Mutai (Suing as the Administrator of the Estate of the Late Joseph Kiptum Bitok) v Chelulei (Environment and Land Case E007 of 2023) [2025] KEELC 6631 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6631 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE E007 OF 2023

CK YANO, J

OCTOBER 2, 2025

BETWEEN

KENNETH BIWOTT MUTAI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH KIPTUM BITOK) ..... PLAINTIFF

AND

ELPHAS RONO CHELULEI ..... DEFENDANT

RULING

1. Before this Court is a Notice of Motion Application by the Defendant/Applicant dated 12th June, 2024 seeking for orders that:-

    i. Spent

    ii. Spent

    iii. This honourable court be pleased to review and/set aside its ruling and orders issued on 08/05/2024.

    iv. This honourable court be pleased to review and/or set aside its ruling and orders issued on 16/03/2023 and in its place there be an order of re-opening of the application dated 13/02/2023 so that the same is heard and determined on merits.

    v. Costs be provided for.

2. The Motion is supported by the Defendant's Affidavit of even date. He deponed that on 27th March, 2023, he learned of the Plaintiff's Application dated 13th February, 2023 and instructed counsel to enter appearance and respond thereto. He deponed that he was not given an opportunity to be heard as the court delivered its ruling without considering his response. He deponed that on 8th May, 2024 the court delivered a ruling on the Application dated 16th January, 2024 finding him in contempt of court.

3. The Defendant explained that he has lived on the land known as Kapsaret/Kapsaret Block 6 (Kamoson)/15 (the suit property herein) with his family for the past 30 years, which land is registered in the name of his late father Lulei Rono. That as part of his estate, it is subject of Succession Cause N. E052 of 2024 in which he is a beneficiary. He averred that the Plaintiff brought this suit in his capacity as the son of his late brother but had never lived on the suit land, and actually lives far from the suit land.

4. The Defendant further averred that he is the one that built the permanent house on the suit property with his own hard earned money to provide shelter for his family. He pleaded with the court to grant the prayers sought as he and his family are on the verge of being rendered homeless. He contended that the Plaintiff will not be prejudiced by the orders and that they will ensure the ends of justice are met.

5. Opposing the Motion, the Plaintiff/Respondent swore and filed a Replying Affidavit dated 15th July, 2024. He deponed that the Defendant knew of the Application dated 13th February, 2023 as he was duly served, after which an Affidavit of Service was filed, and he even responded to it, yet he disobeyed the court's orders. He deponed that prior to chasing him from his father's house and moving into it, the Defendant lived in a house belonging his brother John Kebenei. The Plaintiff further averred that his father built the house many years ago before his demise, and that his late father and step mother's graves are adjacent to the house in dispute.

6. The Plaintiff alleged that the house was left to him and his brother and that he had been living there, but the Defendant wanted to disinherit him. He alleged that the Defendant did not deserve the orders sought as he had come to court with unclean hands. That even after being found guilty of contempt, he refused to purge it an continued living in his father's house. He accused the Defendant of putting blame on his counsel yet he was served personally. The Plaintiff asked that the Application be dismissed with costs.

Submissions:

7. When the matter was mentioned on 3rd March, 2025 the court issued directions that the Application would be heard by way of written submissions. The matter was mentioned on 2nd April, 2025 when both parties told the court they had not filed submissions and the court gave them more time within which to comply. On 6th May, 2025, the Defendant's Advocate confirmed that he had complied and filed his submissions dated 1st May, 2025.

8. The Plaintiff's Advocate requested for and was granted 7 days to comply. This suit was again mentioned on 19th May, 2025 but the Plaintiff had still not complied, and the court issued a date for delivery of its ruling. I have perused the court file and checked the court's e-filing portal and can confirm that as at the date of writing this ruling, the Plaintiff had still not filed his submissions.

Defendant/Applicant's Submissions;

9. In the Applicant's submissions, Counsel submitted that the jurisdiction of court to review judgments and decrees is provided for under Section 80 of the *Civil Procedure Act*. Counsel expounded that the grounds for review as set out under Order 45 Rule 1 of the Civil Procedure Rules, 2010 are; (a) the discovery of new and important matter or evidence which after the exercise of due diligence, was not known or could not be produced at the time when the order was made, (b) some mistake or error apparent on the face of the record, and (c) for any other sufficient reason, and it is a requirement that the application must be made without unreasonable delay.

10. Counsel for the Applicant submitted that, the order under which the Defendant was found in contempt of was made ex-parte and he was not able to defend himself. Counsel argued that neither the

Defendant's replying affidavit nor the fact that he was being locked out of his home of over 30 years considered. Counsel further submitted that an omission by this court led to the failure to consider the fact that the suit land is registered in the Defendant's late father's name, making him a beneficial owner thereof. The Defendant's advocate submitted that had the court taken into account the certificate of title and allowed the Defendant to respond to the application and/or gave him a chance to defend himself, he would have not been held in contempt.

11. Counsel contended that this court has the discretion to review orders, and that the reasons given are sufficient to grant the orders sought. Counsel further submitted that the instant application was made without unreasonable delay, since the ruling was delivered on 8th May, 2024 and the application was filed on 12th June, 2024. Further, that Courts have established what would constitute sufficient reasons for the review of a decision of a court, which is, only for correction of a patent error of law or fact, which stares in the face without any elaborate argument. That such an error cannot be claimed for a fresh hearing or correction of an erroneous view that was taken earlier. He prayed that the application be allowed and the prayers sought be granted in their entirety.

12. In support of his arguments, counsel relied on Republic vs Public Procurement Administrative Review Board & 2 others (2018) eKLR, Centre for Mathematics, Science & Technology Education in Africa Cemest vs Services (2023) KEHC 18501 (KLR), Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR, Abdalla & 6 others vs Khansa Developers Limited & 3 others (2024) KEELC 3667 (KLR) and Shanzu Investments Limited vs Commissioner for Lands (Civil Appeal No 100 of 1993).

Analysis and Determination:

13. I have read and considered the Application and the response thereto, as well as the submissions filed in that regard, and I am of the considered opinion that what the court needs to determine is:-

    i. Whether the Defendant's right to be heard was violated with regards to the Applications dated 13th February, 2023 and 16th January, 2024;

    ii. Whether the Defendant has laid sufficient basis for review of the court's orders issued on 16th March, 2023 and 8th May, 2024;

    iii. Whether the court's orders issued on 16th March, 2023 and 8th May, 2024 should be set aside;

    iv. Whether the Application dated 13th February, 2023 should be re-opened; and

    v. Which party should shoulder the costs of this Application?

Whether the Defendant's right to be heard was violated with regard to the Applications dated 13th February, 2023 and 16th January, 2024

14. The Defendant claims that he was not allowed to defend himself before the injunction was issued and he was found in contempt, which orders were made ex-parte. The right to be heard is a cardinal rule under the principles of natural justice which requires that a party ought not be condemned unheard. However, this does not mean that a party must be heard in all circumstances or despite the circumstances.

15. The right to be heard only requires that a party ought to be given the opportunity to present their case, but it is up to that party to either utilise the opportunity or not. Most importantly, a court cannot force a party to actually utilise the opportunity afforded to them to present their case. What is important is that it can be shown that the Party was availed the opportunity to be heard. This was explained in

Republic vs Commission on Administrative Justice & 2 others Ex parte Michael Kamau Mubea (2017) eKLR, where Justice Odunga held that:-

"

> " 131. In this case however, the Respondent has detailed the actions it took before compiling its report. It is clear from the facts placed before me that the applicant was afforded an opportunity of being heard during the process of investigations. It is contended that on occasions the applicant failed to respond to the Respondent's inquiries. As was held in Union Insurance Co. of Kenya Ltd. vs Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:
>
> 'Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly ... Clearly the applicant was given a chance to be heard ... The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it'."

16. In the instant Application, the Defendant has made several arguments in support of the allegation that this court infringed on his right to be heard. The Defendant claims that the injunction order the basis of the Application for contempt was made exparte, and that he was not heard before the court delivered its ruling. He avers that the orders were issued in his absence without considering his response, and thus he was not granted an opportunity to be heard. It is the Defendant's contention herein that he got wind of the Application dated 13th February, 2023 on 27th March, 2023 and he immediately instructed Counsel to enter appearance and respond to it.

17. I am convinced however, that the Defendant and his counsel are not being entirely honest with this Court. The learned Judge in his ruling delivered on 15th March, 2024 on the Application of 13th February, 2023 found that the Defendant had been served with summons to enter appearance, but he failed to enter appearance or file a response to the Application of 13th February, 2023.

18. There are two Affidavits of Service sworn by one Enock Kimutai Bett, a court process server relating to service of the Plaint, summons to enter Appearance and Application for injunction on the Defendant. The first was sworn on 22nd February, 2023 and indicates that the Defendant was on 16th February, 2023 served with the Plaint, Summons, Application and a Hearing Notice for hearing on 28th February, 2023.

19. From the record, when the matter came up for hearing of the Application on 28th February, 2023, the court was not satisfied with the manner of service and directed the Plaintiff to serve the application again. Enock Kimutai Bett swore and filed a second Affidavit of Service dated 3rd March, 2023 indicating that on 1st March, 2023 he served the Defendant with the Plaint, Summons, the Application as well as a Hearing Notice for hearing on 15th March, 2023.

20. The Defendant filed a Replying Affidavit on 27th March, 2023. however, by that time, the court had already delivered its ruling on 15th March, 2023 with regards to the application for injunction dated 13th February, 2023. There is no way the court could have, even if it wanted, considered the Defendant's response when the truth of the matter is that none had been filed even as at the date of delivery of the ruling. For this reason, the court cannot be faulted.

21. In any event, a court has powers to hear a suit or an application ex-parte as provided under Order 12 of the Civil Procedure Rules. This Court notes that on 3rd March, 2025 the Defendant's Advocate

conceded that the Defendant did not respond to the Application dated 13th February, 2023. I have no doubt in my mind that neither the Defendant nor his Counsel were present on the date fixed for hearing of the Application for injunction dated 13th February, 2023 despite having been served with the same.

22. Turning to the Application for contempt dated 16th January, 2024, the Defendant also argues that he was not heard before the orders were issued, and he contends that his replying affidavit was not considered. The record shows that the Defendant's Advocate was served with the Application for Contempt by Joan Koech Advocate on 22nd January, 2024 and she swore an Affidavit of Service to that effect dated 26th January, 2024. On 31st January, 2024 the Court directed that the parties to file written submissions on that Application, and both of them complied.

23. I have looked at the Ruling of 8th May, 2024 and note that at paragraph 4 thereof, the Hon. Justice Obaga indicated that the Defendant had filed a Replying Affidavit to the Application for contempt dated 29th January, 2024. The same was duly considered by the court in its ruling on the contempt application, alongside the Defendant's submissions.

24. That being the case, it is my finding that with regards to the Applications dated 13th February, 2023, the Defendant was given a chance to present his case and failed to utilise it. As regards the application dated 16th January, 2024, the Defendant was heard on the same before the court made its decision.

Whether the Defendant has laid sufficient basis for review of the court's orders issued on 16th March, 2023 and 8th May, 2024

25. On the prayer for review and setting aside, Section 80 of the *Civil Procedure Act* gives the court unfettered discretion to review its decision by providing as follows: -

> 80. Review
>
> Any person who considers himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

26. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 is the procedural law where review is concerned. It sets out the grounds for review and provides that:-

> 1. Application for review of decree or order [Order 45, rule 1]
>
> (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for

a review of judgment to the court which passed the decree or made the order without unreasonable delay.

27. Order 45 Rule 1 restricts the grounds for review to the following grounds: -

    a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or

    b. On account of some mistake or error apparent on the face of the record; or

    c. For any other sufficient reason

28. The Defendant was not quite clear on what grounds his application for review is premised on, therefore this court is forced to infer from his pleadings and submissions. The Defendant has not claimed that there has been a discovery of any new matter or evidence that was not available to him at the time the two applications were determined.

29. What remains to be determined is whether there was a mistake or error on the face of the record or whether sufficient cause has been established by the Defendant to warrant grant of the orders sought.

30. In his submissions, Counsel argued that;- "an omission by the honorable court led to the failure to take into consideration the registered owner of the suit property who is the late father of the applicant herein who is a beneficial owner".

31. An error on the face of the record as envisioned at Order 45 Rule 1 was defined by the Court of Appeal in National Bank of Kenya vs Ndungu Njau (1997) eKLR, in the following words:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

32. The term a mistake on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. However, the allegation that the court did not consider the fact that the suit land belongs to the Defendant's father is not only false, but also misleading.

33. From the beginning, the Plaintiff has been honest with regards to the ownership of the suit property. He clearly pleaded in his Plaint as well as in the Notice of Motion dated 13th February, 2023 that the suit land was registered in the name of the late Lulei Rono, his grandfather. In issuing the injunction, the court clearly understood that the Plaintiff's interest on the land is through his father, Joseph Kiptum Bitok (Deceased), who was the son of the registered owner.

34. The court was clearly seized of this fact while making its decision, and it cannot therefore be termed an error on the face of the record. The Defendant was, for the mere fact that the order existed, bound by the law to respect it even as he sought to have it reviewed or set aside. There being no other basis for claiming an error in the making of the order, it follows that the Defendant's claim on this ground cannot stand.

35. The Defendant's Counsel further submitted that the Defendant's averments ought to be sufficient reason to grant the orders sought in the instant application. Order 45 Rule 1 does allow a court to review its orders and/or judgment where an applicant has established sufficient reason for doing so.

36. In Attorney General vs Law Society of Kenya & another (2013) eKLR, sufficient cause was defined as:-

> "
>
> "28. 'Sufficient cause' or 'good cause' in law means:
> '...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.'
>
> See Black's Law Dictionary, 9th Edition, page 251.
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

37. In Wachira Karani vs Bildad Wachira (2016) eKLR Mativo J held that:-

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

38. This court therefore has to consider whether the Defendant has demonstrated a sufficient cause warranting review of the its orders, and to do so, it is necessary to look at the facts and evidence presented in this case.

39. According to the Defendant, he has lived on the suit property for the last 30 years. That he built the house in dispute with his own money. Further, that the suit land where the disputed house stands belongs to his late father and he is the beneficial owner thereof. He claims that the court did not consider these facts when issuing the injunction on 16th March, 2023 or when it found him guilty of contempt on 8th May, 2024. The Defendant argues that had the court taken these factors into account and allowed the Defendant to respond to the application and/or gave him a chance to defend himself, it would have not made the orders herein.

40. The Defendant would like this court to believe that the Plaintiff has no right to the disputed house or the suit property. The learned judge considered the facts as well as the evidence provided by the Plaintiff. From what is on record, it appears that the Plaintiff's paternal grandmother, who also happens to be the Defendant's mother, took him from Kaptisia where his mother hailed to the suit property herein and showed him his father's house. That his uncle, John Kebenei, paid his school fees until he was in Form 3 then stopped.

41. At a meeting held by the village elders whose minutes are on record, one family member known as David Lule had stated that before that forum that he found the "boy", referring to the Plaintiff, living at their home when he was about 15 years old, and that he knew him. Another family member by the name Benedictor stated that the boy (Plaintiff) was a biological son to their late brother and s/he did not see why his uncles (his/her brothers) do not like him. S/he acknowledged the Plaintiff as their son.

42. The Plaintiff gives a tale of frustration at his uncle, the Defendant's hands, stating that he demolished his house and scattered every effort on his part to rebuild it. The panel of elders made a finding that his grandparents recognised him as their grandson as it had been proved to them that his grandmother had gone to his mother's family to claim him and had promised to take a cow as was customary. The Panel recommended that the Plaintiff pursue succession of his late father's properties.

43. The Plaintiff claimed in the Application dated 13th February, 2023 that the Defendant went to complete the house the Plaintiff's father had started building with an intention of entering the same upon completion, thereby disinheriting the Plaintiff and his brother. Looking at the ruling of 16th March, 2023 therefore, it is clear that the learned judge was well informed of the fact that the suit property belonged and was registered in the name of the plaintiff's father. It is evident that the Judge considered this fact in making his determination, and issuing an injunction in the following terms:-

> "Interim orders of injunction be and is hereby issued restraining the 1st Defendant/ Respondent either by himself or through his agents, employees and/or servants from constructing, entering, selling, leasing out, occupying, transferring, putting up structures, wasting or otherwise interfering with the Plaintiff's quiet possession of permanent house built on a portion of that parcel of land known as Kapsaret/Kapsaret Block 6(kamoson)/15."

44. There is only one Defendant in this case, which means that despite the fact the order made reference to a "1st Defendant", the order of injunction was clearly directed at the Defendant herein. Despite this, it appears that the Defendant went ahead to finish the house and is now occupying it contrary to the orders of this court, hence the finding of contempt on 8th May, 2024. The Defendant did not deny that he is not currently occupying the house, but justified his action by stating that he is the one who constructed the house with his hard earned money and sweat.

45. It is trite law that orders made by a properly constituted court of law must be obeyed. Therefore, whether made ex-parte or not, for as long as the order of injunction remained in force, the Defendant was bound to obey the order even if he intended to seek its review and/or have it set aside. See the case of Hadkinson vs Hadkinson (1952) All ER, where it was held that:-

> "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

46. There is no doubt that the court orders issued by this court on 16th March, 2023 were both clear and unambiguous and the Defendant was bound by those orders. He disobeyed those orders and rightly so, was found guilty of the contempt on 8th May, 2024. I see no sufficient ground established herein to justify the disturbance of the orders by way of review.

47. As to whether the court should review the orders issued on 16th March, 2023 and 8th May, 2024, the Court of Appeal in Stephen Githua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers

(2016) eKLR citing the case of Evan Bwire Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340 held that:-

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh..."

48. Going by the forgoing analysis, it is evident that the Defendant has established no grounds for review. Further, bearing in mind that all the reasons given by the Defendant were available to the court at the time it made its determinations, it can only mean that the review sought will in effect amount to sitting on Appeal of its own decision, a task this court has no jurisdiction to undertake. Consequently, the prayers for review of the orders of 16th March, 2023 and 8th May, 2024 fails.

Whether the court's orders issued on 16th March, 2023 and 8th May, 2024 should be set aside

49. The Defendant asked the court to set aside the orders made on 16th March, 2023 and 8th May, 2024. The law on setting aside of ex parte orders is found under Order 12 Rule 7 of the Civil Procedure Rules, 2010 which provides that:-

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

50. This provision is amplified by Order 51 Rule 15 which provides that the court may set aside an order made ex parte. In considering whether or not to set aside an ex parte order, the Court of Appeal in Richard Nchapi Leiyagu v IEBC & 2 others (2013) eKLR expressed itself as follows:-

> " We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

51. It is trite that ex parte rulings and/or orders which have been made or entered irregularly ought to be set aside, ex debito justitiae. Put differently, irregular orders or decisions must be set aside as a matter of right or of course. It has been held that in such circumstances, a Court is stripped of discretionary power to determine whether or not an order of setting aside can be granted.

52. The main consideration in this instance is whether the order is regular. One of the tests used in identifying a regular or irregular ex parte order, is whether it was made with sufficient notice to the affected party. An order made in the absence of AND without sufficient notice to the affected party or at all, is not only irregular but also offends the right to fair trial protected by Article 50 of *the Constitution*. It follows therefore that an ex-parte order made in default of appearance despite proper service is regular. In the same vein, if the ex-parte order was made without proper service or any service at all is irregular, and must be set aside as of right.

53. In this instance, the Defendant denies service and claims to have only become aware of the application on 27th March, 2023. However, I have considered the oral submissions tendered by the Defendant's advocate in court on 3rd March, 2025 and note that the fact of service is not denied. In fact, Counsel for the Defendant claimed that the failure to respond was not because of non-service of the Application, but due to an oversight on the part of the firm of Magare Musundi & Co. Advocates which was transitioning.

54. The firm of Magare Musundi could only have known of the matter upon receipt of instruction from the Defendant who was served in person, a clear contradiction of the Defendant's allegation that he

only got wind of the matter on 27th March, 2023. It is on the foregoing basis that this Court reaches a conclusion that that the Defendant had sufficient notice of the Motion.

55. The next consideration for this Court is whether there is a sufficient cause which prevented the Defendant from being in court on the date of hearing of the Application. The burden is on the Defendant to prove that he had sufficient cause for not attending court. As already explained, the Defendant claims that he was not aware of the application and only learnt of it on 27th March, 2023 and immediately instructed counsel to enter appearance and respond to the Application.

56. This court has however brought to light the submissions by the Defendant's Counsel of 3rd March, 2025 where it was explained that the failure to respond was due to an alleged oversight on the part of the firm of Magare Musundi & Co. Advocates which was transitioning. This is proof enough that the Defendant was well aware of the Suit herein as well as the Application dated 13th February, 2023 and even instructed an advocate well before the ruling and/or order was made.

57. That being the case, there is no reason why the Defendant himself, having been served with the Hearing Notice for the Application, was not in court on the material day. For that reason, there is no sufficient reason given for the non-attendance by the Defendant on the hearing date to warrant the setting aside of the ex-parte order. Furthermore, this clear contradiction of the Defendant's on the true position by the Defendant and his Counsel is proof that the Defendant is not honest with this court, and has approached it with unclean hands.

58. With regards to the Contempt order of 8th May, 2024, the same was made after inter-partes hearing and no tangible reason has been established for its setting aside. As a result, the Defendant is therefore undeserving of the orders sought.

Whether the Application dated 13th February, 2023 should be re-opened?

59. The Defendant also asked this court to re-open the Application dated 13th February, 2023 for hearing and determination on merits. There is no doubt that the Court retains discretion to allow re-opening of an application and such discretion must be exercised judiciously. Further, in exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party.

60. At the risk of sounding repetitive, the Defendant herein was served with the Application as well as a Hearing Notice thereto on two different occasions. The Court being satisfied that the Defendant had been duly served with the Notice of Motion, the matter was set down for hearing on 15th March, 2023. The Defendant neither entered appearance nor filed a response to the Application.

61. This court has examined this application and come to the finding that the Defendant herein was given sufficient opportunity to be heard before the Application was allowed and orders issued against him. If indeed he stood to be rendered homeless, he ought to have taken action to defend whatever rights he has over the disputed house on the suit property, yet he failed to do so.

62. Consequently, the court then went ahead to issue a well-reasoned ruling on the same. The ruling and/orders were for that reason regular, and no substantial reason has been given for setting it aside. That being the case, no useful purpose would be served in re-opening it to be heard on merit.

Which party should shoulder the costs of this Application?

63. The law on costs of litigation as I know it going by Section 27 of the *Civil Procedure Act* is that costs follow the event, and secondly, they are discretionary. See Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR. Under the proviso to Section 27, the court may for good reason depart from this general rule.

64. In this instant Application, this Court has found no good cause to depart from the general proposition of the law that costs should follow the event. The Defendant having failed in this Application is not entitled to an award of costs, the same are hereby awarded to the Plaintiff/Respondent.

Orders:

65. In the circumstances, the Defendant/Applicant's Notice of Motion dated 12th June, 2024 lacks merit, and the same is dismissed with costs to the Plaintiff/Respondent.

66. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 2ND DAY OF OCTOBER, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of:-

Mr. Kipkemboi for Defendant.

Ms. Tanui holding brief Ms. Koech for Plaintiff.

Court Assistant - Laban.