

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E028 OF 2025

ELIZABETH **JUDDY**
OPIYO-----PLAINTIFF/RESPONDENT

VERSUS

PHILIP **RUTO** **ROTINO-----**
DEFENDANT/APPLICANT

RULING

- 1.** Before the court is an application dated **29/10/2025**, seeking stay, setting aside, discharge, and or variation of the orders issued on **6/10/2024**. The application is based on the grounds set on its face and in a supporting affidavit of Philip Ruto Rotino, sworn on **29/10/2025**.
- 2.** It is deposed that the defendant/applicant only became aware of the existence of this suit after he was physically served with the interim orders. The applicant deposes that despite the plaintiff knowing both his physical address and WhatsApp number, she opted to serve him through an email address that he no longer uses or has access to.

3. The defendant deposes that, being a retiree, he rarely accesses his emails; otherwise, he was unable to know what had been served via email.
4. The defendant deposes that the mode of service used by the plaintiff was deliberate to ensure that he was not aware of the existence of the suit or the application dated **30/6/2025** that which was unopposed.
5. The defendant deposes that since he was not served through a known medium of communication, he was unable to defend himself, and the court condemned him unheard, contrary to **Article 50** of the Constitution.
6. The defendant deposes that the plaintiff is well known to him since the demise of his wife, who has been causing disturbance every other time, threatening him, claiming to be his wife, which is untrue.
7. The defendant deposes that he had a brief relationship with the plaintiff and was blessed with one child before the relationship stopped, after she became a nuisance to his life, as per attached demand letters annexed as **PRR-(1)**.
8. The defendant deposes that upon the demise of his wife, the plaintiff forcefully moved into the matrimonial home without his consent or authority,

and it took the intervention of the community to force her out of the matrimonial home.

- 9.** The defendant deposes that he is suffering from diabetes, kidney diseases and mild dementia, conditions which have been exacerbated by the passing of his wife and therefore there is a possibility that he could have been forced to append his signature or thumb print on documents without his knowledge or recollection as per attached medical reports marked **PRR-(2)** and a certificate as a person with disability marked **PRR-(3)**.
- 10.** The defendant deposes that he neither entered into any memorandum of understanding with the plaintiff nor did he undertake to transfer any parcel of land to her, subject to commencing succession proceedings in respect of his late father's estate.
- 11.** The defendant deposes that the memorandum of understanding referred to by the plaintiff is a forgery, as he was not aware of the same, nor did he affix his thumbprint on the said document; otherwise, he has made a report to the police as per annexure marked **PRR-(4)**. The defendant deposes that he never entered into any loan agreement or received **Kshs. 27,000,000/=** from the plaintiff or offered any of the

suit premises as security or collateral to any loan or debt.

- 12.** The defendant deposes that from the foregoing, the plaintiff approached this court and obtained ex parte orders based on falsehood and misrepresentation with unclean hands.
- 13.** The defendant deposes that as of **30/6/2025**, when this application was filed he had already leased out a portion measuring **70** acres of the Chepchoina Settlement Scheme Phase 1 to one Joseph Njenga for a period of **5** years as per annexure **PRR-9(a)** and **(b)**, on top of selling approximately **52** acres to Jackson Maiywa Moiben, leaving a portion measuring **62.55** acres to his daughter as per annexures marked **PRR-6(a)** and **(b)**.
- 14.** The defendant deposes that the orders issued on **6/10/2025** are already overtaken by events, have no real impact, are moot, are academic, and of no practical effect. Further, the defendant deposes that the said orders shall have adverse effects on third parties who are not parties to these proceedings, with no opportunity to be heard.
- 15.** The defendant deposes that he stood to suffer real and substantial loss if the application is not heard expeditiously and the orders discharged or varied;

otherwise, there will be no prejudice occasioned to the plaintiff if the reliefs sought are granted.

- 16.** The application is opposed through a replying affidavit sworn by Elizabeth Judy Opiyo on **10/11/2025**, for lack of merit and as an abuse of the court process since the defendant was duly served with the pleading vide his undisputed email address rotinophilip3@gmail.com, going by the affidavit of service attached as **EJO-(1)**.
- 17.** The plaintiff denies the allegation in paragraphs **11**, **12**, and **13** of the replying affidavit on any alleged disturbances or force acts to append his signature or thumbprint on documents without his knowledge.
- 18.** On the contrary, the plaintiff deposes that the defendant voluntarily appeared before M/S Fancy Chebet Ngetich Advocates at Katina & Co. Advocates, who were their instructed advocates to execute a memorandum of understanding dated **26/11/2024**, including giving the details of the amount owed and the parcel numbers, since she was not privy to such information, in which the defendant acknowledged owing **Kshs. 27,000,000/=** and undertook to transfer the land to her.
- 19.** Further, the plaintiff denies being summoned by the police or the Directorate of Criminal Investigations

regarding the alleged forgeries. The plaintiff deposes that she came to court because the defendant became evasive in implementing the terms of the memorandum of understanding, and after she discovered that he owns parcel **No. 298**, Chepchoina Settlement Scheme Phase 1. The plaintiff denies that she relied on any falsehood or misrepresentation of facts in obtaining the interim orders.

20. The plaintiff terms the alleged lease and sale agreements contained in paragraphs **20** and **21** of the supporting affidavit as fiction and means to defeat the cause of justice.

21. The plaintiff denies that the interim orders had been overtaken by events; otherwise, the so-called third parties have not sworn any affidavit to verify the existence of the alleged lease or sale agreements.

22. Again, the plaintiff denies that the defendant could suffer any real or substantial loss as pleaded without the variation of the interims orders, since he had an opportunity to oppose the application but chose not to do so; otherwise, the present application is an afterthought.

23. The plaintiff relies on written submissions dated **11/11/2025**. Reliance is placed on the **Court of Appeal Civil Appeal No. E007 of 2022** that **Order**

5 Rule 22B of the Civil Procedure Rules service of court processes through electronic email is legal, and in this case, there is an affidavit of service confirming there was an electronic mail service delivery receipt to his email, which he has not disputed ownership of.

24. Order 40 Rule 7 of the Civil Procedure Rules provides that an order for an injunction may be discharged, varied, or set aside by the court on an application made thereto by any party dissatisfied with such an order.

25. In **Madhyan -vs- Wema Transporters & 4 others (Civil Appeal E787 of 2021) [2025] KECA 1152 (KLR) (20 June 2025) (Judgment)**, the court cited **Mrao Ltd -vs- First American Bank of (K) Ltd & Others [2003] KECA 1175 [KLR]**, that the definition of *prima facie* case underscores the importance of substance over form, the judicial task being to interrogate whether the facts disclose an arguable right deserving protection, other than merely to recite the phrase “prima facie case”.

26. The court said that the right of a registered proprietor under **Section 26(1)** of the Land Registration Act is protected unless it is shown that the title was acquired through fraud or misrepresentation.

27. In **Baha Durali Ebrahim Shamji -vs- Ah Noor Jamal & Others [1998] eKLR**, the court observed that a litigant who obtains ex parte orders must not withhold material facts which might influence the court's decision, and if he does, the court is entitled to discharge the order even if the omitted facts would not have led to a different result.
28. The jurisdiction to vary, set aside, or discharge an interim order is discretionary. In **Ragai -vs- Barclays Bank of Kenya [2002] I KLR 647**, Ringera J, as he then was, said that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same would, on an application of the party aggrieved, be discharged.
29. In considering whether there has been relevant non-disclosure and what the consequence are the court should attach to any failure to comply with the duty to make full and frank disclosure, the court in **Coast Apparel EPZ Limited -vs- Mtwapa EPZ Limited & Another [2017] KEHC 4025 (KLR)**, observed that the duty of disclosure applies not only to material facts known to the applicant, but also to any additional facts, which he would have known if he had made such inquiries.

- 30.** The court said that an ex parte applicant who fails to make full disclosure is deprived of any advantage he may have derived by that breach of duty and that whether or not the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order, without the examination of the merits, depends on the importance of the fact to the issues which were to be decided by the judge on the application.
- 31.** The court said that whether the non-disclosure was innocent, its knowledge by the applicant was an important consideration, but not decisive; otherwise, not every non-disclosure of facts justifies or requires the immediate discharge of the ex parte order.
- 32.** In **Hasmo Agencies Limited -vs- National Social Security Fund (Land Case E052 of 2023) [2025] KEELC 140 (KLR) (23 January 2025) (Ruling)**, the court said that it is trite that a party who appears before a court has a duty to disclose all material facts.
- 33.** In this suit, the plaintiff in the plaint dated **30/6/2025** and the application dated **30/6/2025** did not disclose the context of the memorandum of understanding and the close relationship she had with the defendant. In the reply to the defence and defence to the counterclaim dated **11/11/2025**, she now terms the

allegations as outrageous, malicious, and that she did not commit such acts. The defendant attacks the legality and the propriety of the memorandum of understanding.

34. The plaintiff does not deny in the replying affidavit to this application that she had a close relationship with the defendant, which formed the basis of the alleged memorandum of understanding.

35. Order 2 Rules 3, 4, 5, and 6 of the Civil Procedure Rules relate to material facts to be pleaded before the court. The plaintiff did not disclose that she had been in a relationship with the defendant, culminating in the signing of the alleged memorandum of understanding. Annexure marked **PRR-(1)-6(a)** and **(b)** have not been disputed by the plaintiff.

36. The plaintiff relies solely on letters dated **4/6/2025**, **22/2/2008**, and an allotment letter dated **14/8/2009** as the basis to obtain an interim injunction. The plaintiff received the letter dated **6/3/2025** denying her any attempts to forcefully enter into any of the defendant's properties without consent, permission, or authority. The letter was clear that the invasion of the defendant's private space after his wife passed on was unwarranted, intolerable, unjustified, and that it

had caused the defendant and his family great emotional and mental anguish.

37. Material facts under **Sections 8** and **16** of the Evidence Act refer to facts relating to motive, preparation, and conduct, and referring to a common intention, existence of a right or custom, state of mind or feeling, showing a system, course of business. The plaintiff did not disclose the nature of the relationship with the defendant, which, in my view, was material.

38. In **Mary Nyambura Kangara -vs- Paul Ogari Mayaka SC Petition No 9 of 2021**, the court held that though marriage has a traditional, religious, economic, social and cultural meaning, it is becoming increasingly common for love consenting adults to live together for long durations with no desire or intention to be within the confines of matrimony, which is an independent relationship outside marriage.

39. In **DAW -vs- EFNA & Another Civil Appeal E035 of 2023 [2025] KECA 1844 [KLR] (7th November 2025) (Judgment)**, the court said that **Section 2** of the Land Act defines what a matrimonial home and that whoever claim beneficial interest or contribution or entitlement in a matrimonial home has to prove the central plank of the proposition he has put forward,

that he was the source of the whole or a very substantial portion of the purchase price.

- 40.** The plaintiff is raising proprietary interests to the land based on a memorandum of understanding, without disclosing the context of such memorandum of understanding, out of which the defendant now discloses was an unwelcome intrusion into his private space after the demise of his wife.
- 41.** The context in which the order was issued, given the statement of defence and counterclaim, has been challenged, as the plaintiff obtained the order without material disclosure and has, as a result tremendous impact on not only the defendant but also other third parties in occupation of the suit property.
- 42.** As much as the defendant does not deny service of summons to enter appearance under **Order 5** of the Civil Procedure Rules, the power to set aside ex parte orders is a discretion. In ***Wachira Karani (supra)***, the court said that the reasons for not attending court must be considered, especially where there is sufficient cause shown.
- 43.** Sufficient cause, as held in ***Shah -vs- Mbogo & Another [1967] E.A.***, depends on the circumstances of each case. The purpose of exercising discretion is to avoid abuse of the court and to avoid unjust or

ridiculous results. The main role of the court, as held in **Patel -vs- E.A. Cargo handling Services Ltd (1974) E.A. 75**, is to do justice to the parties, and where the interests of justice show that a defaulting party had a sound reason, he should be given a hearing. The defendant has availed a report showing his medical conditions and how they may have affected his access to the email. He has also moved to court promptly to file the defence and counterclaim, as well as this application.

- 44.** I do not think he fits a description of one out to derail or obstruct the cause of justice, or one who acted negligently or carelessly. See **Wachira Karani (supra)**.
- 45.** Sufficient cause is a question of fact and is not a straitjacket formula of universal application. The defendant has demonstrated the injustice or hardship the order is causing to him and third parties. The court's discretion, as held in **Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission & 2 others [2013] KECA 282 (KLR)**, aims at avoiding hardship or injustice resulting from an excusable mistake or error to a person who is not out to obstruct or delay the course of justice. See also **CMC Holdings Ltd -vs- James Mumo Nzioki [2004] eKLR**.

46. I find the applicant deserving of the orders sought.
The orders of temporary injunction issued by a ruling dated **24/9/2025** are hereby set aside with no order as to costs.

47. Orders accordingly.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 3rd day of December 2025.

In the presence of:

Court Assistant – Dennis

Arunga for the plaintiff present

Chumba for the defendant for present

A handwritten signature in blue ink, appearing to read 'C.K. Nzili', is written over a large, light grey watermark that says 'ORIGINAL COPY'.

**HON. C.K. NZILI
JUDGE, ELC KITALE.**