. The prayer for stay of execution of the judgement in issue is now spent having been granted on the first instance when the application was filed under certificate of urgency. Further, prayer No. 3 for Court Process Server who swore the Affidavit of Service to be summoned in court for cross

examination was allowed , and the Process Server was cross-examined on **3rd July 2025**.

I. whether the 1st Defendant/Applicant was effectively served with summons to enter appearance.

41. There is no doubt that this court (constituted differently) did enter a judgement on **26th September 2023**, after hearing the Plaintiff and Land Registrar's evidence. The 1st Defendant did not give evidence as he did not Enter Appearance, even after Service with the Summons to Enter Appearance as per the Return of Service sworn by on **27TH January 2022**.
42. The 1st Defendant alleged that he was not served with the Summons to Enter Appearance, and thus the reasons why he failed to attend court: and consequently he was condemned unheard and thus has applied for setting aside of the said judgment.
43. **Order 10 Rule 11** of the Civil Procedure Rules provides that **where judgement 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.**
44. The 1st Defendant disputed service of Summons upon him by **Stephen K. Chebochok**, on **27th November 2021**, as

averred by the said Process Server in his Affidavit of Service dated **27th January 2022**. The said **Stephen K. Chebochok** was summoned by the court for cross examination by **Mr. Kamwaro** for the 1st Defendant and proposed interested party.

45. When cross examined, the Process Server explained that after receiving Summons to Enter Appearance from **Koech Advocate**, he proceeded to the home of the 1st Defendant in company of **Wesley Ngetich** who knew the said home of the 1st Defendant.
46. He described how they travelled to **Olenguruoni**, to **Olposimoru** and later to **Olorien village** where the 1st Defendant lives. It was his testimony that 1st Defendant received him well, and was not hostile. After he explained the purpose of his visit, he served the 1st Defendant with Summons to Enter Appearance, but the 1st Defendant declined to sign on them alleging that the matter was under succession.
47. The above testimony tallied with his disposition in the Affidavit of service sworn on **27th January 2022**. This court finds no reasons to doubt the averments made in the Affidavit of Service sworn by the Process Server in his Affidavit of Service sworn on **27th January 2022**, and filed in court.

48. Therefore, the court believes the said averment as contained in the Affidavit of Service. The 1st Defendant was served with Summons to Enter Appearance, but failed to Enter such Appearance and / or file Defence. The matter proceeded for hearing in his absence as provided by the law, and since there no evidence that service was not affected, the judgement entered against the 1st Defendant is a regular judgment.
49. Consequently, the court finds and holds that the 1st Defendant herein was effectively served with Summons to Enter Appearance, but he failed to Enter Appearance and / or file Defence. Matter proceeded for hearing as stipulated by the law, and Judgement was entered in his absence, and the said judgement is regular.

II. Whether the court should set aside its judgment of 23rd September 2023.

50. Even if the 1st Defendant was served with summons to enter appearance and judgement was entered against him, he has now approached this court for setting aside of the said judgment, and for prayer that he be allowed to file his Defence and defend the suit.
51. **Order 12 Rule 7** of the Civil Procedure Rules provides;
“where under this order judgment has been entered or the suit has been dismissed, the

court on application may set aside or vary the judgement or order upon such terms as may be just”

52. From the above provisions of law, it is clear that court has discretion to set aside an ex parte Judgement, or Judgement in default of entering appearance and filing defence, but such discretion must be exercised judiciously and, on such terms, as may be just. See the case of ***Stephen Wanyee Roki vs K-Rep Bank Limited & 2 others [2018]eKLR*** where the court of appeal held;

“It is trite that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the court. Ordinarily, when an Application to set aside a default judgment and extend time for filing a defence is filed before a court, there are several factors that the court ought to take into account.”

53. The court having held that there is no doubt that the 1st Defendant was property served, then the judgement entered on 26th September 2023, is not ***Irregular*** Judgment, and it cannot be set aside ***ex debito justiae(as a matter of right).***

54. In the case of **James Kanyita Nderitu & Another versus Marios Philota Ghikas & Another [2016] eKLR**, the court held;

“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 others.”

55. It is trite that even where Judgment entered is **regular** one, and the Defendant was properly served, he can still approach the court and seek to set aside the said regular

Judgment if he can show that he was prevented from attending the court by a sufficient cause such as **excusable mistake, inadvertence, accident** or other valid reasons.

56. In such situations, the court will consider whether the Defendant has an intended Defence that raises triable issues. See the case of **CMC Holdings Ltd vs Nzioki (2004) KLR 173**

“In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

57. This court has found and held that the 1st Defendant was served with summons to enter Appearance as per the Affidavit of service filed by the process server. He failed to enter Appearance and or file Defence. The law is very clear on what happens if a defendant fails to attend court. Order 10 rule 9 of the Civil Procedure Rules provides that where a party is properly served and does not appear in court, the Plaintiff may set down the suit for hearing.
58. The 1st Defendant herein failed to Enter Appearance nor file Defence, the 2nd and 3rd Defendants did Enter Appearance and filed their Defence. The court had no option but to set the suit down for hearing, and thereafter **a regular judgement** was entered by the court, on **26th September 2023**.
59. Having found that the judgement herein is regular, the court will now consider the provisions of **Orders 10 rule 11** and **Order 12 rule 7** of the **Civil Procedure Rules** which grant the court discretion to set aside and or vary such ex parte judgement. However, the 1st Defendant has a duty to convince the court as to why it should set aside such a regular judgment.
60. While exercising the discretion on whether to set aside or not to set aside the ex parte judgement herein, the court will exercise the same in such a manner as to avoid injustice and

hardship resulting from such inadvertence, while also taking account of not assisting a person who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See the case of **Shah vs Mbogo & Another (1967) EA 116**, where the court held

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been miscarriage of justice.”

61. The court has considered the judgement of the court dated **26th September 2023**, which ordered for a permanent injunction to restrain the 1st Defendant from entering into the suit land, **Cis Mara/ Olposimoru/354**, and an order to the 2nd and 3rd Defendants to rectify the Register and undo the alterations on the Plaintiffs title. This judgement is affecting the 1st Defendant, and the implementation of the same may cause hardship on his part.

62. The 1st Defendant failed to Enter Appearance and file Defence, which is a mistake, but having come to court, he should not be allowed to suffer hardship due to the said

mistake. See the case of **Philip Chemowolo & Aother vs Augustine Kubede 9 1982-88) KAR 103** where the court held:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

63. It is evident that mistakes do occur in the process of litigation. The Court of Appeal in the case of **Murai vs Wainaina (NO 4) 1982) KLR 38** held;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not

forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

64. Although the 1st Defendant had not appointed an advocate who failed to enter appearance or committed a mistake/blunder but the same logic in the above holding applies herein and the 1st Defendant failed to enter appearance and file Defence , but he should not be let to suffer hardships due to that inadvertent mistake.
65. The court too has considered the ***Draft Defence*** filed by the 1st Defendant, and has found that it raises triable issues. A Defence with triable issues means; **“a bonafide triable issues is any matter raised by the Defendant that would require further interrogation by the court during a full trial.. it is therefore does not need to be an issue that would succeed but just one that warrant further intervention by court”** *See the case of Job Kilach vs Nation Media Group Ltd, Slaba Agencies Ltd & Micheal Rono [2015]eKLR.*

66. A defence with triable issues need not be one that would succeed at the end of the trial, but one that has been brought to the attention of the court and raises reasonable Defence. Further, "**defence** with triable issues" is a legitimate defense that raises questions requiring a full court trial to resolve, preventing a summary judgment. This defense does not have to guarantee success but must be bona fide (genuine) and require further investigation by the court to determine the facts, such as a dispute over contract terms or alleged fraud. The existence of a triable issue means the court must grant the defendant unconditional leave to defend the case instead of entering a quick judgment for the plaintiff. See the case of ***Tree Shade Motors Ltd vs DT Dobie & Another (1995-1998) 1 EA324***

67. Further, in the case of ***Sebei District Administrator vs Gasyali (1968) EA 300***, the court held as follows;

"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of the court. Though I

realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend.”

68. The court has considered the Draft Defence attached to the application, and finds that the 1st Defendant alleged that the Plaintiff was sold two acres by the late **Kiprop Arap Rono**, but he vied of 30 acres instead of the 2 acres sold to him. The draft defence raises triable issues and the 1st Defendant should be allowed to advance them. See the case of **Job Kilach vs Nation Media Group Ltd , Salaba Agencies Ltd & Michael Rono(Supra)**.
69. Was the Application filed timeously? The judgement in issue was delivered on **26th September 2023** and the instant application was filed on 3rd October 2023. This Application was filed promptly, and there was no delay.
70. Consequently, this court finds that the 1st Defendant has been able to convince this court to set aside the Judgement entered on **26th September 2023**.

III. Whether the court should join the proposed interested party to the suit ?

71. The proposed Interested party is **Rono Kiprotich Hillary(as the legal Representative of the estate of Kiprop Arap Rono)**. He averred that the estate of Kiprop Arap Rono was not aware of the matter in court and that the Plaintiff had unprocedurally excised the suit property from the land parcel 352, which belongs to the estate of Kiprop Arap Rono. Further, that the matter had even been heard by the minister, who ruled in favour of the Kiprop Arap Rono.
72. The Proposed Interested party has averred that if the judgement is not set aside and the decree is executed, then the deceased estate stands to lose property without having been heard.
73. The court has seen annexure **RKH1**, which is a Limited Grant issued to **Samuel Kipkoech Rop** and **Rono Kiprotich Hillary**, the Proposed Interested party herein. it is evident that the Proposed Interested Party has Limited Grant to represent the estate of **Kiprop Arap Rono**. He can thus represent the said estate.
74. But can he be joined in this suit? According to Mutunga Rules **“interested party”** means **a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to ...**

75. Therefore, it is clear that an **Interested party is** an individual or entity possessing a discernible stake, legal interest, or duty in the ongoing proceedings, even if they stand outside the direct purview of the litigation. See the case of ***Kamau v Kamau & another; Kihungi (Intended Interested Party) [2024] KEELC 7215 (KLR)***
76. The Civil Procedure Act and Rules , Cap 21 is silent on the concept of "Interested Party", However, ***Order 1 Rule 10(2) of the Civil Procedure Rules (CPR) provides that;***
“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
77. Further, **Rule 7 of the Constitution** of Kenya (***Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013*** provides that an ***interested party*** can apply to be joined or the Court can move on its own motion and join a party to proceedings before it. Rule 2 thereof defines an ***interested party*** as a ***person or entity***

that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.

78. The principles for joinder of an Interested Party in a suit were settled by the Supreme Court in the case of ***Francis Kariuki Muruatetu & Another Vs. Republic & 5 Others as consolidated with 16 of 2013; [2016] eKLR*** , which set down the principles of joinder that;

“(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***
- b. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated***

to the satisfaction of the Court. It must also be clearly outlined and not something remote.

c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

79. Further, the Supreme Court in the case of **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 Others [2014] eKLR** held that;

“In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she

herself appears in the proceedings, and champions his or her cause...

Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

***“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
(ii)joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
(iii)joinder to prevent a likely course of proliferated litigation.”***

80. The intended Proposed interested party is one of the Legal Representatives of the estate of Kiproop Arap Rono, who has alleged that the Plaintiff un-procedurally excised land from the estate of the deceased and there is a minister decision in favour of the said ***Kiproop Arap Rono***.

81. While applying the principles set out in ***Muruatetu case***(supra), the court is persuaded that the proposed interested party had demonstrated identifiable stake in these proceedings and is thus joined in the proceedings as an interested party.

IV. Whether the court should order re-hearing of the suit.

82. A court may order a re-hearing of a case after a successful application for review and setting aside of a judgement under the Civil Procedure Rules. The court herein has set aside the judgement of the court entered on **26th September 2023**, and admitted the Interested Party in the proceedings. It would thus be prudent to order for re-hearing on this matter after the 1st Defendant has filed his Defence and the Interested Party has joined the proceeding. Thus the court allows re-hearing of this suit.

V. Who should bear costs of these Applications.

83. Given that the court found that the 1st Defendant was served with Summons to Enter Appearance and he failed to do so, and given that the judgement of **26th September 2023**, was a **regular** Judgment, which has been set aside, the court directs the 1st Defendant to pay costs of this application.

84. For the above reasons the court allows the two Applications dated **3rd October 2023** brought by the 1st Defendant and the Interested party in terms of setting aside the judgement of **26th September 2023**; and on application of **3rd November 2023**; joinder of the Interested party; the 1st Defendant allowed to file his Defence within a period of **14**

Days from the date hereof; Re-hearing of the suit as a defended suit by 1st Defendant, and the other Defendants.

85. Further, the 1st Defendant is directed to pay a throw away costs of **ksh 30,000/=** to the Plaintiff/ Respondent before the next court appearance. Failure of which, the orders issued herein will lapse automatically.
86. So that this suit can be fast tracked, the 1st Defendant and Interested Party are directed to file their Defence within the next **14 Days** from the date hereof. The Plaintiff will have leave of **7 Days** after service to file response to the Defence if any.
87. After close of pleadings, parties will have **30 Days** to comply with **Order 11 of Civil Procedure Rules** by filing their trial bundles, and this suit is hereby set down for hearing. If the 1st Defendant and Interested Party do not comply, then the orders issued herein will automatically lapse, and the earlier judgment of **26th September 2023**, will stand reinstated.

It is so ordered.

Dated, Signed and Delivered virtually at Narok this 9th October 2025

**L. Gacheru
Judge
9/10/2025.**

***Delivered on line in the presence of
Elijah Meyoki - Court Assistant***

Mr. Koech for the Plaintiff/ Applicant
Mr. Kipela H/B for Mr Kamwaro for 1st Defendant/Applicant
& Interested Party.

L. Gacheru
Judge
9/10/2025.