

2. The facts in support the prayers sought hereinabove were outlined in the body of the present Application as well as the Supporting Affidavit therein and can be summarized as follows; -
- i. Indeed, in the year 2018, the Applicant herein was served with the pleadings and documents of the suit before this Court.
 - ii. Upon service, the Applicant did instruct the firm of MELLY & COMPANY, ADVOCATES to act on her behalf in this matter.
 - iii. Based on this instruction, the firm of MELLY & COMPANY, ADVOCATES did file a Memorandum of Appearance dated 14.09.2018 and a Statement of Defence dated 15.03.2019.
 - iv. However, unknown to the Applicant and without being given an opportunity to be heard, the Court did pronounce a Judgement on the 25.04.2019 in favour of the Respondent herein.
 - v. Consequently, the Applicant is of the view that the Judgement pronounced on the 25.04.2019 did condemn her unheard thereby breaching the rules of natural justice.
 - vi. The Applicant sought this Court to review and/or set-aside the Judgement pronounced on the 25.04.2019 as well as the Decree issued on the 17.09.2020 so that she can get a chance to be heard.
 - vii. Lastly, the Applicant did state that the Orders sought herein could not prejudice the Respondent in way if allowed in the interest of justice.

3. The present Application was duly served on the Respondent.
4. The Respondent upon service of the present Application did oppose the same through a Replying Affidavit dated 03.07.2025 on the following facts; -
 - i. According to the Respondent, the present Application was an excuse to deny her the fruits of a lawfully obtained Judgement in her favour.
 - ii. The Respondent did state that the Applicant herein had duly admitted being served with the pleadings of this suit.
 - iii. However, for unknown reasons, the Applicant did not file the relevant Statement of Defence on time until the 02.04.2019 when she did file a Statement of Defence dated 15.03.2019 which was out of time.
 - iv. The Court accordingly did note that the Statement of Defence dated 15.03.2019 had been filed out of time and without leave of the Court and deemed the same to be irregularly on record.
 - v. By the time the Applicant was filing the Statement of Defence dated 15.03.2019, the Court had already entered an Interlocutory Judgement on the 05.10.2018 against the Applicant herein.
 - vi. The suit herein did proceed for full hearing without the Applicant being in Court despite being served with the hearing notice thereof.
 - vii. Consequently, the Judgement was pronounced on the 25.04.2019 and a Decree issued on the 17.09.2020.
 - viii. The Respondent did state it took the Applicant more than two years to file the present Application.

- ix. Clearly therefore, the present Application was filed after a prolonged delay which the Applicant does not have any justification for.
 - x. Even after filing the present Application, it has taken the Applicant more than four years to prosecute the same.
 - xi. In essence, the Respondent did state that equity does not aid the indolent and therefore litigation must come to an end.
 - xii. The Respondent sought this Court to dismiss the present Application with costs thereof.
5. The Replying Affidavit by the Respondent was served on the Applicant who did rebut the contents therein through a Further Affidavit dated 23.07.2025 based on the following facts;-
- i. According to the Applicant, the Statement of Defence dated 15.03.2019 was filed out of time due to unforeseen and critical circumstances beyond the control of the Applicant.
 - ii. The Applicant did state that the Advocate known as ELIAB KEMBOI MELLY who was in conduct of this suit on her behalf was not of good health during this period and did subsequently pass on in the year 2021.
 - iii. The Applicant did aver that it was due to the illness of her advocate that she was not regularly updated and/or informed on the progress of the case herein.
 - iv. The Applicant did plead that she was never notified of any hearing date by this Court prior to the pronouncement of the Judgement on the 25.04.2019 to enable her defend herself.

- v. Similarly, even after the demise of her advocate in the year 2021, the Applicant did face various legal challenges to take possession of the actual file to enable her proceed with the same.
 - vi. Consequently, it was only in the year 2025 that the Applicant was able to regain the actual possession of the file and retained the current advocate on record.
 - vii. The Applicant did state that this Court did have the discretion and inherent powers to set-aside the Ex-parte Judgement pronounced on the 25.04.2019 and allow her to ventilate her case.
 - viii. The Applicant did urge this Court not to condemn her for the wrongs done by the previous and/or late advocates.
 - ix. As regards whether or not the Court herein was functus officio, the Applicant did state that this Court had the Jurisdiction to set-aside an Ex-parte Judgement that was not just and/or pronounced without hearing both parties.
 - x. The Applicant did reiterate that she had a good and arguable Defence which should be considered by the Court before determination of the issues in this suit.
 - xi. In conclusion, the Applicant did maintain that no prejudice will be occasioned to the Respondent if the Orders sought are granted so that substantive justice is served and that the matter is determined on merits.
6. Upon filing and service of the Further Affidavit dated 23.07.2025, the Court did direct that the present Application would be canvassed by way of written submissions.
 7. In compliance, the Applicant did file her submissions dated 25.08.2025 while the Respondents did not file any submissions thereof.

8. The Court had carefully perused the present Application, the Replying Affidavit by the Respondent, the Further Affidavit by the Applicant and the submissions therein and identifies the following issues for determination; -

ISSUE NO. 1 - WHETHER THERE ARE SUFFICIENT REASONS TO WARRANT THE REVIEW AND/OR SETTING ASIDE OF THE JUDGMENT DATED 25.04.2019 AND DECREE ISSUED ON THE 17.09.2020?

ISSUE NO.2 - WHETHER THE PRESENT APPLICATION IS MERITED OR NOT?

ISSUE NO. 3 - WHO SHALL BEAR THE COSTS OF THE PRESENT APPLICATION?

9. The Court having identified the above-mentioned issues for determination, the same will now be discussed hereinbelow.

ISSUE NO. 1 - WHETHER THERE ARE SUFFICIENT REASONS TO WARRANT THE REVIEW AND/OR SETTING ASIDE OF THE JUDGMENT DATED 25.04.2019 AND DECREE ISSUED ON THE 17.09.2020?

10. The first issue for determination is whether or not there are sufficient reasons and/or grounds pleaded by the Applicant to convince this Court to review and set-aside the Judgement pronounced on the 25.04.2019.
11. The Applicant seeks this Court to exercise its discretion powers provided under Section 42 of the Civil Procedure Rules, 2010 as well as Section 3A of the Civil Procedure Act, Cap 21 to do so.
12. For clarity purposes, Order 42 of the Civil Procedure Rules, 2010 deals with issues of Appeals and not setting aside of Ex-parte Judgements as sought in the present Application.

13. The Applicable provision for setting aside a Judgement entered either due to non-appearance, default of Defence and/or failure to serve or be served is provided under Order 10 Rule 11 of the Civil Procedure Rules, 2010.
14. Turning back to the present Application, the first reason relied by the Applicant for this Court to set-aside the Judgement pronounced on the 25.04.2019 is that she was never served with any court documents and/or given a chance to be heard prior to the pronouncement of the Judgement on the 24.04.2019.
15. The Respondent in their reply to the present Application did dispute this allegation that the Applicant was never served or given an opportunity to be heard.
16. The Respondent in fact did file a Notice of Appointment and a Memorandum of Appearance dated 14.09.2018.
17. In addition to the above, the Respondent did also annex a Statement of Defence dated 15.03.2019 and filed in Court on the 02.04.2019.
18. The Applicant in the Further Affidavit did not dispute the fact that a Notice of Appointment and/or a Memorandum of Appearance together with the Statement of Defence dated 15.03.2019 were filed on her behalf.
19. Looking at the above scenario, it is clear that the allegation made by the Applicant that she was never served was misleading and misleading.
20. The Applicant's explanation in the Further Affidavit that the Counsel on record was unwell and in fact later went to be with his maker in the year 2021 does not negate the fact that proper service had been effected on the Applicant.

21. In essence, this Court is of the considered view and finding that the Applicant was properly served and was fully aware of this suit prior to the pronouncement of the Judgement on 25.04.2019.
22. The second reason advanced by the Applicant in seeking to set-aside the Judgement pronounced on the 25.04.2019 is that the suit did proceed without her participation thereof.
23. As such, the Applicant herein was never accorded a chance to defend the cause of action against her and therefore she was condemned unheard against rules of natural justice.
24. The Applicant did state that after procuring an Advocate to represent her, she did not get any information and/or hearing notice of when the suit herein would be heard.
25. The Applicant further did state that the illness and eventual death of her Advocate made it difficult to monitor and/or be updated with the manner in which the suit was on going.
26. The Respondent on the other hand did not really comment on the reasons advanced by the Applicant about the failure to monitor or participate in the proceedings before the Judgement was pronounced on the 25.04.2019.
27. Instead, the Respondent did state that the present Application had been filed after an inordinate delay of over two years and then another four years from the date it was filed to be fixed for hearing by the Applicant.
28. The Respondent further did aver that the reasons as to why the Applicant has not been keen to file and/or prosecute the present Application had not been explained satisfactorily.
29. For this reason, the Respondent sought this Court to dismiss the present Application.

30. The Applicant in response to the Respondent's allegation did state that since the demise of her advocate, she was not able to procure and/or secure possession of the physical file until the year 2025 when she did.
31. The Applicant did again reiterate that the illness and demise of her advocate did create challenges in procuring the actual file and securing another Counsel to take the necessary action.
32. Looking at the above facts, the first issue for consideration is why the Applicant did not participate in this matter prior to the Judgement pronounced on the 25.04.2019.
33. As earlier stated, the Applicant was well aware of the proceeding that had been instituted against her.
34. It is also true that she had engaged the services of an Advocate who as fate would have it, became unwell and eventually rested in the year 2021.
35. Be as it may, the record shows that although the Memorandum of Appearance was filed on the 14.09.2018, the Statement of Defence was never filed until the 02.04.2019.
36. Clearly, the Statement of Defence filed on the 02.04.2019 was out of time and had in fact been filed without leave of the Court hence irregularly on record.
37. However, even before the Applicant's Statement of Defence was filed on the 02.04.2019, the Court had entered an Interlocutory Judgement on the on the 05.10.2018.
38. The Judgement in this matter was pronounced on the 25.04.2019 which was only about 20 days later after the Applicant had filed the Statement of Defence dated 15.03.2019.

39. The Court's assumption was that by the time the Applicant was filing the Statement of Defence dated 15.03.2019 on the 02.04.2019, the proceedings thereof did indicate that actually a hearing had been undertaken thereof.
40. Even if there was no hearing by the 02.04.2019 when the Applicant filed her statement, there must have been either a hearing date or a date for the Judgement slated for the 25.04.2019.
41. The thinking of the Court is that the Applicant had the opportunity to monitor and/or follow the manner in which the present suit was being conducted.
42. It is true that the Applicant could have had a Counsel to present her, but it is also crucial to note that the Advocate was not the party in the matter but only an agent.
43. The Applicant had the obligation of ensuring that she was aware of what is happening in Court and participate in the proceeding to protect her interests.
44. The second issue is the explanation as to why it took her two years to file the present Application and 4 years after filing it to fix the same for hearing.
45. In total, the Applicant had an obligation to explain why there has been a delay of 6 years since the Judgement was pronounced on the 25.04.2019 to prosecute the present Application.
46. The explanation by the Applicant was that the illness and demise of her advocate did cause difficulties and challenges which were beyond her control.
47. The Applicant did state that the actual file could not be traced from the offices of the deceased Counsel until the year 2025.

48. Unfortunately, this explanation does not pursue the Court as a satisfying reason for the delay.
49. To begin with, the present Application was filed by the Applicant's deceased Counsel on the 03.06.2021.
50. In other words, even before the Applicant's previous Counsel passed away, he was aware that a Judgement had been pronounced against the Applicant on the 25.04.2019.
51. The Applicant was also aware of this Judgement pronounced on the 25.04.2019 because she was the deponent in the present Application filed on the 03.06.2021.
52. The expectation of the Court was is that the Applicant did have a copy of the present Application which was pending before the Court.
53. Assuming that the Applicant did not have the Copy of the present Application but armed with the information that one is pending, then a copy would have been easily procured from the Court record.
54. The Applicant by either visiting the Court registry or instructing another Counsel upon the demise of the previous Counsel would have enabled her obtain all the pleadings and proceedings to enable her take the appropriate action.
55. Unfortunately, the Court is of the view that the Applicant has never been serious in the participation of this matter.
56. A period of six years since the Judgement was pronounced is a long time and there are chances that the suit property has even changed hands or the nature in which it used to be.
57. As such, this Court is of the considered view that the present Application has been brought after an inordinate delay and

there is no reason as to why the Applicant was unable take the necessary steps within a reasonable time.

58. In conclusion, this Court hereby makes a finding that the Applicant does not deserve the Orders sought herein as litigation must surely come to a close.

ISSUE NO. 2 - WHETHER THE PRESENT APPLICATION IS MERITED OR NOT?

59. Based on the determination in Issue No.1 hereinabove, the Court is of the view and finding that the present Application is not merited.

ISSUE NO. 3 - WHO SHALL BEAR THE COSTS OF THE PRESENT APPLICATION?

60. On costs, the winning party is awarded costs.
61. In the present Application, costs are awarded to the Respondent herein.

CONCLUSION

62. In conclusion, the Court hereby makes the following Orders in relation to the present Application; -

A. THE NOTICE OF MOTION DATED 02.06.2021 IS NOT MERITED AND THEREFORE DISMISSED FORTHWITH.

B. THE APPLICANT IS CONDEMNED TO PAY THE COSTS OF THE PRESENT APPLICATION TO THE PLAINTIFF/RESPONDENT ONLY.

DATED, SIGNED and DELIVERED in ELDORET this 19TH DAY OF FEBRUARY, 2026.

EMMANUEL.M. WASHE
JUDGE

IN THE PRESENCE OF:

Court Assistant: Brian

Counsel for the Applicant: Ms. Isiaho (N/A)

Counsel for the Respondent: Ms. Rono holding brief for Mr.
Tarigo

For the 1st Defendant/Applicant

N/A for the Attorney General for the

2nd and 3rd Defendants