Kisoso v Omoi & another; County Government of Kajiado & another (Interested Parties) (Environment and Land Appeal E010 of 2024) [2025] KEELC 6958 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6958 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E010 OF 2024

LC KOMINGOI, J

OCTOBER 9, 2025

BETWEEN

ANDREW KARKEENA KISOSO .... APPELLANT

AND

JACKSON RATEMO OMOI .... 1ST RESPONDENT

ESTHER MUTHONI RATEMO .... 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF KAJIADO .... INTERESTED PARTY

HAMUD MOHAMED OSMAN .... INTERESTED PARTY

(Being an Appeal from the Ruling of Hon. J. Karanja delivered on 23rd February 2024 in Kajiado CMELC 504 of 2017)

JUDGMENT

1. In the Ruling delivered on 23rd February 2024, Hon. J. Karanja found that the Appellant had not satisfied the grounds for setting aside the judgement delivered on 8th December 2021, which was two years before to the Application dated 19th April 2023. Further, the decree issued in that Judgement had already been executed. The applications by the Appellant and 2nd Interested Party were therefore dismissed and the 1st Defendant's application allowed with costs.
2. Aggrieved by the said decision, the Appellant filed the Memorandum of Appeal dated 21st March 2024 and Amended on 28th March 2025 appealing against the entire Ruling on the grounds that:
    1. The Learned trial Magistrate erred both in law and in fact by failing to consider, appreciate, evaluate, determine and or make a finding on whether the Appellant was served with Summons

to Enter Appearance and Hearing notices before the matter proceeded for hearing in the Appellant's absence.

2. The Learned trial Magistrate erred both in law and in fact by failing to consider, appreciate, evaluate, determine and or make a finding on whether an Interlocutory Judgement had been entered against the Appellant to warrant the matter to proceed in the absence of the Appellant.

3. The Learned trial Magistrate erred both in law and in fact by failing to consider, appreciate, evaluate, determine and or make a finding on all the grounds relied upon by the Appellant for the Application for setting aside the judgement.

4. The Learned trial Magistrate erred both in law and in fact by holding that it was quite improbable that the Appellant was unaware of the matter before the Magistrate Court without any factual basis or evidence to support his finding.

5. The Learned trial Magistrate erred both in law and in fact by holding that the 1st Defendant was a proxy of the 2nd Defendant and that the 2nd Defendant was a proxy of the Interested Party without any evidence to support such a holding.

6. The Learned trial Magistrate erred both in law and in fact by dismissing the Application for setting aside judgement on the basis that to allow such an application he would be sitting on Appeal against a fellow Magistrate.

7. The Learned trial Magistrate erred both in law and in fact by basing his decision on the fact that the issues raised by the Appellant herein had been raised by the County Government of Kajiado instead of evaluating the issues raised and making a determination on the issues based on their own merit.

8. The Learned trial Magistrate erred both in law and in fact by making a finding that the Appellant took too long to file the application for setting aside and had not filed an appeal yet the facts before him were clear that the Appellant was not served summons, did not enter appearance and did not participate in the proceedings before the trial Court as the Appellant was unaware of the existence of the matter.

9. The Learned trial Magistrate erred both in law and in fact by ignoring evidence tendered by the Appellant and solely relying on evidence tendered by the Respondents.

10. The Learned trial Magistrate erred both in law and in fact by being biased in favour of the Respondents instead of applying the law to all parties equally.

11. The Learned trial Magistrate erred both in law and in fact in entertaining extraneous matters that were not relevant to the case.

12. The Learned trial Magistrate erred both in law and in fact in disregarding and or failing to accord the necessary consideration to the evidence tendered by the Appellant.

3. The Appellant therefore sought that:

   i. The Appeal be allowed and the Ruling dated 23rd February 2024 be set aside;

   ii. The Appellant's application dated 19th April 2023 be allowed as prayed and referred to another Magistrate other than Hon. Karanja for determination;

   iii. That the costs of the Application at the Lower Court and this Appeal be awarded to the Appellant.

4. This Appeal was canvassed by way of written submissions.

Submissions of the Appellant

5. Counsel submitted that the Appellant filed an application dated April 2023 at the Lower Court, seeking inter alia stay of execution of the judgement dated 22nd December 2021, vacate and /or set it aside and allow the Appellant leave to enter appearance and file a defence out of time.

6. On 20th April 2023, the Respondents filed an application seeking enforcement of the judgement dated 8th December 2021. And the 2nd Interested Party in his Application dated 31st August 2023 sought stay of execution of the judgement, that the judgement be varied/set aside and for his joinder as an interested party in the suit.

7. These applications were heard and determined together in the Ruling dated 23rd February 2024 which is the subject of this Appeal and the following identified as the issues for determination.

8. On whether the learned Magistrate erred in law and fact by failing to appreciate the application to set aside the judgement because the Appellant was never served with summons to enter appearance, counsel submitted that, the Respondents filed a suit in the lower court on 7th December 2017 against one Andrew Karkeeena Kisoso as the 2nd Defendant. Summons to Enter Appearance were issued in that name. Unable to trace him, the Respondents obtained leave on 23rd January 2018 to serve summons by advertisement in a local daily, which they did in the Daily Nation on 5th February 2018, still using the name Karkeeena while his name is Andrew Parkeenka Kisoso. He contends that the suit, summons, and substituted service targeted "Karkeeena," a different person, not him. And that he never saw the advertisement and had no knowledge of the suit.

9. Later, the Respondents attempted to execute the judgment relating to Plot No. 229/Business-Noonkopir against his property, Plot No. 413/Business-Noonkopir. And he only learned of the case on 18th April 2023 when police officers served him with court documents while attempting eviction. He immediately filed an application on 19th April 2023 to set aside the judgment for lack of proper service. He also contested that the judgement was in relation to Plot 229, while the execution targeted Plot 413- his plot, which was clearly distinct from the Respondents plot.

10. Counsel submitted that the learned Magistrate dismissed the application, holding it was "improbable" that the Appellant was unaware of the case, without explaining the basis for that conclusion or addressing the name discrepancy, service defects, or applicability of Order 10 Rule 11 of the Civil Procedure Rules. The magistrate further reasoned that similar issues had been raised by the 1st Defendant at trial, though the Appellant had not participated in the proceedings at all. As such, the learned Magistrate erred in his determination and findings because in cases of irregular default judgment, where no or improper service is effected, the judgment should be set aside ex debito justitiae, as of right, as held in Agigreen Consulting Corp Ltd v NIB [2020] eKLR and James Kanyita Nderitu v Marios Philotas Ghikas [2016] eKLR. The Appellant's Right to be heard as enshrined in Article 50 was therefore breached.

11. On whether the learned Magistrate erred by failing to find that an interlocutory judgement was entered against the Appellant, counsel submitted that the matter before the lower court proceeded for hearing without the Appellant being served with hearing notices or being made aware of the hearing dates. The trial court did not put its mind to this issue of service of hearing notices upon the Appellant. Counsel argued that the issue of non-service of hearing notices upon the Appellant was a critical issue for determination which the Learned Magistrate failed to consider or make a determination on. Counsel also made reference to Order 12 Rule 7 of the Civil Procedure Rules and submitted that in an

application for setting aside an ex-parte judgement the court was bound to consider whether the draft defence filed by the applicant raised triable issues as held by the Court of Appel in CMC Holdings Ltd vs. Nzioki [2004] KLR 173. Which the Learned Magistrate failed to consider. These other cases were also cited regarding considering the draft defence: Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] eKLR and Peter Ndeti Ndolo v William Mutisya Muindi [2021] eKLR.

12. On whether the Magistrate erred in entertaining extraneous matters and not considering all grounds in the Application, counsel submitted that Learned Magistrate's holding that the 1st Defendant appeared to have been arguing on behalf and as proxy of the 2nd Defendant and now the Intended Interested Party as well, was incorrect because the County Government of Kajiado, being the allotting authority of the plots was best placed to inform the court to whom it allocated the parcels of land. And at the Lower Court, it maintained that Plot Numbers 229 and A687 are two distinct plots and that the 1st Respondent was not the registered owner of plot number A687/Business-Noonkopir T. Centre. It was therefore incorrect for the Magistrate to allude that the County Government of Kajiado was acting as a proxy of the Appellant by informing the Court of the status of the suit plots. Counsel also submitted that the Magistrate's claim that the Appellant wanted a second bite at the cherry was equally incorrect because the applications at the lower court were from the Appellant and the 2nd Interested Party. The 1st Interested party being the County Government was not an applicant and the Magistrate cannot claim that the Appellant was trying a second bite at the cherry while he had not participated in the proceedings.

13. Counsel also argued that the Magistrate's sentiments that the Appellant had failed to comply with the Court's order and filed the application almost two years after the judgement was also incorrect, because he could not have complied with orders he was not aware of. He only learnt of the judgement after being served with the eviction order and it was the 2nd interested party who was in occupation of the suit property.

14. On whether the learned Magistrate erred by holding that the Lower Court would be sitting on its own appeal, it was argued that the application for setting aside the judgement due to non-service was in no way re-litigating the matter or sitting on appeal. Reference was made to the case of Peter Ndeti Ndolo v William Mutisya Muindi [2021] eKLR where Odunga J. (as he then was) held: "…the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error…" Counsel went on to argue that the Lower Court's finding that there was nothing to set aside was also incorrect because an incorrect default judgement should be set aside where a party has been condemned unheard citing James Kanyiita Nderitu& Another vs. Marios Philotas Ghikas & Another [2016] eKLR.

15. As such, the Appeal should be allowed as prayed.

Submissions of the 1st and 2nd Respondent

16. In response to the Appeal, counsel submitted that the Appellant was called severally through his cell phone number 0727242854 but he declined to receive summons to enter appearance and instructed the process server to serve his advocates instead. The 1st and 2nd Respondents were also granted leave by the Court to serve Summons through a Newspaper advertisement and the same was done vide the Daily Nation Newspaper on 5th February 2018. Despite this, the Appellant failed to participate in the suit. The matter was concluded with a judgement delivered on 8th December 2021. In compliance with the Court orders, the 3rd Respondent issued the 1st Respondent with an allotment letter in his name. It was until 19th April 2023, that the Appellant sought to have the judgement set aside. The 1st and

2nd Respondents learnt that the Appellant had entered plot number A687 originally 229/Business-Noonkopir T. Centre and caused constructions to be undertaken contrary to the Lower Court's order necessitating the 1st and 2nd respondents to file an application dated 20th April 2023. The application was seeking enforcement of the orders.

17. The 3rd respondent and the appellant filed grounds of opposition and replying affidavit in opposition of this application and Mr.Hamud Mohamed Osman, the interested party file an application dated 31st August 2023, seeking to be enjoined in the suit before the lower court. The 1st and 2nd Respondents opposed this application through their Replying Affidavit. A Ruling was rendered which is subject of this appeal.

18. On whether there were justifiable reasons for the learned magistrate to set aside the judgment delivered on 8th December 2021, counsel submitted that a court may set aside or vary interlocutory judgment entered in default of appearance or defence pursuant to Order 10 Rule 11 of the Civil Procedure Rules and held in Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede (1982 1988) KAR. However, for judgement to be set aside, a worthy explanation ought to be advanced citing Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd (2018) eKLR and Mbugua v Sigimo Enterprises Limited & another. It was submitted that the Appellant was duly served through substituted service as per Order 5 Rule 17 Civil Procedure Rules as well as being called through his registered telephone number which he acknowledged was his telephone number, but declined to receive summons. As such the Appellant was aware of the suit and declined to participate.

19. On the allegation that the person sued was Karkeena and not him, his name being Parkeena, counsel submitted that, the inadvertent error in misspelling of the name did not warrant his decline to participate in the proceedings, pointing out that the name Karkeena was given to them by the 3rd Respondent when they went to inquire of the property's status. Counsel went on to add that since the Appellant contested service, he had an opportunity to cross examine the process server and without such cross examination, then the Court had no reason to doubt that service was not effected as held in David Koome Matugi v APA Insurance Limited [2021] eKLR. The Appellant therefore wasted his opportunity to be heard and there was no valid reason why the regularly entered judgement should be set aside. Reference was made to James Kanyiita Nderitu & Another [2016] eKLR which espoused circumstances of setting aside a regularly and an irregularly entered default judgement. Counsel also argued that the application was filed inordinately late, in 2023, which was two years after the judgement was entered on 8th December 2021. Adding, that the judgement had already been executed and the 3rd Respondent issued the 1st respondent with an allotment letter in his name. The application had therefore been overtaken by events and was rightfully dismissed citing Virginia Muchandi Muthengi v Elisha K. Njagi [2020] eKLR and the Supreme Court's case of Institute for Social Accountability & Another vs. National Assembly and 3 others (Petition 1 of 2018). It was also submitted that the Appellant's draft defence did not raise any triable issues pointing out that the Appellant had indicated that he purchased the suit property from one Jesse M. Gachango and sold it to one Agatha Silapei Koin which confirmed that he had no claim to the suit.

20. On whether the court should uphold the lower court's decision of allowing the application dated 20th April 2023, it was submitted that in that application, the 1st and 2nd Respondents sought orders directing Officer Commanding Station (OCS) Kitengela Police Station Police Station to supervise the full compliance of the judgment and orders issued on 8th December 2021, specifically the order of permanent injunction that was issued prohibiting the Defendants by themselves, agents, servants and/or employees from interfering with the Plaintiff's use and enjoyment of plot number A687 originally 229/Business-Noonkopir T. Centre in any way, among others. That the issue of ownership of Plot No. A687 originally 229/Business Noonkopir T. Centre having been conclusively dealt with, and the 1st

Respondent issued with an allotment letter, meant that they ought to be protected and where there was no stay of execution order, then there was no basis why the prayer for police protection should be declined as held in Kirobon Farmers vs Samuel O. Nyarangi ELC No. 29 of 2017. As such, the Court should issue directions that the Lower Court's orders be complied with and dismiss this Appeal with costs to the 1st and 2nd Respondents.

Analysis and Determination

21. The Appellant raised 14 grounds of Appeal which can be compressed into the following issues:

    i. Whether the Learned Trial Magistrate erred in failing to set aside the Judgement delivered on 8th December 2021;

    ii. Whether the Learned Trial Magistrate disregarded the Appellant's evidence in the Application dated 19th April 2023

    iii. Whether this Appeal is merited;

    iv. What orders should issue.

    v. Who should bear costs of the Appeal?

22. This being a first Appeal, the Court must conduct a fresh and independent evaluation of the entire evidence adduced before the trial court while bearing in mind that it did not hear or observe the witnesses. See Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR) where it was stated thus;

    > " In Selle -vs- Associated Motor Boat Co., [1968] EA 123, it was expressed thus:
    >
    > "... Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

23. The first issue for determination is whether the Learned Magistrate erred in failing to set aside the Judgement delivered on 8th December 2021.

    The Appellant sought that this Judgement be set aside on grounds that he was not aware of the suit at the Lower Court as he had not been served with the pleadings. He also claimed that his name was also wrongly spelt, hence he was not accorded a fair hearing.

24. It has been established that the decision to set aside an ex parte judgement is discretionary and should be exercised to excuse an error to avoid injustice. See Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] KECA 143 (KLR) where the Court of Appeal held:

    > " ... The object of clothing the court with discretion to set aside judgment obtained ex parte has been pronounced in many decisions. Sample the following:
    >
    > "To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..." See : Shah v Mbogo and Another [1967] EA. 116."

25. The Appellant claims that he was not aware of the suit at the Lower Court as he was not served. The Respondents claim that the Appellant was duly served vide substituted service through an advertisement in the Daily Nation newspaper on the 5th February 2018 as evidenced on page 51 of

the Record of Appeal. This was after the Court process server tried to contact the Appellant several times, his telephone number 0727242854. He declined to receive the said summons as deponed by the process server.

26. The Court takes note of the Affidavit of Service dated 18th December 2017 on page 57 of the Record of Appeal sworn by Dominic Njoroge Gachuma the process server. It states that between 14th and 18th December 2017, the Appellant was called and informed of the suit against him, about the court documents that he was supposed to be served with and of the hearing date of 19th December 2017. He however failed to give his address or location so as to receive the said documents. Counsel for the Respondents in her Supporting Affidavit dated 22nd January 2018 on page 467 of the Supplementary Record of Appeal stated that on 19th December 2017, the Appellant sent an advocate who received documents on his behalf but neither entered appearance nor filed a defence. This was vehemently denied by the Appellant who stated that he was well known in Kitengela and the Respondents could have served him at his residence or through his phone number.

27. Having found that the Appellant was duly served, the Learned Trial Magistrate set down the suit for hearing culminating in the judgement dated 8th December 2021.

28. The Learned Trial Magistrate in the Ruling delivered on 23rd February 2024 found: "in respect of the 2nd Defendant's assertion of improper service due to the misspelling of his name, I find it quite improbable that the 2nd Defendant was unaware of the matter in Court..."

29. From the look at the evidence tendered as already outlined in the preceding paragraphs, I do not find an error in this conclusion. This Court finds that there is evidence that the Appellant was duly served and/or was aware of the pendency of the suit at the Lower Court. Moreover, while the Appellant claims that his name was wrongly spelt in the pleadings that was no reason for his failure to enter appearance.

30. The grounds for setting aside a default judgement were further outlined in Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR) as follows:

... Lord Atkin observed:

> "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 judgment 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. ..."
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> ...
>
> It is primarily important to ascertain whether there are merits which ought to be tried. At the same time this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice. (See Mbogo v Shah [1968] E A 93)

31. To determine whether the Appellant has a triable defence which the Learned Trial Magistrate ought to have considered and set aside the Judgement, this Court reviewed the facts of the case as per all the Records of Appeal filed. The history of this case is:

32. The Respondents filed this suit at the Lower Court through a Plaint dated 7th December 2017 seeking that the 1st Respondent be declared as the legal owner of Plot No. A687 originally 229/Business Noonkopir Trading Centre; the 1st Interested Party herein be compelled to issue him an allotment letter; a permanent injunction against the Appellant from interfering with the suit property; damages for trespass and costs of the suit.

33. It was their claim that the 1st Respondent purchased the property on 14th April 1990 from Lelion Siakati Sapuru and Nkomeiya Mankurura Nkunja but that sometime in October 2017 they discovered that the 1st Interested Party had transferred the property to the Appellant which led to the filing of this suit.

34. The 1st Interested Party's testimony at the lower court, was that there was a validation exercise carried out due to double allocation of plots. That the Appellant had been allocated plot No. 413 and at the time of the validation exercise he was present and stood at the plot in contention. His plot was then validated and given new number as plot No. A687. Later on, the Respondents appeared with documents for plot No. 229 but the same had already been validated in the Appellant's favour.

35. In the Judgement delivered on 8th December 2021, the Learned Trial Magistrate indicated that the Respondents produced a Letter of Allotment dated 26th June 1989 in favour of the previous owners Lelion Siakati and Ole Mankurura, the transfer of the plot in favour of the Respondents dated 19th April 1990 and a search dated 7th February 2017 showing that it was registered in favour of the 1st Respondent. However, the County Government of Kajiado herein the 1st Interested Party, relied on the Letter of Allotment dated 19th May 1995 in the name Jesse Gachago and the transfer dated 8th January 2013 to the Appellant for plot No. 413.

36. The learned Trial Magistrate went on to point out that the testimony of the 1st Interested Party was that: "during the validation exercise they did not have their office records with respect to land ownership but relied on what was being supplied to them by the purported owners on the ground… As stated by the 1st Defendant's witness, they only relied on the documentations offered to them by the alleged land owners irrespective of whether they were legit or not. Nonetheless, in the event of a dispute they would resolve the same before a final letter of allotment with the validated number was issued. In the present case, the Plaintiffs raised their query way after the validation exercise had been done and a letter of allotment already issued in the 2nd Defendant's name. However, this copy was not produced as evidence. Thus there was nothing, not even a property search certificate to show that Plot No. A687 belonged to the 2nd Defendant… Neither the 1st Plaintiff nor the 2nd Defendant has a letter of allotment for plot No. A687. Buts since the latter did not defend the suit, we were left with no other option than to find that the 1st Plaintiff has proven his case on a balance of probability… " He therefore, declared him the owner and ordered the 1st Interested Party to issue him with a Letter of Allotment for plot A. 687 (originally 229 Business) Noonkopir Trading Centre. A permanent injunction was also issued against the Appellant and he was ordered to pay costs of the suit.

37. This is the Judgement that the Appellant sought to be set aside through his Application dated 19th April 2023. In his Supporting Affidavit he claimed that he purchased the suit plot Kajiado/Noonkopir/413/Business from one Jesse Gachago on 8th January 2013 and sold it to Agatha Silapei on 22nd April 2015. Agatha then sold it to Hamud Mohamed Osman on 25th January 2017. He also sought that Hamud Osman be joined in suit in the Lower Court since he was the owner of the suit property. The Respondents contested this Application.

38. This leads the Court to the other issue for determination on whether the Learned Magistrate erred in disregarding the Appellant's evidence.

The Appellant in his statement of defence claimed that the Respondents had no claim against him because parcel 413 which was validated to (parcel A687) was no longer in his possession having been sold to Agatha Silapei who later sold it to Hamud Osman.

39. Part of the documents produced to support his position, was a certificate of official search dated 21st April 2015 which shows that plot 413 Noonkopir Trading Centre was registered in favour of the Appellant.

40. There is a report dated 17th December 2012, from the County Council of Olkejuado on the dispute between parcels No. 386, 413 and 229. The report shows that documents for the three parcels are genuine; plot 413 was confirmed and validated by the County Surveyor; and plot 229 although it was allotted earlier does not indicate as having ever been identified by the County Surveyor. Part of the report reads, "Going by the evidence and clarification by the County Surveyor, it is my considered opinion that the site belongs to Plot No. 413 as per attached documents. However, documents for plot No. 229 are also genuine. Therefore, I recommend that it be identified to the owner subject to availability of land because it has remained un-developed beyond the two years allowed by the council as clearly indicated on the allotment letter..."

41. This report does not show who were the parties present in the dispute resolution meeting held on 3rd April 2012. The 2nd Respondent in her replying Affidavit denied that there was a dispute and stated that she only learnt that of the validation and transfer of the plot to the Appellant on 31st October 2017. She then filed a complaint with the National Land Commission on 2nd November 2017. The National Land Commission then advised the Appellant to stop any activities on the said plot through the letter dated 8th November 2017. This suit was filed thereafter.

42. Mr. Hamud Mohamed, as 2nd Interested Party in this Appeal also filed an application at the Lower Court seeking joinder on grounds that he was the owner of plot No. 413 (now plot No. A687) having purchased it from Andrew Parkeenka as per paragraph 4 of the Certificate of Urgency and Notice of Motion dated 31st August 2023. Without getting into the details of this application, the first glaring discrepancy is the issue of purchase. The Appellant in has consistently indicated that he sold the property to Agatha Silapei, who then sold it to the 2nd Interested Party. The Court notes some contradiction in that one Hamud Mohamud states that he purchased the property from the Appellant- Andrew Parkeenka but also in the same application in paragraph 6, states that he purchased the property from one Agatha Silapei.

43. The agreement for sale from the Appellant to Agatha Silapei on 22nd April 2015 is for plot No. Kajiado/Noonkopir/413 and from Agatha to Hamud in the year 2017 is also for plot Kajiado/Noonkopir/413. If plot 413 was validated in the year 2016 and issued new number A687, why was this new number not reflected in the sale agreement entered in 2017? Secondly, the said plot was validated in the year 2016 as per the testimony on record, and the sale agreement shows that it was sold to one Agatha Silapei in the year 2015, how come it was the Appellant who was present for the validation process and not the owner at the time, Agatha Silapei?

44. The County Land Registrar in his testimony stated that during the validation exercise carried out on 31st March 2016, all plot owners were expected to be present. During this validation exercise, plot 413 was validated to A687. The owner was Andrew Kisoso. The validation exercise was undertaken to curb the issue of double allocation. He also testified that the same property had two allocations being number 229 and 413. But since the owner of plot 413 was the one present during the validation exercise, then he was validated as the owner of new plot number A687. When the Respondents presented their documents for plot 229, the same could not be validated. During cross-examination he

admitted that in his report he had indicated that plot No. 413 and 229 were different plots. However, at the validation exercise, they relied on the documents given to them by persons on the ground because they did not have old land ownership records. He stated that is how parcel 413 was validated as belonging to Andrew Kisoso because he was the person who was on that plot during the validation exercise.

45. The Learned Trial Magistrate in the Ruling delivered on 23rd February 2024 found that the two issues for determination in the Appellant's application dated 19th April 2023 was whether: he had established sufficient grounds for setting aside of the judgement entered on 8th December 2021 and allow him to enter appearance and file a defence out of time; and whether there were sufficient grounds to join Hamud Mohamed as a Defendant/Interested party in the matter…

    … The matter herein had been heard and determined by my predecessor Hon. I. Kahuya who delivered the judgement on 8th December 2021. The matter lay dormant since but suddenly became alive in April 2023…

    … The 1st defendant participated fully in the trial… the very same grounds raised by the 2nd Defendant and the Interested Party were raised by the 1st Defendant at trial. These grounds and claims including the issue of the title identification and ownership of the suit plot were heard and considered by the trial Court and eventually dismissed…

    The trial court having made and passes judgement on these claims, is it proper for me to consider the same claim once more whether they be raised again by the 1st Defendant or 'afresh' by the 2nd Defendant and the Interested Party? I think not…

    The 1st defendant having already fully defended the matter in trial, it is not for this Court to give the 1st defendant and by extension the 2nd Defendant another bite the cherry. This is for the Appellate Court to do or decide.

46. This Court has outlined its opinion as per the evidence on record. The court has also taken into consideration the finding of the Learned Trial Magistrate that the issues raised by the Appellant had been raised by the 1st Interested Party at trial, heard, considered and dismissed, what different defence would the Appellant make even if the judgement was set aside and allowed to enter his defence? It is clear from the Judgement delivered on 8th December 2021 that the 1st Defendant defended the position that the suit property belonged to the Appellant, and the learned Trial Magistrate found that the Respondents had proved their case to the required threshold. The Court of Appeal in Bouchard International (Services) Ltd v Philip Nzioki M'mwereria [1987] KECA 75 (KLR) stated "… A judge had to judge the matter in the 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…"

47. Further, the Court of Appeal in Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] KECA 143 (KLR) cited with approval Patel v E.A. Cargo Handling Services [1974] EA 75, where Sir William Duffus, 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 in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment, as is the case here the court will not usually set aside the judgment 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."

48. From the proceedings, it is noted that the 1st Interested Party- the County Government of Kajiado, who is the allotting authority, participated in the suit in the Lower Court and gave its position. The Trial Court then arrived at a determination based on the evidence given by the Respondents and the 1st Interested Party. If the 1st interested Party as the allotting authority gave evidence and the Trial court found that the said evidence did not meet the required threshold, what additional evidence would the Appellant give that would be more convincing to the Court to warrant the setting aside of the judgement? It is also on record that the documents presented by the 1st Interested Party, herein were the same documents to be produced by the Appellant. I therefore find that the learned Trial Magistrate did not err in his decision because the Appellant did not raise any triable issues that merited the setting of the judgement.

49. The Appellant also raised the ground that he was not a proper party to the suit because he was no longer the owner of the suit property.

On the Appellant not being the current owner of the suit property, the question that this Court needs to answer is whether the claim that he was no longer the owner of the suit property absolves him from being a party to the suit. It is on record that there is no evidence that the suit property was transferred from the Appellant to any other person. Therefore, the last person recorded as the owner of plot No. 413, was the Appellant. This Court finds that he was therefore the right party to be sued. Further, it is now settled that the history of how the property was acquired was as good as the end result. Therefore, if the Court finds that the Appellant did not hold good title, then no valid title or claim of ownership could pass to any other persons.

50. It is on record that in the proceedings before the lower court, the Respondents sought and were granted leave to serve the Appellant by substituted service. This was after several attempts to effect personal service. He declined to receive service and directed the process server to serve his Advocates.

51. It is on record that the cell phone No. 0727-242854 belongs to the Appellant to date. He was called on this number but he declined to receive any calls which demonstrates a clear intention to evade service. This phone number was in use in 2017.

It is my view that he was aware of the suit in the lower court but deliberately stayed out of the proceedings.

52. In any event, in his application to set aside the Judgement he did not seek to cross examine the process server because he knew that the truth could come out.

53. It is his testimony that he has since sold the plot to a third party who has also sold to someone else.

In essence he is not the beneficial owner of the suit plot.

54. It is also on record that the Judgement has been executed in that the 1st Respondent has already been registered as the owner of the plot.

55. In addition, the County Government of Kajiado, (the 1st Interested Party herein) confirms that there were double allocation of plots. From the record plot 413 was allotted to one Jesse Gachago on 19th May 1994 before being transferred to the Appellant in the year 2014. While plot 229 was allotted to one Nkomeiya Ole Mankurura on 20th June 1989 and transferred to the 1st Respondent on 19th April 1990 and formalised in favour of the 1st Respondent through the letter dated 16th October 2008. Therefore,

if the parties are claiming the same plot of land, it is trite that the first allocation in time should succeed. And this should be the allotment issued in 1989 for plot No. 229/Business Noonkopir Trading Centre.

56. After reviewing the Records of Appeal and the findings, this Court is not convinced that the Learned Trial Magistrate erred in law or in fact in declining to set aside the Judgement delivered on 8th December 2021. I find that this Appeal is therefore not merited and the Ruling dated 23rd February 2024 is upheld.

57. This Appeal is thus dismissed with costs to the 1st and 2nd Respondents.

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

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Ibrahim Mwangi for the Appellant.

Mr. Chumba for the 1st, 2nd Respondents.

Mr. Katunga Mbuvi for the 1st Interested Party.

Peter – Court Assistant.