



Shembekho v Chemche & 3 others (Environment and Land Case 193 of 2014) [2026] KEELC 275 (KLR) (28 January 2026) (Ruling)

Neutral citation: [2026] KEELC 275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 193 OF 2014
A NYUKURI, J
JANUARY 28, 2026**

BETWEEN

MANOAH SHEMBEKHO PLAINTIFF

AND

SHANGO CHEMCHE 1ST DEFENDANT

SHADRACK SHANGO 2ND DEFENDANT

JOHN SHANGO 3RD DEFENDANT

DAVID M. SHANGO 4TH DEFENDANT

RULING

1. This ruling is in regard to two applications, namely; application dated 24th July 2024 filed by the plaintiff seeking provision of police security during the defendants’ eviction and application dated 20th December 2024 filed by the defendants seeking setting aside the ex parte judgment herein.

Application dated 24th July 2024

2. In the application dated 24th July 2024, the plaintiff sought orders that the Officer in charge Malava Police Station provides security and supervises the eviction of the defendants from parcel No. N. Kabras/ Malava/3446 on the basis that in its judgment dated 6th March 2018, this court made orders restraining the defendants from interfering with the suit property and also ordered their eviction therefrom. That the delay in filing the application was because he was still negotiating with the defendants asking them to vacate the suit property in vain.
3. The application was opposed. Shango Chemche, the 1st defendant filed a replying affidavit dated 25th October 2024. He stated that the suit proceeded ex parte and a decree issued on 6th March 2018. That no notice of entry of judgment was served on the respondents’ advocate and that the application



is premature because provisions of Order 18 Rule (1) (a) of the Civil Procedure Rules are yet to be complied with. That police have no role to play in execution of decrees in civil cases and that the applicant has not shown that the intended eviction was approved by the Sub County Security Committee.

Application dated 20th December 2024

4. In the application dated 20th December 2024, the defendants sought orders that the Honourable Court be pleased to set aside the judgement entered on 6th March 2018 and the case be reopened so that the defendant cross examines the plaintiff and his witnesses and that the court process server Athanas Arthur Musambai be summoned for examination on service of pleadings on the defendants.
5. The application is predicated on the supporting affidavit of the 1st defendant dated 20th December 2024. The 1st defendant deponed that the alleged service by Athanas Arthur Musambai dated 5th December 2017, is false as the defendants' advocate was never served as alleged and that even his diary for that date shows that he had no matters for hearing. That the hearing notice was served on a stranger who had no authority to be served. That the signature on the hearing notice is not his and hence the judgment on record is irregular. That he has never seen the said process server who does not know him. That he was not aware that this suit was heard. That the defendants have a good defence raising triable issues. He annexed a return of service by Athanas Arthur Musambai, his diary for the date of alleged service, and copy of decree.
6. The application was opposed. The plaintiff filed a replying affidavit dated 29th April 2025. He stated that the defendants' advocate was duly served for 14th December 2017. That the defendants have not stated if they consulted their advocate or not or even checked from court to find out the progress of their case. That the defendants have no defence to his claim. That the applicants did not meet the required threshold.
7. The two applications were disposed by way of written submissions. On record are submissions filed by both parties, which this court has duly considered.

Analysis and determination

19. I have carefully considered the two applications, the responses thereto and the rival submissions. Two issues arise for the court's determination, namely; whether the defendants have met the threshold for setting aside ex parte judgment and whether the court should authorize police to provide security for the defendant's eviction.
20. The setting aside of ex parte judgment is premised on provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, which provides that:

“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.”
19. As was held in *CMC Holdings Limited vs. Nzioki* [2004] 1KLR 173, the power of the court to set aside ex parte judgment is discretionary and the court is enjoined to consider the particular circumstances of each case. In that case, the Court of Appeal held as follows;

“In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or



hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such 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 be wrong principle....

The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues...

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

19. In considering an application for setting aside ex parte judgment, the court considers whether service was proper, thus whether the judgment on record is regular; and even where the court finds that the judgment is regular, it ought to proceed further and consider whether the applicant has a triable defence.
20. The defendants have denied service of hearing notice on their advocate for the hearing of 14th December 2017. Mr. Kraido advocate for the defendants stated that the signature on the hearing notice was not his and denied having ever met the process server. From the return of service, the process server stated that he served Mr. Kraido advocate personally. Mr. Kraido provided documents with his signature. The court has considered documents filed by Mr. Kraido which are on record. Some of those documents are on record including the Memorandum of Appearance dated 26th October 2010 and the hearing notice dated 20th June 2016 from the firm of Mukavale advocate served on him on 14th September 2016. While this court appreciates the fact that it is not a handwriting expert, it however does not need any measure of expertise to see that clearly, the signature on the hearing notice of 14th December 2017 has no iota of semblance whatsoever with the signatures not disputed as those belonging to Mr. Kraido, which include his signature on the defendants’ Memorandum of appearance and on the hearing notice dated 14th September 2016. A cursory look of the same confirms Mr. Kraido’s averments that the signature on the impugned hearing notice is not his.
21. For the above reasons, it is clear that the hearing of 11th December 2017, proceeded without service on the defence counsel, which means that the matter proceeded without affording the defendants opportunity to be heard.
22. Service must be confirmed, before the issue of whether the defence raises a triable issue can be interrogated. Where service of the hearing notice was not effected, then it is not necessary to interrogate the issue as to whether there is a triable defence because Article 50 of *the Constitution* grants everyone a right to a fair hearing which includes the right of a defendant to be made aware of the hearing date, even if they merely entered appearance without filing defence.
23. While the plaintiff has accused the defendants of coming to court too late in the day, they have also not convinced this court why since 2018, when they obtained the judgment, they never served it on the defendants’ counsel and never bothered to execute it till 2024. Their allegations that they were still trying to convince the defendants to vacate the suit property is implausible as there is no proof of such negotiations. Therefore, both parties are guilty of indolence, yet for the sake of fair hearing and in the interests of justice, the court is convinced that the defendants deserve the orders sought



in their application. That being the case, the ex parte judgment herein is hereby set aside. Therefore, the application by the plaintiff dated 24th July 2024 seeking to implement the ex parte judgment by ordering the OCS Malava Police Station to provide security for eviction of the defendants, is baseless and therefore declined. Consequently, the application dated 24th July 2024 is hereby dismissed.

24. In the premises, I find and hold that the application dated 20th December 2024 is merited and the same is hereby allowed. The ex parte judgment delivered on 6th March 2018 is hereby set aside. The case is reopened. The defendant is granted leave to cross examine the plaintiff's witnesses. In view of the circumstances obtaining in this matter, and the indolence on the part of both parties, I make no order as to costs.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 28TH DAY OF JANUARY, 2026 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Shilisia holding brief for Mr. Mukavale J. for the plaintiff

No appearance for the defendant

Court Assistant: Delphine

