

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC CASE NO. E043 OF 2021**

**CHRISTINE NDINDA PETER**  
.....**PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JOSEPHINE NZULA MUIA .....1<sup>ST</sup>**  
**DEFENDANT/APPLICANT**  
**BENEDICT MBUVI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the Notice of Motion dated 9<sup>th</sup> April, 2025 brought under the provisions of Sections 1A,1B,3A,20 and 63 of the Civil Procedure Act in addition to Order 10 Rule 11, Order 40 and Order 45 of the Civil Procedure Rules, 2010.
2. The 1<sup>st</sup> Defendant/Applicant seeks the following orders: -
  - 1) **[SPENT]**
  - 2) **THAT this Honourable Court be pleased to review and set aside its 2<sup>nd</sup> and 3<sup>rd</sup> orders it made in a judgment delivered on the 7<sup>th</sup> December, 2022 and a decree issued at Makueni on the 5<sup>th</sup> January, 2023.**
  - 3) **THAT this Honourable Court issue an order prohibiting the Plaintiff/Respondent from interfering with the 1<sup>st</sup> Defendant's/Applicant's use and peaceful occupation of LR MAKUENI/KIOU/1689.**
  - 4) **THAT this Honourable Court do issue a mandamus order compelling the Plaintiff/Respondent to hand over to the 1<sup>st</sup> Defendant/Applicant the title for LR MAKUENI/KIOU/1689 which**

**she is forcefully and unlawfully withholding having taken the same from Makueni County Lands Registry without my express permission or otherwise.**

**5) THAT this Honourable Court do issue a mandamus order compelling the Government Surveyor in charge of Mukaa Sub-County to redraw the boundaries between LR MAKUENI/KIOU/1688 and LR MAKUENI/KIOU/1689 in the presence of the parties in this case herein.**

**6) THAT costs be provided for.**

3. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Josephine Zula Muia of even date.
4. The Applicant averred judgement was delivered against her by this Court on 7<sup>th</sup> December, 2022. She further averred that she was not served with summons to enter appearance or the suit papers by the Plaintiff and only came to learn of the case on 11<sup>th</sup> September, 2024 when she visited the court registry. The Applicant averred that she does not dispute the decree in terms of order number one. However, she contended that orders 2 and 3 of the decree are harsh and punitive. She deponed that she was not given an opportunity to be heard as per the rules of natural justice.
5. Opposing the application, the Plaintiff/Respondent filed a replying affidavit sworn by herself on 27<sup>th</sup> May, 2025. She averred that the 1<sup>st</sup> Defendant was duly served with summons to enter appearance, plaint, witness statement and a list of documents. She added that the 1<sup>st</sup> Defendant elected not to participate in these proceedings and the matter proceeded to formal proof hearing.

6. The Respondent contended that she would be prejudiced if the application is allowed as the Applicant intends to deny her from enjoying the fruits of judgment. She urged the court to dismiss the application with costs.
7. The application was canvassed by way of written submissions.
8. In the Applicant's submissions dated 3<sup>rd</sup> June, 2025, Counsel identified three issues for determination namely: -
  - a) *Whether there was a validly and unambiguous executed contract of a sale of land between the parties;*
  - b) *Whether there was a consent by the Land Control Board of the local area;*
  - c) *Whether the Applicant has established a prima facie case on the even application against the Plaintiff/Respondent.*
9. Submitting on issue c), Counsel contended that the Applicant was not served with the suit papers which was a violation of Section 20 of the Civil Procedure Act. It was further contended that the default judgment obtained by the Plaintiff gave her undue advantage as the Applicant was condemned unheard.
10. Counsel relied on the decision of the court in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** to buttress the submission that the Applicant had established a prima facie case with regards to prayer number two of the application.
11. The Plaintiff/Respondent did not file her submissions in respect of the instant application.
12. After perusal of the application, the replying affidavit and the Applicant's submissions, the sole issue for determination is as follows: -
  - a) *Whether the judgment delivered on 7<sup>th</sup> December, 2022 and the subsequent decree ought to be set aside?*

13. The court is vested with unfettered discretion to set aside ex parte judgment and such discretion must be exercised judiciously. The governing provisions on setting aside a judgment which has been entered in default of defence are spelt out under Order 10 Rule 11 of the Civil Procedure Rules, 2010 outlines as follows: -

**‘Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.’**

14. Being a discretionary power, the Court of Appeal observed as follows in **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** with regard to the setting aside of *ex-parte* orders: -

***“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”***

15. The Court of Appeal went on further to state as follows: -

***“The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the Applicant failed to turn up for hearing on the hearing date but also whether the Applicant has reasonable defence which is usually referred to as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.***

16. In **Shah v Mbogo [1967] EA 116** at 123B Harris J, judiciously held as follows:-

*“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”*

17. Similarly, in **Patel v EA Cargo Handling Services Ltd [1974] 1 EA 75 (CAM)** the Court of Appeal aptly held thus: -

*“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 wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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.”*

18. The record shows that the 1<sup>st</sup> Defendant was personally served with summons to enter appearance together with the plaint and witness statements on 14/01/2022. The record further shows that Ali Simba Kalii, a duly licensed court process server filed an affidavit of service on 25/01/2022. At paragraph 5 of the said affidavit of service, the deponent averred as follows: -

*“The 1<sup>st</sup> Defendant accepted service but declined to sign arguing that she had not been requested for transfer by the Plaintiff and furthermore she had signed the sale agreement...”*

19. Interestingly, in her supporting affidavit to the instant application, the Applicant advanced a similar argument at paragraphs 3 and 15. She averred that indeed she had executed a sale agreement with the Plaintiff and that she did not refuse to transfer the 4½ acres sold to the Plaintiff. She cited the Plaintiff's uncooperativeness and unavailability when required to go before the Land Control Board as required.
20. From the foregoing, it is inconceivable that that the grounds being advanced by the Applicant now in support of the application were somehow known by the court process server at the time of service. How else would the court process server have known the context surrounding the 1<sup>st</sup> Defendant's failure to transfer the suit property to the Plaintiff if they had never come into contact?
21. The argument that the 1<sup>st</sup> Defendant was not served with court process is therefore implausible and the subsequent entry of interlocutory judgment on 21/03/2022 was regular and procedural.
22. It is also apparent from the annexures presented in support of the application that a draft statement of defence is glaringly missing. Again, it is also evident that the application herein was made after two years and four months after final judgment.
23. Regarding issues a) and b) of the Applicant's submissions, which are tied to prayers 3, 4 and 5 of the application, it is noteworthy that this court duly delivered a decision on the issues regarding ownership of the suit property in the final judgment dated 7<sup>th</sup> December, 2022. It is therefore inappropriate to reopen the dispute on the substantive issues of whether there was a valid contract or whether consent of the Land Control Board was issued because the court is already *functus officio*.

24. The above position was endorsed by the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** where the Court observed as follows:-

*“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts.”*

25. Accordingly, after thorough analysis of the application, it is clear that the Applicant has not present any arguable defence which can necessitate the court’s exercise of discretion for setting aside the judgment and decree in her favour. No other sufficient cause has been demonstrated for an award of the orders which were sought.

26. In the end, the application herein is devoid of merit and accordingly it is dismissed with costs to the Respondent.

.....

**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS  
THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**IN THE PRESENCE OF:**

Mr. Mutiso for Applicant

Mr. Munyasya for Respondent.

Court assistant – Steve Musyoki

ORIGINAL