



**Pasha v Kula & 3 others; Tiger Farm (Isenya) Limited & another (Interested Parties)  
(Environment & Land Case 401 of 2017) [2025] KEELC 4514 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4514 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 401 OF 2017  
LC KOMINGOI, J  
JUNE 12, 2025**

**BETWEEN**

**LEONARD ROIPA RORIAN PASHA ..... PLAINTIFF**

**AND**

**ELIJAH TENDA OLE KULA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH NKOSHESHE TOMBO ..... 2<sup>ND</sup> DEFENDANT**

**TIMA OLE MPAASHE ..... 3<sup>RD</sup> DEFENDANT**

**MRS RAHAB NYANGENA ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**TIGER FARM (ISENYA) LIMITED ..... INTERESTED PARTY**

**PRINCIPLES STYLES LIMITED ..... INTERESTED PARTY**

**RULING**

1. This Ruling is in respect of Notice of Motion application dated 23<sup>rd</sup> January 2025 by the 2<sup>nd</sup> Defendant herein (the Applicant), is brought under: Article 48 and 50(1) of *the Constitution*; Section 1A, 1B and 3A of the *Civil Procedure Act*; Order 9 Rule 9(a) and Order 45 Rule 1 of the Civil Procedure Rules. It seeks:

- i. Spent;
- ii. Spent;
- iii. Spent;
- iv. That the Hon. Court be pleased to review and set aside the Judgement delivered on 29<sup>th</sup> July and all consequential orders.



- v. That upon grant of prayer (iv) above, the Hon. Court be pleased to grant leave to the Applicant to defend this suit and file its pleadings and/or documents within 21 days.
  - vi. That costs be in the application.
2. The grounds are on the face of the application and are set out in paragraph 1 to 9. It is supported by the sworn Affidavit of Joseph Nkosheshe Tombo. He claims that he only learnt of the judgement delivered on 29<sup>th</sup> July 2024 on 8<sup>th</sup> January 2025 when the Plaintiff together with his agents stormed the property to erect beacons thereon. Consequently, the Plaintiff processed a new title Kajiado/Kaputiei North/129330. He avers that it was upon instructing a different advocate who perused the court file and learnt that his matters was closed without giving his evidence. He claims that being elderly, he was not aware of the hearing date as his Advocate did not inform him of the same. He also claimed that the said advocate did not inform him that his case had been closed. Therefore, the orders issued against him were adverse as he was at risk of losing 39.024 hectares of his land, which the Plaintiff wanted to hive off from property Kajiado/Kaputiei North/721. Unless the orders sought were granted, the Plaintiff would execute the Court's decree which was passed without the Applicant's participation.
  3. The Plaintiff/ Respondent in his Grounds of Opposition contested the application on grounds that:
    - i. The Applicant did not comply with the provisions of Order 9, Rules 5, 12 and 13 of the Civil Procedure Rules, 2020 when appointing M/S Mutunga Justus and Associates as his new Counsel to prosecute this Application and consequently only his former Counsel M/S Ochieng Omburo & Associates are the only ones to prosecute this Application before this Honourable Court.
    - ii. The Application does not disclose any reasonable cause of action and is therefore scandalous, frivolous, and vexatious.
    - iii. If the Application is granted it will prejudice, embarrass or delay the rightful expeditious Execution of the Judgment and Decree of this Honourable Court date 29<sup>th</sup> July 2024.
    - iv. There is no reasonable Ground for setting aside the Judgment and Decree of this Honourable Court.
    - v. The Plaintiff is bound to suffer irreparably by any delay to execute the said Judgment and Decree of this Honourable Court taking into account the period it has taken the Plaintiff from 2007 to date to realise his Rights in his property.
    - vi. The Application is an abuse of the process of this Honourable Court.
  4. The Plaintiff, Leonard Roipa Rorian Pasha in his Replying Affidavit contested the application on grounds that counsel for the Applicant M/S Mutunga Justus was not properly on record because he had not complied with provisions of Order 9, Rules 5, 12 and 13 of the Civil Procedure Rules. He also indicated that Counsel for the Applicant in the impugned judgement, Mr.Ochieng who was present at the hearing sought time to go through the Proceedings to apprise himself with what transpired in his absence. He also asked that Counsel for the Plaintiff and that of the 1<sup>st</sup> Defendant to supply him with documents to enable him to adequately prepare the Defence of his Clients. Although the Plaintiff opposed the Application for Adjournment, this Court granted the Application as the last adjournment. It also ordered the Plaintiff and the 1<sup>st</sup> Defendant to serve them with requested documents and the said Defendants to rectify their position within 21days.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' defence hearing was then fixed for the 5<sup>th</sup> July 2023. When the matter was virtually mentioned in Court on this day, Counsels for all the parties were in attendance and the time



for physical defence hearing of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was set at 10:30am and their Counsel, Mr. Ochieng confirmed that he would be ready to proceed. When the matter was called out in open court, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' was absent and the Plaintiff's counsel sought that their case be closed and the orders were granted.

6. In an application dated 10<sup>th</sup> July 2023 they sought to have the dismissal order of their defence case on 5<sup>th</sup> July 2023 set aside and reinstated for hearing which was declined by the Court. But the Applicant neither appealed nor sought a review of this decision. Consequently a judgement and decree was delivered. He contested the allegation that the Applicant was unaware of what transpired in this case stating that this judgement and its effect was lengthily discussed in the community, which the Applicant belonged to. Therefore, it was impossible for him to claim that he was unaware. He also added that on the day their case was closed for being absent in Court, his advocate Mr. Ochieng swore in the Affidavit that they were on their way to court when their car broke down. He pointed out that the 3<sup>rd</sup> Defendant who was the 2<sup>nd</sup> Defendant's/Applicant co-defendant and shared the same advocate was aware of the judgement and even allowed the Plaintiff to fix a physical boundary between them. As such, the claim that the Applicant was unaware, was false.
7. The 2<sup>nd</sup> Defendant/Applicant in his Further Affidavit, indicated that his advocate was properly on record through his Court's leave granted on 24<sup>th</sup> January 2025. He contested his knowledge of the hearing stating that the claim that he was in the same car with Mr. Ochieng' when the matter was dismissed was false.
8. The application was canvassed by way of written submissions.

#### **The 2<sup>nd</sup> Defendant's/Applicant's Submissions**

9. Counsel outlined the following as issues for determination: Whether the firm of Mutunga Justus and Associates are properly on record for the Applicant? And whether the Applicant has demonstrated sufficient grounds to set aside an ex-parte judgment?
10. On Whether the firm of Mutunga Justus and Associates are properly on record for the applicant this honourable court granted the said leave to come on record through an order dated 24<sup>th</sup> January 2025 and therefore the firm of Mutunga Justus and Associates was properly on record for the Applicant as provided under Order 9 rule 9 and 10 of the Civil Procedure Rules.
11. On whether the Applicant has demonstrated sufficient grounds for setting aside an ex-parte judgment, it was submitted that the court had discretion to set aside ex parte judgement entered from an excusable error, and in this case, it was not the Applicant's mistake to be absent in court at the defence hearing. Blame was laid on his previous advocate who it was argued did not inform the elderly applicant of the ongoing of the Court. And even the Affidavit sworn by him to seek reinstatement of the suit was done without the Applicant's authority. Reference was made to the following cases to support this argument: Shah vs Mbogo & Another [1967] EA 116, Edney Adak Ismail vs. Equity Bank Limited, CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173, Stephen Boro Gititha vs. Family Finance Building Society & 3 others and Lucy Bosire vs. Kehancha Div. Land dispute Tribunal & 2 others. It was therefore in the interest of justice for the court to set aside the judgement because the Applicant stood to lose thirty nine (39) hectares of his land for being condemned unheard. As such, the application should be allowed with orders that the Applicant files his pleadings within 21 days.

#### **The Plaintiff/ Respondent's submissions**

12. Counsel submitted that that the Applicant's former Advocates were still his Advocate until the conclusion of the cause or matter, because the Applicant had not complied with the provisions of



Order 9 Rules 5 & 6 Civil procedure Rules. Counsel argued that the Applicant had not served any Notice of Change on every other party or his former Advocate as envisaged. And even if he states he is exempted from doing so as he applied Rule 9, it equally had a requirement of service. Counsel for the Applicant had therefore not adhered to the procedure for Change of an Advocate when the case has been finalised and the application should therefore be struck out with costs.

13. Counsel went on to submit that a review should only be filed where an appeal had not been filed as per Order 45, Rule 1(1) of the Civil Procedure Rules. However, in this case, the 1<sup>st</sup> Defendant had filed an appeal against the decision in Civil Appeal No.735 of 2024. Therefore, the application herein should not be entertained citing: Protein and Fruit Processors Limited vs. Credit Bank Limited [2005] eKLR and Origo & Another vs. Mungale[2005] 2KLR 307.
14. Counsel argued that the signature on the Affidavit for reinstatement which the Applicant claims not to have signed, and the signature in the Affidavit sworn in support of this application by the Applicant, bore a prima facie semblance. Therefore, if there was any contention as to the authenticity of the impugned affidavit, the same should be submitting for investigative analysis. Counsel also pointed out that the Applicant and his co-defendants had the habit of falling out with and changing advocates and not regularising their position on time. Therefore the issue that the Applicant was unaware of the hearing date was false arguing there must be an end to citing Waki. J.A in Bi-Mach Engineers Limited vs. James Kahore Mwangi. And that even if the mistake was occasioned by the Advocate, it is not a panacea to all mistakes as held in Said Swellem Gheithan Saanum vs. The Commissioner of Lands & others[2015] eKLR.
15. The application should therefore be dismissed with costs.

### **Analysis and Determination**

16. I have considered the Notice of Motion, the Affidavit in support, the response thereto, the Grounds of Opposition, the rival submissions, and the authorities cited. I find that the issues for determination are:
  - i. Whether this Court ought to review and/or set aside its judgement delivered on 29<sup>th</sup> July 2024 is merited;
  - ii. What orders should issue?
  - iii. Who should bear costs of the Application?
17. On the 23<sup>rd</sup> April 2025 Mr. Mukeli for the 1<sup>st</sup> Defendant, intimated to the court that he was in support of the Notice of Motion.

### **Mr. Kipkorir Ngetich for the 2<sup>nd</sup> Interested Party also stated that they were in support of the Notice of Motion.**

18. The 2<sup>nd</sup> Defendant/Applicant has approached Court seeking for a review and on setting aside of the judgement delivered on 29<sup>th</sup> July 2024 on grounds that he was not given an opportunity to be heard. He claimed that he was not made aware of the hearing date by his advocate hence his absence was not deliberate. He also stated that he was not aware of the application to reinstate their case and that the previous advocate acted without instructions.
19. The Respondent contested the application on grounds that there was no evidence that the 2<sup>nd</sup> Defendant/Applicant was not aware of the hearing stating the defendants had contributed to the delay in conclusion of this matter by changing Advocates on several occasions.



20. I have gone through the court record. On the 5/7/2023 when the matter was called out in the virtual session, Mr. Ochieng for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, told the court that he was ready to proceed. This was the second time he was appearing in this matter. The court then scheduled the hearing for 10:30a.m. in open court. Later at 10:30a.m. counsel did not appear. His clients' were also not present. There was no explanation. The 2<sup>nd</sup>, 3<sup>rd</sup> defendants' case was closed and the matter reserved for filing of written submissions.
21. Before Judgment was delivered the 2<sup>nd</sup>, 3<sup>rd</sup>, Defendants filed the Notice of Motion dated 10<sup>th</sup> July 2023 seeking that the orders dismissing their defence on 5<sup>th</sup> July 2023 be set aside. Upon hearing the same the court dismissed the Application for lack of merit. Judgement was eventually delivered on 29<sup>th</sup> July 2024. In paragraph 4 of the Supporting Affidavit, the 2<sup>nd</sup> Defendant/Applicant stated that his Advocate did not inform him of the hearing date. It is his case that the Advocate never informed him that his case has been closed.
22. In the case of Patel Vs. E.A Cargo Handling Services Ltd (1974) EA 75, William Dreyffus P. at Page 76 stated;
- “The main concern of the court is to do Justice to the parties and the court will not impose conditions on itself to fetter the discretion given to it by the rules. I agree that where it is a regular Judgement as is the case here, the court will not usually set aside the Judgement unless it is satisfied that there is a defence on the merits. In this respect, a 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.”
23. I am satisfied that the 2<sup>nd</sup> Defendant/Applicant has put forward sufficient reasons to warrant this court to exercise discretion in his favour.
24. I note that this dispute has been in the courts since the year 2007. This is a long time. In order not to prolong the dispute further and on the interest of justice I allow the 2<sup>nd</sup>, 3<sup>rd</sup> Defendants to prosecute their defences so that the issues herein can finally be resolved.
25. It is also important to point out that the firm of Mutunga Justus and Associates are properly on record having been granted leave by this Court on 23<sup>rd</sup> January 2025.
26. In conclusion I find merit in this Application and the same is allowed in the following terms;
- a. That the Judgement delivered on 29<sup>th</sup> June 2024 and all consequential orders are hereby set aside.
  - b. That the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants do file any additional pleadings within twenty one (21) days from the date of this Ruling.
  - c. That the 2<sup>nd</sup> Defendant do pay the Plaintiff throw away costs of Kshs.10,000/= within twenty one (21) days from the date of this Ruling.
  - d. That costs of this Application do abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12<sup>TH</sup> JUNE 2025.**

**L. KOMINGOI**

**JUDGE.**



In The Presence Of:

Mr. T.T. Aswani for the Plaintiff.

Ms. Ntaiwe for Mr. Mukeli for the 1<sup>st</sup> Defendant.

Mr. Mutunga for the 2<sup>nd</sup> Defendant.

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

Mr. Ngetich for the 2<sup>nd</sup> Interested Party.

Court Assistant – Mutisya.

