

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELC CASE NO. 1417 OF 2014

**EVALYNE
KARIUKI.....PLAINTIFF/RESPONDENT**

WANGARI

-VERSUS-

**LA-NYAVU GARDENS LIMITED.....1ST
DEFENDANT**
**BISHOP BONIFACE E. ADOYO.....2ND
DEFENDANT**
**DR. JOYCE GIKUNDA.....3RD
DEFENDANT/APPLICANT**
**HARUN NYAKUNDI.....4TH
DEFENDANT**

RULING

1. Before this court for determination is the notice of motion dated 3rd June 2025, filed by the 3rd defendant/applicant, and it is expressed to be brought under **Section 80** of the **Civil Procedure Act, Order 22 Rule 22, Order, 45** and **Order 51** of the **Civil Procedure Rules** seeking the following orders:-

1. Spent.

2. Spent.

3. Spent.

4. The orders issued on 29th September, 2020 be set aside and instead the judgment of the court dated 30th October, 2018 and Decree thereto be set aside and leave be granted to the defendants to unconditionally defend suit.

5. Alternatively, in the interest of justice, the orders issued on of 29th September, 2020 be reviewed and/or varied by limiting the liability for the payment of the judgment debt/decretal sum to the 1st Defendant only because of the doctrine of the veil of incorporation.

6. Further, in the interests of justice, the orders of 29th September, 2020 be reviewed and/or varied by altering the calculation of interest of the judgment debt/decretal sum to make it run from the date of filing suit on 7th November, 2014 instead of running from the 10th December, 2007.

7. Costs of this application be provided for.

2. The application is premised on the grounds on its face, and on the affidavit of the 3rd defendant/applicant's sworn on even date. The 3rd defendant/applicant's main contention in these proceedings is that she was denied a fair trial in the processes leading to the court orders which the plaintiff/respondent is currently executing. She deposed that the judgement delivered on 30th October, 2018 and the decree thereto which the plaintiff/respondent is in the process of executing is a default judgment, with an illegal and irregular amended plaint that was lodged without the leave of court and served out of time. Further, that the debt forming the basis of the execution proceedings in question was incurred by the 1st defendant

which is a limited liability company, therefore, and as a director of the 1st defendant, she is not liable personally.

3. The 3rd defendant/applicant further deposed that the high court's decision dated 29th September, 2020 upholding the judgment of 30th October, 2018 was entered without the glaring illegalities attending to it being brought to the court's attention; particularly, that the latter judgment was rendered during a mention date and without any notice being issued to the defendants herein.
4. The plaintiff/respondent filed the replying affidavit sworn on 9th July, 2025. She deposed that she took out proceedings in respect of the judgment debt against the defendants herein jointly and severally and having obtained judgment as such, she is entitled to proceed against any of the defendants personally. That on 10th December, 2007 she transferred Kshs.5,745, 682/- to the defendants who failed to convey the contractual parcel of land, leading her to seek and obtain judgment against the defendants for the same amount with interest from 10th December 2007, being the date when the defendants received the aforesaid amount without the intention of transferring the land in question to her until payment in full. Further, that insolvency proceedings against the defendants herein are live before the high court.

5. The application was canvassed through written submissions. The 3rd defendant/applicant filed her written submissions dated 31st July, 2025. The plaintiff/respondent filed her written submissions dated 15th August, 2025.
6. I have carefully analyzed and considered application, the reply thereof, the written submissions and the entire record in this matter. In my view, the issue for determination is *whether this court's decision dated 29th September, 2020 merits review as sought by the 3rd defendant/applicant.*
7. **Order 10 Rule 11** of the **Civil Procedure Rules, 2010**, provides 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.”
8. The court in **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75** ruled as follows:-
“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. ... 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.”

9. The instant application is seeking a review of the decision of this court (E.O. Obaga, J.) dated 29th September, 2020 dismissing the 3rd defendant/applicant’s application dated 30th November, 2018 which sought, *inter alia*, the setting aside of “the Judgment entered in default of defence dated 30th October, 2018 in its entirety.” The *ratio decidendi* of this court’s ruling dated 29th September, 2020 is set out in paragraphs 10 and 11 therein.

10. For clarity, paragraph 10 reads as hereunder:-

“The Respondent subsequently amended her plaint and served the same upon the advocate for the applicants. The plaint sought a liquidated sum. The applicants failed to file a defence. The respondent was therefore at liberty to apply for entry of judgment because there was no valid application for stay of proceedings under Section 6 of the Arbitration which would have held her back. The judgment in default of defence was therefore regular. The Respondent had paid her money for which she anticipated to get a plot but this did not work. She opted to seek a refund.”

11. The 3rd defendant/ applicant pointed out the following errors on the face of the record justifying review of this court's decision dated 29th September, 2020 that affirmed the trial court's decision:-

- a. Judgment was entered against the 2nd, 3rd and 4th Defendants as directors without the court first lifting the 1st Defendant's corporate veil;***
- b. Tabulation of interest was determined to commence on 10th December, 2007 rather than from the date of filing the Plaintiff's suit in 2014;***
- c. Entry of default Judgement in favour of the Plaintiff was not followed up by a Formal Proof hearing contrary to the provisions of Order 10 rule 6 of the Civil Procedure Rules.***

12. The court's discretion to set aside or vary a judgment is guided by the overriding objective of procedural fairness and justice under **Article 159(2) (d)** of the **Constitution of Kenya**. In **Zamzam Yusuf v Abdillahi Igge & another [2020] KEHC 2746 (KLR)**, the court noted as follows:-

"I am aware that the respondents are entitled to the fruits of their judgment. However, justice demands that you consider the account of the other side too in order to arrive at a just and fair determination. I am reminded, here, that the discretion in setting

aside judgment is intended so to be exercised to avoid injustice from occurring on a party. See Shah vs Mbogoh”

- 13.** Judicial discretion is exercised in relation to review of judgments in order to avoid injustice and ensure procedural fairness. It is beyond peradventure that the non-prosecution of formal proof may invite scrutiny of the judgment’s validity, especially if the defendant’s rights under **Article 50(1)** of the **Constitution** are implicated as in the instant proceedings. It is trite that formal proof is not merely a formality but a necessary step to validate the judgment’s legal basis. This court is persuaded that the absence of formal proof undermined the validity of the judgment dated 30th October, 2018 which this court upheld through the ruling dated 29th September, 2020.
- 14.** Further, the plaintiff/respondent failed to controvert the 3rd defendant/applicant’s pleadings that the judgement dated 30th October, 2018 and consequent orders thereto emanate from an illegal and irregular amended plaint lodged without the leave of court and served out of time. Nor, did the plaintiff/respondent challenge the applicant’s position that the judgement dated 30th October, 2018 was not followed up by any formal proof. It is trite that parties are bound by their pleadings. The plaintiff/applicant being the maker of the amended plaint in question, was best suited to speak to the alleged illegalities and

irregularities in the amended plaint. The court has drawn the inference that the plaintiff/ respondent avoided presenting evidence relating to the legality and regularity of the amended plaint because it would have adversely affected her case. (See, **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR**).

15. Moreover, the defendants cannot be faulted for the mistakes of their counsel who failed to draw the mind of the court to the defects in the amended plaint in the proceedings culminating in the ruling of 29th September, 2020. Accordingly, this court finds that the 3rd defendant/applicant has adduced sufficient grounds warranting review of the same. The plaintiff/respondent deposed that the computation of interest on the decretal sum begins as from 10th December 2007 which date she delivered Kshs.5,745,682/- to the 1st defendant, contradicting the averments contained in the plaintiff's application dated 14th November, 2014 on record where she claimed to have paid 30 percent of the purchase price (Kshs.4,000,000/- for half-an-acre plot) on 10th December, 2007 the remainder of the purchase price on 20th November, 2008 and a further Kshs.1,000,000/- on 30th April, 2010.

16. From the above, I find merit in the notice of motion dated 3rd June, 2025 and the same is hereby allowed in the following terms:-

i. The orders issued on 29th September, 2020 are hereby set aside.

ii. The judgment of the court dated 30th October 2018 and the decree thereto are hereby set aside.

iii. The defendants are granted leave to defend the suit.

iv. Each party shall bear their own costs.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 15TH DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
15/12/2025.**

In the presence of:

Mr. Benson Agungo - Court assistant

Mr. Kalii for the 3rd Defendant/Applicant

Mr. Kiplangat for the Plaintiff/Respondent