



REPUBLIC OF KENYA



**Rop v Soo & another (Environment and Land Case 55 of 2018)  
[2025] KEELC 7666 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7666 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND CASE 55 OF 2018  
LA OMOLLO, J  
NOVEMBER 6, 2025**

**BETWEEN**

**DAVID KIPLANGAT ROP ..... PLAINTIFF**

**AND**

**RAEL CHEPTONUI SOO ..... 1<sup>ST</sup> DEFENDANT**

**JOHN KIMUTAI MISIK ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction.**

1. This ruling is in respect of the 1<sup>st</sup> Defendant/Applicant's Notice of Motion application dated 8<sup>th</sup> July, 2024 and the 2<sup>nd</sup> Defendant/Applicant's Chamber Summons application dated 28<sup>th</sup> November, 2024.
2. The Notice of Motion application dated 8<sup>th</sup> July, 2024 is expressed to be brought under Sections 1, 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 10 Rule 11 & Order 50 of the Civil Procedure Rules, Article 159 of *the Constitution* of Kenya and Section 3 of the *Environment and Land Court Act*.
3. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to set aside its judgement and/or any consequential orders a rising (sic) there from for the non-attendance during the prosecution of the case on the part of the 1<sup>st</sup> Defendant/Applicant.
  - d. That upon the grant of prayers (sic) (3) above the Honourable Court do give directions thereafter.



- e. That provided costs of this application be provided for. (sic)
4. The application is based on the grounds on its face and the supporting affidavit of Rael Cheptonui Soo sworn on 8<sup>th</sup> July, 2024.
5. The Chamber Summons application dated 28<sup>th</sup> November, 2024 is expressed to be brought under Article 159(2) of *the Constitution* of Kenya and Order 9 Rule 9 (a) & Order 10 Rule 11 of the Civil Procedure Rules 2010.
6. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this Honourable Court be pleased to set aside its judgement and/or any consequential orders arising during the prosecution of the case on the part of the 2<sup>nd</sup> Defendant/Applicant.
  - e. That costs of this application be provided for.
7. The application is based on the grounds on its face and the supporting affidavit of John Kimutai Misik sworn on 28<sup>th</sup> November, 2024.

#### **Factual Background.**

8. The Plaintiff/Respondent commenced the present proceedings vide the Originating Summons dated 6<sup>th</sup> July, 2018 where he sought the following prayers;
  - a. The Defendants/Respondents claim/interest to that portion measuring 0.57 Ha or thereabouts comprised in that parcel of land known as Kericho/Roret/521 stands extinguished by lapse of time.
  - b. That the Plaintiff/Applicant has obtained title and ownership of that portion of land measuring 0.57 Ha or thereabouts comprised in that parcel of land known Kericho/Roret/521 (sic) by virtue of the doctrine of adverse possession.
  - c. That pursuant to the foregoing the Land Registrar Kericho County or the Land Registrar currently in lawful custody of the Land Register in respect of land parcel No. Kericho/Roret/521 be ordered to delete the name of Kimisik Soo from the register and/amend (sic) the map to reflect the area so curved in favour of the Plaintiff and issues him with fresh title to the portion measuring 0.57 Ha or thereabouts comprised in the said land.
  - d. For an order that the Applicant is entitled to costs of this suit.
  - e. Any order that the Honourable Court shall deem fit (sic) to grant.
9. On 1<sup>st</sup> October, 2019 the 1<sup>st</sup> Defendant/Applicant filed a Replying Affidavit to the Originating Summons sworn on the same date.
10. The 2<sup>nd</sup> Defendant/Applicant did not file any response to the Originating Summons.
11. The suit was heard and on 26<sup>th</sup> May, 2022 the Court delivered judgement in favour of the Plaintiff/Respondent.



12. The application dated 8<sup>th</sup> July, 2024 first came up for directions on 16<sup>th</sup> July, 2024 when the Court directed that it be heard on 25<sup>th</sup> September, 2024.
13. On 25<sup>th</sup> September, 2024 the 2<sup>nd</sup> Defendant requested and was granted time to seek legal representation.
14. On 9<sup>th</sup> December, 2024, the application dated 28<sup>th</sup> November, 2024 first came up for hearing. The Court directed that the said application be served upon the Respondents.
15. The application dated 28<sup>th</sup> November, 2024 came up for hearing on 4<sup>th</sup> February, 2025. The Court issued directions that the applications dated 8<sup>th</sup> July, 2024 and 28<sup>th</sup> November, 2024 shall be heard by way of written submissions.
16. It is important to note that both applications are filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and they are seeking orders for setting aside the Judgment delivered herein.
17. The applications were mentioned severally to confirm filing of submissions and on 7<sup>th</sup> April, 2025 they were reserved for ruling.

#### **The 1st Defendant/Applicant's Contention in the application dated 8th July, 2024**

18. The 1<sup>st</sup> Defendant/Applicant contends that she lives in Kaptalationy Village, Kelelwa sub-location, Tulwet Location, Roret Division of Bureti Sub County.
19. She also contends that she was served with the Originating Summons filed in this suit and in response she filed a Replying Affidavit on 1<sup>st</sup> October, 2019.
20. She further contends that her present advocates on record perused the file and advised her that the matter proceeded without her being served.
21. It is her contention that she has confirmed that the 2<sup>nd</sup> Defendant/Respondent filed an application dated 11<sup>th</sup> April, 2023 which was heard and a ruling delivered on 9<sup>th</sup> November, 2023 in addition to other numerous applications and directions that were issued without her being notified.
22. It is also her contention that she has been sickly as she is advanced in age and goes on to state that she was surprised that the 2<sup>nd</sup> Defendant/Respondent who is a son to her deceased co-wife never served her with any documents and neither did he notify or inform her of the developments that have been made in this matter.
23. It is further her contention that the Plaintiff/Respondent also failed to serve her with the documents filed in the present suit.
24. She contends that she has looked at the various affidavits of service filed in the present matter and adds that there is an affidavit of service on the Court record that is sworn by Vincent O. Ogotu on 12<sup>th</sup> February, 2018. She goes on to state that the averments made therein are true as she was served.
25. She further contends that there is another affidavit of service on the Court record sworn on 28<sup>th</sup> September, 2021 by Hillary Kimetto. She goes on to state that in the said affidavit of service, the process server contends that he served her with a mention notice and a Notice of Change of Advocates and alleged that she declined to sign.
26. It is her contention that the said process server did not state if he knew her and who directed him to her. She goes on to state that the said process server also alleged that he served her with directions and yet no such directions were served upon her.



27. It is also her contention that there is another affidavit of service on the Court record sworn on 19<sup>th</sup> October, 2021 by Hillary Kimetto. He deposed that he went to Talationy village within Tulwet. She goes on to state that she does not know any such village known as Talationy.
28. It is further her contention that the said process server stated that he received the documents for service from the Plaintiff/Respondent's Counsel in Kericho at 8:00 O'clock and served them on her and the 2<sup>nd</sup> Defendant/Respondent at 8:30 am.
29. She contends that there are other affidavits of service on the Court record sworn on 20<sup>th</sup> July, 2022 and 18<sup>th</sup> November, 2022 by Hillary Kimotto (sic). She goes on to state that the attached notices to the said affidavits of service have no dates.
30. She also contends that in the said affidavits of service, the process server alleges that he served her documents on various dates at Kaptalationy (sic) Village and yet she was not within the jurisdiction of this Court and neither was she in her home.
31. She further contends that on 9<sup>th</sup> October, 2021 she was requested by her son to attend to her daughter in law Mercy Chepkorir who resides in Eldoret and was due to deliver a baby.
32. It is her contention that on 10<sup>th</sup> October, 2021 she boarded a motor vehicle to Eldoret and her daughter in law underwent a caesarian section procedure on 11<sup>th</sup> October, 2021.
33. It is also her contention that she travelled back to her home on 23<sup>rd</sup> October, 2021 and therefore she was not the one being served by the process server all along.
34. It is further her contention that on 16<sup>th</sup> April, 2022 she was involved in a life-threatening accident when she was travelling to Olunguruone for a function at her daughter's place. She goes on to state that her larger family including her grand children were also involved in the same accident.
35. She contends that she was immobilized as a result of the said accident and she opted to remain at her daughter one Liliy Chepngetich Soo's home in Olunguruone which place was convenient for her to go to Tenwek Hospital as opposed to her home.
36. She also contends that her recovery process was slow since she had a brace on. She goes on to state that she was nursed by her daughter and only returned to her home in mid-December, 2022.
37. She further contends that she is at loss as to who was served by Hillary Kimetto between April to December, 2022.
38. She ends her deposition by stating that it is clear that she was not served with the Court processes and goes on to state that she will be seeking to have Hillary Kimetto, the said process server cross examined on his affidavits of service.

**The Plaintiff/Respondent's Response to the 1<sup>st</sup> Defendant/Applicant's application dated 8<sup>th</sup> July, 2022.**

39. The Plaintiff/Respondent filed a Replying Affidavit sworn on 12<sup>th</sup> August, 2024.
40. He deposes that in the year 2018, he filed the present suit vide an Originating Summons which was served upon the Defendants/Applicants.
41. He also deposes that upon service, the 1<sup>st</sup> Defendant/Applicant filed a Replying Affidavit sworn on 1<sup>st</sup> October, 2019.



42. He further deposes that the Kaptalationy village where the 1<sup>st</sup> Defendant/Applicant resides is also known as Talationy Village.
43. It is his deposition that he has been advised by his Counsel on record that despite service, the Defendants/Applicants failed to defend their claim and/or attend Court for hearing of the suit.
44. It is also his deposition that various affidavits of service were filed as evidence of service. They were sworn on 12<sup>th</sup> July, 2018, 28<sup>th</sup> September, 2021, 19<sup>th</sup> October, 2021, 20<sup>th</sup> July, 2022 and 18<sup>th</sup> November, 2022.
45. It is further his deposition that the 1<sup>st</sup> Defendant/Applicant's contention that the failure to defend the suit was not deliberate and that the suit was heard and determined without her knowledge is misleading. He goes on to state the 1<sup>st</sup> Defendant/Applicant is seeking that the Court entertains her indolence as she concedes that she was aware of the suit and had filed a response to the Originating Summons.
46. He deposes that the Court heard the matter after the Defendants/Applicants failed to attend Court and delivered judgement on 26<sup>th</sup> May, 2022. He adds that the Court found that he was entitled to 0.57 Ha of land parcel No. Kericho/Roret/521 by virtue of adverse possession.
47. He also deposes that the Defendants were served with the Notice of Entry of Judgement, Decree and the order issued by this Court.
48. He further deposes that he was constrained to file the application dated 27<sup>th</sup> September, 2022 seeking among other orders, an order that the Deputy Registrar of this Court executes the application for consent to subdivide, the mutation and transfer forms in order to transfer the said portion of the suit parcel since the Defendants/Applicants neglected, ignored and/or willfully refused to execute them.
49. It is his deposition that the 1<sup>st</sup> Defendant/Applicant has come to Court with unclean hands because she was aware of the suit but was not diligent enough to defend it. He adds that the 1<sup>st</sup> Defendant/Applicant ought to have followed up and/or instructed Counsel immediately after judgement was delivered and not after two years had lapsed.
50. It is also his deposition that the process that led to the issuance of the Certificate of Confirmation of Grant dated 2<sup>nd</sup> April, 2019 in HC Succession Cause No. 273 of 1999 In the matter of the estate of Kimisik Arap Soo was not done in good faith as the Defendants/Applicants were aware of the pendency of the present suit and his claim.
51. It is further his deposition that he has been advised by his Counsel on record that the Court's discretionary power to set aside judgement ought to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake but not to assist a person who deliberately sought to delay the course of justice.
52. He deposes that he is advised by his Counsel on record that the Court will not usually set aside a regular judgement unless it is satisfied that there is a defence that has merit.
53. He also deposes that the 1<sup>st</sup> Defendant/Applicant's Replying Affidavit contained mere denials and averments that obfuscated the facts in the present suit. He adds that the 1<sup>st</sup> Defendant/Applicant contended that he (Plaintiff/Respondent) went to the suit parcel in the year 2010 but failed to provide any evidence.
54. He further deposes that as per the evidence on the Court record, he acquired the suit parcel in the year 1999.



55. It is his deposition that the 1<sup>st</sup> Defendant/Applicant admitted during the succession proceedings that she had sold the suit parcel to him.
56. It is also his deposition that the 1<sup>st</sup> Defendant/Applicant signed a consent on 14<sup>th</sup> June, 2000 to transfer the suit parcel to him. He goes on to state that the 1<sup>st</sup> Defendant/Applicant does not therefore have a credible defence.
57. It is further his deposition that the application under consideration has been brought in bad faith and is an afterthought. He goes on to state that the 1<sup>st</sup> Defendant/Applicant cannot argue that she was unwell in the year 2022 and state that she returned home in December, 2022 and yet the application under consideration was filed two years after the judgement was delivered.
58. He deposes that he has been advised by his advocates on record that the application as filed does not meet the conditions for grant of an order of stay of execution and setting aside of the judgement.
59. He also deposes that the 1<sup>st</sup> Defendant/Applicant has not sufficiently demonstrated how she stands to suffer substantial loss and/or irreparable harm in the event the orders sought are not granted.
60. He further deposes that in as much as the 1<sup>st</sup> Defendant/Applicant contends that she has a right to be heard, the sword of justice cuts both ways and therefore the interests of all the parties have to be taken into account.
61. It is his deposition that the decree has since been executed and a title deed issued in his name.
62. It is also his deposition that by seeking for orders of stay of execution and setting aside of the judgement, the 1<sup>st</sup> Defendant/Applicant is essentially inviting this Court to issue orders in vain as they have been overtaken by events.
63. It is further his deposition that in the event the suit is reinstated, he will be prejudiced as he will be forced to incur costs in the process of transferring and registering the land in his name.(sic)
64. He ends his deposition by stating that he is advised by his advocates on record that litigation must come to an end and that a successful litigant must be given an opportunity to enjoy the fruits of their judgement.

**The 2<sup>nd</sup> Defendant/Applicant's Contention in the application dated 28<sup>th</sup> November, 2024.**

65. The 2<sup>nd</sup> Defendant/Applicant contends that on 23<sup>rd</sup> March, 2023 the area Chief of Tulwet Location visited the homestead of the late Kimisik Arap Soo and informed them of the impending survey and subdivision exercise that was to be carried out on land parcel No. Kericho/Roret/521 pursuant to a judgement and decree of this Court.
66. He also contends that he was caught unaware and immediately sought to find out what the suit was about. He goes on to state that he established that the matter had been pending in Court since the year 2018.
67. He further contends that he instructed his former Counsel to ascertain the status of the said matter and it was established that a judgement had already been delivered and implementation orders subsequently issued.
68. It is his contention that he has been advised by his Counsel on record that pleadings must be served upon all the Defendants in a suit.



69. It is also his contention that the pleadings in the present matter were never served upon him and he was therefore condemned unheard which is against the principles of natural justice. He goes on to state that he was not notified of the entry of the judgement against himself as required by law.
70. It is further his contention that he has been advised by his Counsel on record that lack of proper service is a ground to set aside an ex parte judgement.
71. He contends that the resultant decree and subsequent orders of this Court are premature and illegal as the Plaintiff/Respondent failed effect service of pleadings.
72. He also contends that the property subject to the present suit is registered in the name of Kimisik Arap Soo (deceased). He goes on to state that this was the sole asset of the said estate that is available for distribution to the beneficiaries. This is as per the Certificate of Confirmation of Grant issued in Kericho HC Succession Cause No. 273 of 1999.
73. He further contends that he is one of the administrators of the estate of Kimisik Arap Soo (deceased) and goes on to state that unless orders of stay of execution are granted, the entire estate of Kimisik Arap Soo stands to be disinherited rendering his application an exercise in futility.
74. It is his contention that during the duration of the case, he was experiencing health problems that severely hampered him and his ability to respond to the present matter.
75. It is also his contention that the 1<sup>st</sup> Defendant/Respondent is aware and agreeable to his application.
76. He ends his deposition by stating that it is in the interest of justice and fair hearing that he makes the application under consideration and he urges the Court to allow it.

**The Plaintiff/Respondent's Response to the 2<sup>nd</sup> Defendant/Applicant's application dated 28<sup>th</sup> November, 2024.**

77. The Plaintiff/Respondent filed a Replying Affidavit sworn on 31<sup>st</sup> January, 2025.
78. He reiterates his averments in the Replying Affidavit sworn on 12<sup>th</sup> August, 2024 and contends that the Defendants/Applicants were given an opportunity to be heard but they squandered it.
79. He deposes that contrary to the assertions by the 2<sup>nd</sup> Defendant/Applicant that he was caught unawares when the Chief Tulwet Location visited the suit parcel, it is evident that the Defendants/Applicants were served with a Notice of Entry of Judgement, decree and order of this Court. This is as per the affidavit of service sworn on 20<sup>th</sup> July, 2022.
80. He also deposes that it is inconceivable that the 2<sup>nd</sup> Defendant/Applicant was unaware of the judgement of this Court and the subsequent orders of execution and yet they were served with all the Court processes.
81. He further deposes that a temporary injunction had been issued restraining the Defendants/Applicants from trespassing, ploughing, damaging, wasting, alienating, transferring or in any way interfering with his use, occupation, possession and ownership of a portion of land parcel No. Kericho/Roret/521 measuring 0.57 Ha.
82. It is his deposition that the claim by the Defendants/Applicants that they were not aware of this matter is misleading because if it were true then they would have annexed a draft defence containing triable issues (sic). He then reiterates his averments in the Replying Affidavit sworn on 12<sup>th</sup> August, 2024.



83. It is also his deposition that the 2<sup>nd</sup> Defendant/Applicant's application is an afterthought and even if the 2<sup>nd</sup> Defendant/Applicant was unwell for the entire duration of the suit, nothing precluded him from seeking advise of Counsel and approaching this Court instead of filing the application under consideration two years after judgement was entered and executed.
84. It is further his deposition that the 2<sup>nd</sup> Defendant/Applicant's application does not meet the prerequisite conditions for grant of an order for stay of execution and the setting aside of the judgement as the 2<sup>nd</sup> Defendant/Applicant has not demonstrated how he stands to suffer substantial loss and/or irreparable harm in the event the orders sought are not granted.
85. He deposes that in as much as the 2<sup>nd</sup> Defendant/Applicant cites his right to be heard, the sword of justice cuts both ways and therefore all the interests of the parties have to be taken into account.
86. He reiterates that the decree has been executed and a title deed issued in his name.
87. He also reiterates that the 2<sup>nd</sup> Defendant/Applicant is seeking an order of stay of execution and setting aside of the judgement which is essentially inviting the Court to issue orders in vain as they have been overtaken by events.
88. He further reiterates that in the unlikely event that the present suit is reinstated, he will be prejudiced as he will be forced to incur costs and expenses in the process of having the said parcel of land transferred and registered in his name. (sic)
89. He ends his deposition by stating that he has been advised by his advocates on record that litigation must come to an end and a successful litigant must be afforded an opportunity to enjoy the fruits of his/her judgement.

#### **The 1<sup>st</sup> Defendant/Respondent's Response to the 2<sup>nd</sup> Defendant/Applicant's application**

90. The 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit sworn on 6<sup>th</sup> January, 2025.
91. She deposes that she supports the application dated 25<sup>th</sup> November, 2024.
92. She also deposes that the 2<sup>nd</sup> Defendant/Applicant is her step son and a fellow administrator of the estate of her late husband.
93. She further deposes that the 2<sup>nd</sup> Defendant/Applicant has been unwell for quite sometime and as such he could not have actively participated in the present proceedings.
94. It is her deposition that the 2<sup>nd</sup> Defendant/Applicant's application has merit and it should be allowed as prayed.
95. She ends her deposition by stating that the rules of justice dictate that a party should not be condemned unheard and therefore she fully supports the 2<sup>nd</sup> Defendant/Applicant's application.

#### **Issues for Determination.**

96. The Plaintiff/Respondent and the 2<sup>nd</sup> Defendant/Applicant filed their submissions on 3<sup>rd</sup> March, 2025. The 1<sup>st</sup> Defendant/Applicant filed her submissions on 6<sup>th</sup> March, 2025.
97. The 1<sup>st</sup> Defendant/Applicant submits on the following issues;
  - a. Whether the Applicant has met the criteria for the grant of orders sought.
  - b. Who should have costs of this suit.



98. On the first issue, the 1<sup>st</sup> Defendant/Applicant relies on Order 42 Rule (sic) of the Civil Procedure Rules, the judicial decisions of *Njenga v Njeri & 2 Others* (Civil Appeal E125 of 2023) [2023] KEHC 23991 (KLR) (24<sup>th</sup> October 2023), *Shell Ltd vs Kibiru and another* (1989) KLR 410, *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR and submits that if the judgement is executed, she will suffer a miscarriage of justice.
99. The 1<sup>st</sup> Defendant/Applicant also submits that she will suffer irreparable loss that cannot be adequately compensated by an award of damages if orders of stay of execution are not granted.
100. The 1<sup>st</sup> Defendant/Applicant further submits that an order of stay of execution of the judgement should be granted in order to preserve the subject matter of the land in dispute.
101. The 1<sup>st</sup> Defendant/Applicant submits that the application under consideration has been filed without inordinate delay.
102. The 1<sup>st</sup> Defendant/Applicant reiterates that during the pendency of the suit she was involved in a road traffic accident and also reiterates that at the time she is alleged to have been served with notices in the affidavit of service sworn on 14<sup>th</sup> October, 2021, she was in Eldoret taking care of her daughter in law.
103. The 1<sup>st</sup> Defendant/Applicant relies on the judicial decision of *CMC Holdings Ltd vs Nzioki* [2004] KLR 173 and urges the Court to set aside the judgement.
104. The 1<sup>st</sup> Defendant/Applicant concludes her submissions by relying on the judicial decision of *Republic vs Rosemary Wairimu Munene ex parte Applicant vs Ihuru Dairy Farmers Co-operative Society Ltd* (no citation given) and urges the Court to allow her application as prayed.
105. The 2<sup>nd</sup> Defendant/Applicant submits on the following issues;
  - a. Whether the Applicant has met the criteria for the grant of orders sought.
  - b. Who should have costs of this suit.
106. The 2<sup>nd</sup> Defendant/Applicant relies on Order 42 Rule (sic) of the Civil Procedure Rules, the judicial decisions of *Njenga v Njeri & 2 Others* (Civil Appeal E125 of 2023) [2023] KEHC 23991 (KLR) (24<sup>th</sup> October 2023), *Shell Ltd vs sKibiru and another* (1989) KLR 410, *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR and submits that unless orders of stay of execution are granted, the estate of *Kimisik Arap Soo* will be disinherited rendering the application dated 28<sup>th</sup> November, 2024 an exercise in futility (sic).
107. The 2<sup>nd</sup> Defendant/Applicant also submits that should the judgement of the Court be executed, the estate of *Kimisik Arap Soo* will lose a portion of the land of the deceased despite non-service of the pleadings upon them.
108. The 2<sup>nd</sup> Defendant/Applicant further submits that the Court should issue orders of stay of execution so as to preserve the subject matter of the suit.
109. It is the 2<sup>nd</sup> Defendant/Applicant's submissions that the decision whether or not to set aside an ex parte judgement is discretionary.
110. It is also the 2<sup>nd</sup> Defendant/Applicant's submissions that he was not notified of the entry of judgement as required by law and lack of proper service is a ground to set aside an ex parte judgement.
111. The 2<sup>nd</sup> Defendant/Applicant reiterates that he only came to know of the suit when their area Chief visited their homestead which shows that the matter proceeded without his participation and therefore the judgement delivered on 26<sup>th</sup> May, 2022 should be set aside.



112. The 2<sup>nd</sup> Defendant/Applicant concludes his submissions by relying on the judicial decision of CMC Holdings Ltd vs Nzioki [2004] KLR 173 and urges the Court to allow his application as prayed.
113. The Plaintiff/Respondent submits on the following issues;
  - a. Whether there was proper service of the Originating Summons and other Court processes upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants.
  - b. Whether the judgement in favour of the Plaintiff/Respondent was obtained irregularly.
  - c. Whether the Applicants are deserving of an order of stay of execution.
  - d. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants applications have merit.
114. On the first issue, the Plaintiff/Respondent relies on Order 5 Rule 8 of the Civil Procedure Rules and submits that the Defendants/Applicants were served with the Originating Summons.
115. The Plaintiff/Respondent also submits that an affidavit of service was filed by one Vincent O. Ogotu that was sworn on 12<sup>th</sup> July, 2018 as evidence of the said service.
116. The Plaintiff/Respondent further submits that the Defendants/Applicants refused to sign the said documents but this did not amount to improper service.
117. The Plaintiff/Respondent relies on Order 5 Rule 13 of the Civil Procedure Rules and submits that it is baffling how the Defendants/Applicants are now feigning ignorance of the present proceedings.
118. The Plaintiff/Respondent reiterates his averments in his Replying Affidavits and submits that proper service was effected upon the Defendants/Applicants.
119. On the second issue, the Plaintiff/Respondent relies on the judicial decision of William Maina Macharia & another v Francis Barchuro & 3 others [2018i] eKLR [2018] KEELC 2242 (KLR) and while reiterating his averments in his Replying Affidavits submits that the Defendants/Applicants have not demonstrated that they have a defence that raises triable issues.
120. The Plaintiff/Respondent relies on the judicial decision of CAO v JO [2018] eKLR and submits that the Defendants/Applicants were properly served and therefore the judgement entered in this matter was regular.
121. On the third issue, the Plaintiff/Respondent relies on the judicial decision of Peter Ngugi Kainamia & another vs Tabitha Wambui Munyao & 7 Others [2020] eKLR and submits that the Defendants/Applicants have failed to demonstrate that they will suffer substantial loss if an order for stay of execution is not granted.
122. The Plaintiff/Respondent also submits that the applications under consideration were filed two years after the delivery of the judgement which delay should be termed as inordinate.
123. The Plaintiff/Respondent further submits that the Defendants/Applicants have not given any security for due performance of the decree and in any event, the judgement of this Court has already been implemented.
124. On the fourth issue, the Plaintiff/Respondent relies on the judicial decision of William Macharia Maina & another v Francis Barchuro & 3 Others Kibiwott Yator Kuryases & 8 others (Interested Parties) eKLR (sic) and urges the Court to dismiss the Defendants/Applicants application.



### **Analysis and Determination.**

125. I have considered the 1<sup>st</sup> Defendant/Applicant and the 2<sup>nd</sup> Defendant/Applicant's applications, the responses thereto and the rival submissions.
126. It is my view that the following issues arise for determination;
  - a. Whether the judgement delivered on 26<sup>th</sup> May, 2022 should be set aside.
  - b. Who should bear costs of the applications.

#### **A. Whether the judgement delivered on 26th May, 2022 should be set aside.**

127. The 1<sup>st</sup> Defendant/Applicant is seeking that the Court sets aside the judgement delivered on 26<sup>th</sup> May, 2022.
128. The 1<sup>st</sup> Defendant/Applicant contends that even though she was served with the Originating Summons, she was not served with the other Court processes.
129. The 1<sup>st</sup> Defendant/Applicant also contends that in early October, 2021 she was in Eldoret and she was therefore not served with various hearing and mention notices as alleged by the process server Hillary Kimetto vide his Affidavit of Service sworn on 19<sup>th</sup> October, 2021.
130. The 1<sup>st</sup> Defendant/Applicant further contends that in April, 2022 she was involved in a road accident and spent the rest of that year in Olunguruone recuperating and was not therefore at her home as alleged.
131. The 1<sup>st</sup> Defendant/Applicant has attached to her affidavit in support of the application a Copy of a Birth Certificate No. 6607168. It is issued on 23<sup>rd</sup> March, 2022. It states that Jael Cherono Misik was born on 11<sup>th</sup> October, 2021 and her parents are Mercy Chepkorir and Robert Kiprotich Misik.
132. The 1<sup>st</sup> Defendant/Applicant has also attached the affidavits of service sworn by Hillary Kimetto on 20<sup>th</sup> July, 2022 and 18<sup>th</sup> November, 2022.
133. The 1<sup>st</sup> Defendant/Applicant has further attached a copy of a receipt issued by Wareng Travel Luxury Shuttle. The date of travel is stated to be 10<sup>th</sup> October, 2021 and it is for travel from Kericho to Eldoret.
134. The 1<sup>st</sup> Defendant/Applicant has attached a "Note Creation Summary" issued by Tenwek Hospital which states that she was involved in a road traffic accident on 20<sup>th</sup> April, 2022. It states that she attended their clinic on 6<sup>th</sup> May, 2022, 12<sup>th</sup> May, 2022 and 23<sup>rd</sup> September, 2022. The date the said document was issued is not clear.
135. The 2<sup>nd</sup> Defendant/Applicant is also seeking that the Court sets aside its judgement.
136. The 2<sup>nd</sup> Defendant/Applicant contends that he only became aware of the present matter on 23<sup>rd</sup> March, 2023 when their area Chief visited their home and informed them that there would be a survey and subdivision exercise of the suit parcel pursuant to the judgement of this Court.
137. The 2<sup>nd</sup> Defendant/Applicant contends that he was not served with any pleadings in this matter but despite the said assertion, the 2<sup>nd</sup> Defendant/Applicant contends that he was unable to file a response to the present matter because he was unwell.
138. Among the documents attached by the 2<sup>nd</sup> Defendant/Applicant to his affidavit in support of the application, are undated handwritten treatment notes and an "OGD Report" issued by Siloam Hospital on 14<sup>th</sup> November, 2022. The report is signed by Dr. Ismail Hegazy.



139. The 2<sup>nd</sup> Defendant/Applicant has also attached a Surgical Discharge Summary issued by Roret Sub-County Hospital on 19<sup>th</sup> July, 2022.
140. In response, the Plaintiff/Respondent contends that the Defendants/Applicants were served with the pleadings in this matter.
141. The Plaintiff/Respondent also contends that the Defendants/Applicants were also served with a Notice of entry of judgement together with the Decree of this Court.
142. The Plaintiff/Respondent further contends that the judgement entered by the Court was a regular one which can only be set aside if there is a Defence that raises triable issues.
143. The Plaintiff/Respondent submits that the applications under consideration have been filed two years after judgement was delivered and therefore they were filed after inordinate delay.
144. The Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) held as follows;

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

145. In the above cited judicial decision, the Court held that in a regular default judgement, the Defendant would have been served with summons to enter appearance but for one reason or another failed to enter appearance or file a Statement of Defence. In an irregular default judgement, judgement would



- have been entered against a Defendant who would not have been properly served with summons to enter appearance.
146. In the present matter, this Court will first determine whether the judgement was regularly or irregularly entered.
  147. The 1<sup>st</sup> Defendant/Applicant contends that she was served with the pleadings in this matter and she filed a Replying Affidavit on 1<sup>st</sup> October, 2019.
  148. It is this Court's view that since the 1<sup>st</sup> Defendant/Applicant admits that she was served with the pleadings in this matter and that she filed a response, then the judgement entered against her was a regular default judgement.
  149. The 2<sup>nd</sup> Defendant/Applicant on the other hand contends at paragraph 2 of his affidavit in support of the application that he came to learn about the present proceedings on 21<sup>st</sup> March, 2023 when the area Chief Tulwet Location visited their home and informed them of an impending survey and subdivision exercise on the suit parcel pursuant to a judgement and decree of this Court.
  150. Conversely, at paragraph 12 of the said affidavit, the 2<sup>nd</sup> Defendant/Applicant contends that he was unwell during the duration of this matter and that is what "hampered his ability to respond to this case".
  151. It is evident that the 2<sup>nd</sup> Defendant/Applicant is admitting to having notice of this suit.
  152. Further, there is an affidavit of service on the Court record sworn by Vincent O. Ogotu on 12<sup>th</sup> July, 2018. He deposes that he served the 1<sup>st</sup> Defendant/Applicant and the 2<sup>nd</sup> Defendant/Applicant with the pleadings in the present matter on 12<sup>th</sup> July, 2018.
  153. It is therefore this Court's view that the judgement that was entered against the 2<sup>nd</sup> Defendant/Applicant was also regular default judgment.
  154. In *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* (supra) cited above, the Court of Appeal held that the Court has the discretion to set aside a regular default judgement.
  155. The Court of Appeal also held that the Court should take into consideration the following factors;
    - a. The reason for the failure of the Defendant to file his memorandum of appearance or Defence.
    - b. The length of time that has lapsed since the default judgment was entered.
    - c. Whether the intended Defence raises triable issues.
    - d. The respective prejudice each party is likely to suffer.
    - e. Whether on the whole it is in the interest of justice to set aside the default judgment.
  156. The 1<sup>st</sup> Defendant/Applicant admits that she was served with the pleadings in this matter and that she filed a Replying Affidavit to the Originating Summons.
  157. It is the 1<sup>st</sup> Defendant/Applicant's contention that subsequently, she was not served with any Court processes. The 1<sup>st</sup> Defendant/Applicant has set out in great detail the averments of the affidavits of service sworn by Hillary Kimetto on 28<sup>th</sup> September, 2021, 19<sup>th</sup> October, 2021, 20<sup>th</sup> July, 2022 and 18<sup>th</sup> November, 2022.
  158. The 1<sup>st</sup> Defendant/Applicant contends that at the time the said process server is alleging to have served her, she was not in her home as she was away in Eldoret and/or in Olenguruone.



159. In support of her contention that she was away in Eldoret, the 1<sup>st</sup> Defendant/Applicant has attached to her affidavit in support of the application a copy of a receipt issued by Wareng Travel Luxury Shuttle. The receipt is for KShs. 500/= and the date of travel is 10<sup>th</sup> October, 2021 from Kericho to Eldoret.
160. The 1<sup>st</sup> Defendant/Applicant contends that she travelled to Eldoret to take care of her daughter in law who was about to have a baby. She has attached a birth certificate whose details have been set out in the preceding paragraphs.
161. It is this Court's view that the issue of whether or not the 1<sup>st</sup> Defendant/Applicant was in Eldoret and/or Olenguruone in October, 2021 and in April to December, 2022 respectively, is inconsequential.
162. What is evident is that the 1<sup>st</sup> Defendant/Applicant was aware of the pendency of this suit and was under a duty to follow up and find out the progress of the matter.
163. This Court delivered judgement on 26<sup>th</sup> May, 2022. The 1<sup>st</sup> Defendant/Applicant filed her application under consideration on 15<sup>th</sup> July, 2024; This was two years after judgement was delivered.
164. In the judicial decision of Samuel Thuo Mugure v Erastus Mungai Kiarie & 2 others [2019] KEELC 1997 (KLR) the Court held as follows;
- “A litigant must be vigilant and keen to follow up the progress of suits to ensure they are determined expeditiously. The long period of time taken before the 1<sup>st</sup> Defendant took action in this case only goes to show that the 1<sup>st</sup> Defendant had little regard for these proceedings.”
165. It is this Court's view that the 1<sup>st</sup> Defendant/Applicant was not as vigilant as she ought to have been and this Court cannot therefore exercise its discretion in her favour.
166. Further, the suit was filed in the year 2018 and it took four years to have the matter determined. The present application had been brought two years post judgment. There is no doubt that setting aside the judgment in this matter will be prejudicial to the Plaintiff/Respondent and is therefore not in the interest of justice.
167. The judgement of this Court was delivered on 26<sup>th</sup> May, 2022. The 2<sup>nd</sup> Defendant/Applicant filed an application dated 11<sup>th</sup> April, 2023 seeking to set aside the judgement of this Court, which application was struck out on 9<sup>th</sup> November, 2023 for failure to comply with the provisions of Order 9 Rule 7 of the Civil Procedure Rules.
168. The 2<sup>nd</sup> Defendant/Applicant thereafter filed the application under consideration that is dated 28<sup>th</sup> November, 2024. The application was therefore filed after a period of two years and six months had lapsed since judgement was delivered.
169. The 2<sup>nd</sup> Defendant/Applicant is seeking that this Court sets aside its judgement on the ground that he was not served with the pleadings in this matter.
170. In response, the Plaintiff/Respondent contends that the 2<sup>nd</sup> Defendant/Applicant was served with the pleadings but he failed to defend the suit.
171. The Plaintiff/Respondent refers to various affidavits of service sworn on 12<sup>th</sup> July, 2018, 28<sup>th</sup> September, 2021, 19<sup>th</sup> October, 2021, 20<sup>th</sup> July, 2022 and 18<sup>th</sup> November, 2022 in support of his assertions that the 2<sup>nd</sup> Defendant/Applicant was served.



172. This Court has established that despite the 2<sup>nd</sup> Defendant/Applicant contending that he became aware of the present proceedings on 23<sup>rd</sup> March, 2023, he admits at paragraph 12 of his affidavit in support of the application that he was experiencing health problems which “hampered his ability to respond to this case”.
173. In support of his contention that he was unwell, the 2<sup>nd</sup> Defendant/Applicant has attached to his affidavit in support of the application, copies of medical documents. Some of those documents are undated while others are dated 14<sup>th</sup> November, 2022 and 19<sup>th</sup> July, 2022.
174. It is not clear when exactly the 2<sup>nd</sup> Defendant/Applicant became aware of the suit but what is evident is that he failed to file a response.
175. It is not disputed that this suit was instituted in the year 2018 and judgement delivered on 26<sup>th</sup> May, 2022.
176. The medical documents that the 2<sup>nd</sup> Defendant/Applicant as attached were issued in July and November, 2022 months after the Court delivered judgement.
177. It is therefore this Court’s view that the 2<sup>nd</sup> Defendant/Applicant has not given sufficient reason for his failure to file his Memorandum of Appearance and Replying Affidavit.
178. As was held in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* (supra) cited above, the Court has to consider whether the intended defence raises triable issues.
179. A perusal of the documents attached to the 2<sup>nd</sup> Defendant/Applicant’s affidavit in support of the application show that the 2<sup>nd</sup> Defendant/Applicant has not attached a draft Replying Affidavit.
180. In the judicial decision of *Mbogo vs Shah* EALR [1968] EA 93 the Court held as follows;
- “A Court’s discretion to set aside an *ex parte* 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.”[Emphasis Mine]
181. In the present matter, it is my view that the 2<sup>nd</sup> Defendant/Applicant has not demonstrated sufficient cause for this Court to exercise its discretion and set aside its judgement.
182. Before penning off, I note that the parties have extensively submitted on whether or not orders of stay of execution should be granted.
183. The 1<sup>st</sup> Defendant/Applicant and the 2<sup>nd</sup> Defendant/Applicant sought for orders of stay of execution pending hearing and determination of the applications under consideration.
184. In the judicial decision of *Issa Ahmed & 15 others vs Mohamed Al-Sawae* [2021] eKLR the Court held as follows;
- “The object and purpose of pleadings is to ensure that litigants come to Court with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration. The pleadings are meant to give each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between the parties, and to prevent any deviation from the



course which litigation on particular causes must take. A Court cannot assume or infer a case by referring to a stray sentence here and a stray sentence there in the pleading. A Court cannot exercise its judicial position to grant a relief which is not even sought by parties in their pleadings as granting the same would lead to a miscarriage of justice.”

185. I cannot therefore consider whether or not orders of stay of execution should be granted because they were sought and intended to be granted pending the inter partes hearing and determination of the applications.

**Disposition.**

186. Taking the foregoing into consideration, I find that the 1<sup>st</sup> Defendant/Applicant’s application dated 8<sup>th</sup> July, 2024 and the 2<sup>nd</sup> Defendant/Applicant’s application dated 28<sup>th</sup> November, 2024 lack merit and are hereby dismissed with costs to the Plaintiff/Respondent.

187. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Rubia for Wambeyi for the 1<sup>st</sup> Defendant/Applicant.

Mr. Kipkorir for Plaintiff/Respondent

TI holding brief for Mr. Nyagaka for the Plaintiff/Respondent.

Court Assistant; Mr. Joseph Makori.

