



**Charara v Kirui alias Joshua Kipngetch Kirui (Environmental and Land Originating Summons 72 of 2018) [2026] KEELC 1542 (KLR) (12 March 2026) (Ruling)**

Neutral citation: [2026] KEELC 1542 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 72 OF 2018  
LA OMOLLO, J  
MARCH 12, 2026**

**BETWEEN**

**MARY CHEPKEMOI CHARARA ..... PLAINTIFF**

**AND**

**WILLIAM KIPNGETICH KIRUI ALIAS JOSHUA KIPNGETICH  
KIRUI ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 20<sup>th</sup> March, 2025. The application is expressed to be brought under Sections 13 & 19 of the *Environment and Land Court Act*, Sections 1A, 1B, 3, 3A & 63E of the *Civil Procedure Act*, Order 22 Rule 18 & 22, Order 40 and Order 50 of the Civil Procedure Rules
2. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. That the Honourable Court be pleased to set aside the ex-parte proceedings and judgement herein delivered on the 16<sup>th</sup> October, 2019 (sic) and allow the Applicant to defend the suit.
  - d. That the costs herein be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of William Kipngetch Kirui alias Joshua Kipngetch Kirui that is sworn on 20<sup>th</sup> March, 2025.



## **Factual Background.**

4. The Plaintiff/Respondent commenced the present proceedings vide the Originating Summons dated 18<sup>th</sup> September, 2018 wherein she sought the determination of the following questions;
  - a. Whether the Respondent fraudulently sub-divided and transferred the land parcel L.R Kericho/Litein/625 registered in the name of the Tapkelal W/O Misik(Deceased) without undertaking succession proceedings as bylaw (sic) required.
  - b. Whether the title subsequent to the sub-division L.R Kericho/Litein/625 should be declared null and void for contravention of the law. (sic)
  - c. Whether the ownership of the properties (sic) L.R NO. Kericho/Litein/625 should be restored to the name of Tapkelal W/O Misik (Deceased) for purposes of undertaking succession of the said estate.
  - d. Whether there exists trusteeship between the Respondent and the Applicant in relation to the land parcel L.R Kericho/Litein/625 now registered in the name of the Defendant.
  - e. Whether the Respondent should bear (sic) the costs of this suit
5. The Defendant/Applicant did not file a response to the Originating Summons.
6. On 27<sup>th</sup> September, 2019 judgement was delivered in the following terms;
  - a. A declaration is hereby issued that the suit property is family land to which both the Defendant and the late Kikwai Charara were entitled by virtue of being the sons of the late Tapkelal W/ O Misik Deceased.
  - b. It is hereby declared that the Defendant holds the suit property in trust for the estate of the late Kikwai Charara deceased.
  - c. The Defendant shall sub-divide and transfer 1.5 acres of the suit property to the estate of Kikwai Arap Charara for onward transmission to the Plaintiff upon completion of succession proceedings.
  - d. The costs of this suit shall be borne by the Respondent.
7. The application under consideration first came up for hearing on 24<sup>th</sup> March, 2025 when the Court directed that it be served upon the Plaintiff/Respondent.
8. On 10<sup>th</sup> May, 2025 the Court issued directions that the application be canvassed by way of written submissions. The matter was mentioned severally to confirm filing of submissions and on 4<sup>th</sup> December, 2025 it was reserved for ruling.

## **The Defendant/Applicant's Contention.**

9. The Defendant/Applicant contends that on 19<sup>th</sup> March, 2025 their area Chief issued him with a notice from the Sub County Surveyor's Office which stated that the said surveyor would visit the suit land on 21<sup>st</sup> March, 2025 to implement a Court order.
10. He also contends that no order was attached to the said notice and he therefore sought advice from his advocates on record who obtained an order issued in this matter on 14<sup>th</sup> June, 2022.



11. He further contends that on the same day, their area Chief called and informed him that the date of the survey had been changed from 21<sup>st</sup> March, 2025 to 20<sup>th</sup> March, 2025.
12. It is his contention that at the time of drafting of the application under consideration, the surveyor accompanied by Police Officers were on the suit parcel of land taking measurements for purposes of hiving off a 1 ½ acre portion of the suit parcel of land.
13. It is also his contention that the Plaintiff/Respondent commenced the present proceedings and obtained an ex parte judgment on 16<sup>th</sup> October, 2019 (sic).
14. It is further his contention that he was not served with the pleadings filed in this matter and therefore, the Plaintiff/Respondent obtained an irregular judgement.
15. He contends that the Plaintiff/Respondent's suit is baseless and that he has a good defence as he is the registered owner of the suit parcel of land and has been in possession for a period of over fifty years.
16. He also contends that he filed an application dated 3<sup>rd</sup> February, 2020 which sought to set aside the proceedings. He goes on to state that on 2<sup>nd</sup> June, 2022, the said application was struck out on a technicality.
17. He further contends that the Plaintiff/Respondent filed an application dated 14<sup>th</sup> February, 2020 which sought orders to facilitate execution of the judgement.
18. It is his contention that he filed a Replying Affidavit to the said application which Replying Affidavit was deemed irregular.
19. It is also his contention that after his application was struck out on 2<sup>nd</sup> June, 2022, he informed his Advocates that they will settle the matter at home since they are family members.
20. It is further his contention that the issue was not settled amicably as he expected and the Plaintiff/Respondent initiated the process of executing the said judgement.
21. He contends that he will be prejudiced as he stands to lose a portion of the suit parcel of land.
22. He also contends that since judgement was delivered six years ago, the Plaintiff/Respondent ought to have first taken out a Notice to Show Cause.
23. He further contends that he was not able to follow up on his matter on account of age-related ailments as he is 90 years old.
24. He reiterates that the Plaintiff/Respondent is one of his family members and that she stayed quiet for four years before commencing execution.
25. It is his contention that on 17<sup>th</sup> September, 2019, a stranger went to his home in Kirobon and served him with a decree that was issued in the present suit.
26. It is also his contention that he has poor eyesight and he therefore took the decree to his advocates on record who explained the contents to him.
27. It is further his contention that he is aggrieved with the said decree and he now wishes to be given an opportunity to file a response to this suit.
28. He contends that affidavits of service were filed by one Joseph Cheruiyot Chepkwony in the present proceedings. He goes on to state that the said Joseph Cheruiyot Chepkwony deposed that he served him with the pleadings filed in the present suit and adds that he has never met Joseph Cheruiyot



- Chepkwony and that the said Joseph Cheruiyot Chepkwony never served him with the Court processes as alleged.
29. He further contends that the only document he was served with is the Decree of the Court.
  30. It is his contention that the Plaintiff/Respondent is the wife to his deceased brother one Kikwai Charera.
  31. It is also his contention that they reside on different parcels of land and goes on to explain that he lives on land parcel No. Kericho/Litein/625 which measures approximately 7 acres and which parcel of land is in Kaitamat Village while the Plaintiff/Respondent resides in Itoik in Litein where she has 9 acres of land.
  32. It is further his contention that he did not subdivide and transfer land parcel No. Kericho/Litein/625 that was registered in the name of Tapkelal W/O Misik (deceased) without undertaking succession proceedings as alleged.
  33. He contends that Tapkelal W/O Misik (deceased) was his mother and she transferred the said parcel of land to him before she died. He goes on to state that it was therefore not true that he transferred the suit parcel of land to himself in the year 1976 without the authority of the deceased.
  34. He reiterates that he has lived on the suit parcel of land for over fifty-five years and his children have built their homes on it.
  35. He also contends that his title should not be declared null and void as there was no violation of the law in its acquisition.
  36. He further contends that the Plaintiff/Respondent's averments in the Originating Summons are not true. He goes on to state that it was not true that when the Plaintiff/Respondent was married to his deceased brother, she settled on the suit land until his brother died on 8<sup>th</sup> July, 1997.
  37. It is his contention that all along the Plaintiff/Respondent and her family have been living in Itoik in Litein.
  38. It is also his contention that his father Charera Misik (deceased) and his mother Tapkelal W/O Misik (deceased) had the following children;
    - a. Taplelga Rosio – Daughter (deceased)
    - b. Taplule Bor – Daughter
    - c. Kiprotich Charera – Son (Deceased)
    - d. Kikwai Charera – Son (Deceased)
    - e. William Kirui – Son
  39. It is further his contention that his deceased parents only owned land parcel No. Kericho/Litein/625 which measures seven acres where they were all brought up.
  40. He contends that at the time of his father's death, title deeds had not been processed and when they were processed, the land was registered in the name of their mother who is now deceased.
  41. He also contends that when his deceased elder brother married the Plaintiff/Respondent and they had their first child, the family sat and agreed that his deceased brother vacates the suit parcel of land and be settled elsewhere.



42. He further contends that it was agreed that he would remain on the suit parcel of land.
43. It is his contention that cattle from the homestead were sold and land purchased for Kikwai Charera (deceased) at Itoik Village.
44. It is also his contention that the said parcel of land was purchased at kshs. 1,300/= after which the Plaintiff/Respondent moved to the said parcel of land.
45. It is further his contention that at some point he left his home for an extended period of time and within which period his elder brother one Kikwai Cherera (deceased) took advantage of his absence and sold a portion of the suit parcel of land measuring 2 acres to one Lelatich Soi.
46. He contends that a family meeting was called and Kikwai Cherera (deceased) alleged in the said meeting, that the suit parcel of land was still family land and he was entitled to a portion of it.
47. He also contends that they discussed at length on the issues bedeviling them as a family and it emerged that their deceased mother bought for Kikwai Cherera (deceased) the land he was in occupation of. He goes on to state that it also emerged that Kikwai Cherera (deceased) had taken a majority of the cows from their home.
48. He further contends that Kikwai Cherera (deceased) used a fraction of the money he got from the purported sale of the two-acre portion of the suit parcel of land to purchase a ten-acre parcel of land in Rongai.
49. It is his contention that in the said meeting he proposed that all the three parcels of land and animals be regarded as family property and be subdivided equally amongst the two sons of the deceased. He goes on to state that Kikwai Cherera (deceased) considered his proposal and opted to remain with the parcel of land at Itoik together with all the property he had taken.
50. It is also his contention that he filed Nakuru HCC Case No. 177 of 2003 against Lelatich Soi and the Court delivered judgement and evicted him as he (Lelatich Soi) purchased land from Kikwai Cherera (deceased) who was not the registered owner of the suit parcel of land.
51. He reiterates that the Plaintiff/Respondent's claim is baseless as the suit parcel of land belongs to him.
52. It is further his contention that there was no need for him to undertake succession proceedings as the suit parcel of land was transferred to him after the family agreed and adds that this agreement is according to their customs and traditions.
53. He contends that the Plaintiff/Respondent is guilty of non-disclosure as she failed to disclose that in Nakuru HCC No. 177 of 2003, she claimed a two-acre portion of the suit parcel of land.
54. He also contends that he is prejudiced with the Plaintiff/Respondent's actions as she failed to serve him with the pleadings in this matter deliberately in order to ambush him with an eviction order.
55. He further contends that even though his earlier application was struck out, he is still interested to pursue this matter.
56. He ends his deposition by apologizing to the Court and the Plaintiff/Respondent for any inconvenience caused for his failure to defend the suit.

#### **The Plaintiff/Respondent's Response.**

57. In response to the said application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 19<sup>th</sup> May, 2025.



58. She deposes that the Defendant/Applicant was served with the pleadings in this matter and explains that this deposition is in response to paragraphs 3, 5 and 7 of the affidavit in support of the application.
59. In response to paragraph 6 of the affidavit in support of the application, the Plaintiff/Respondent deposes that the Defendant/Applicant has been illegally occupying her share of the suit parcel of land which parcel of land had been shared equally.
60. She further deposes that paragraph 8 of the affidavit in support of the application is full of falsehoods and states that judgement in this matter was obtained regularly contrary to the assertions by the Defendant/Applicant.
61. It is her deposition that the allegations at paragraphs 10 and 11 of the affidavit in support of the application are full of falsehoods and explains that she brought the relevant documents to Court and that she is the absolute owner of a portion of the suit parcel of land that the Defendant/Applicant is in possession of.
62. It is further her deposition that if the Defendant/Applicant's application is allowed, she will suffer irreparable loss and damage as the Defendant/Applicant is in possession of her portion of the suit property.
63. The Plaintiff/Respondent denies the allegations at paragraphs 14, 15 and 16 of the affidavit in support of the application and deposes that the application under consideration is an abuse of the Court process and a waste of the Court's time.
64. She deposes that the Defendant/Applicant admits that he was served with the Court processes and he cannot at the same time deny that he was served.
65. The Plaintiff/Respondent also deposes that the Defendant/Applicant's intention is to deny her rightful ownership of a portion of the suit parcel of land.
66. She further deposes that the application under consideration is frivolous, vexatious and an abuse of the Court process and if the Court grants the orders sought, she will suffer irreparable loss and damage.
67. It is her deposition that the Defendant/Applicant has filed the application under consideration in bad faith.
68. It is also her deposition that the Defendant/Applicant has no right to seek that the judgement of this Court be set aside and yet he admits that the execution process has been completed.
69. It is further her deposition the suit parcel of land was to be subdivided between the Defendant/Applicant and her deceased husband one Kikwai Charara equally.
70. She deposes that the suit parcel of land is family property and also states that her deceased husband purchased land at Itoik where they reside after he sold a two-acre portion of land parcel No. Kericho/Litein/625.
71. She also deposes that the Defendant/Applicant fraudulently subdivided and transferred the suit parcel of land to his name without undertaking succession proceedings.
72. She further deposes that the allegations at paragraph 32 of the affidavit in support of the application have been made in bad faith because Tapkelal W/O Misik (deceased) died before she could transfer the suit parcel of land to anyone.
73. She denies the averments at paragraphs 33, 34 and 35 of the affidavit in support of the application and reiterates that the Defendant/Applicant intends to forcefully take her portion of the suit parcel of land.



74. The Plaintiff/Respondent deposes that the present matter proceeded in the presence of the Defendant/Applicant and he cannot therefore be said to be condemned unheard.
75. The Plaintiff/Respondent also deposes that the prayer for stay of execution of the judgement and decree is an afterthought as the Defendant/Applicant was aware of the progress of the suit.
76. The Plaintiff/Respondent further deposes that the Defendant/Applicant failed to enter appearance and file a Statement of Defence. She goes on to state that instead, the Defendant/Applicant chose to address the Court through correspondences that are not known in law.
77. It is her deposition that the Defendant/Applicant cannot use false allegations to deny her constitutional rights and goes on to state that the Defendant/Applicant is guilty of laches.
78. She reiterates that judgement herein was entered regularly and properly and adds that she proceeded with honesty and transparency.
79. It is her deposition that she adhered to all the requirements of the law and she cannot therefore be accused of any wrongdoing.
80. It is also her deposition that it is not true that Lelaitich Soi was evicted from the suit parcel of land.
81. She ends her deposition by stating that the Defendant/Applicant's application should be dismissed with costs.

#### **The Defendant/Applicant's Supplementary Affidavit.**

82. The Defendant/Applicant filed a Supplementary Affidavit sworn on 8<sup>th</sup> May, 2025.
83. He deposes that the Plaintiff/Respondent entered the suit parcel of land on 20<sup>th</sup> March, 2025.
84. He also deposes that at that time, he was not on the suit parcel of land but was informed that the execution of the orders of the Court went beyond the scope of the decree.
85. He further deposes that instead of the Plaintiff/Respondent hiving off 1 ½ acres of the suit parcel of land, she has hived off three acres.
86. It is his deposition that the Plaintiff/Respondent did not give him sufficient notice so that he could be present and point out the portion of the suit parcel of land that could be hived off.
87. It is also his deposition that the Plaintiff/Respondent hived off a prime portion of his land where he has a tea plantation.
88. It is further his deposition that he is an old man and that he has invested in the said tea plantation and is where he gets his income.
89. He deposes that the Plaintiff/Respondent has denied him income from three acres of the suit parcel of land after the illegal execution.
90. He ends his deposition by stating that the present application is urgent as the Plaintiff/Respondent is in the process of getting the title deed and she is likely to sell off the land.

#### **Issues for Determination.**

91. The Defendant/Applicant filed his submissions on 3<sup>rd</sup> December, 2025 while the Plaintiff/Respondent filed submissions on 1<sup>st</sup> December, 2025.



92. The Defendant/Applicant reiterates the averments in his affidavit in support of the application and submits that the Court should take into consideration his age and the fact that he is blind and allow his application so that he can be heard. The Defendant/Applicant relies on the judicial decision of *Mugachia vs Mwakibundu* 1 KAR 660 in support of his submissions.
93. The Defendant/Applicant also relies on the judicial decision of *Shanzu Investment Ltd vs The Commissioner of Lands Civil Appeal No. 100 of 1993* and reiterates that he was not served with the pleadings filed in the present suit.
94. The Defendant/Applicant submits that he has a good defence and that land matters are emotive and require to be justly ventilated upon.
95. The Defendant/Applicant also submits that they are family members and the issues raised ought to be determined on merit.
96. The Defendant/Applicant relies on the judicial decision of *Tree Shade Motors Ltd vs D.T Dobie & Co. Ltd & another Civil Appeal No. 38 of 1998* in support of his submissions.
97. The Defendant/Applicant submits that the application under consideration should be allowed in the interest of justice as he will be prejudiced if he is not given his day in Court.
98. The Defendant/Applicant relies on the judicial decision of *Ambala Shankerbai Patel vs The Plateau Licensing Court [1954] 17 LRK 147* and submits that he was registered as the owner of the suit parcel of land on 22<sup>nd</sup> November, 1983.
99. The Defendant/Applicant also submits that the ex parte judgement and proceedings in this matter has the effect of hiving off a 1 ½ acre portion of the suit property.
100. The Defendant/Applicant further submits that instead of the Plaintiff/Respondent hiving off 1 ½ acres of the suit parcel of land, she hived off 3 acres.
101. It is the Defendant/Applicant's submissions that in the circumstances, he deserves to be heard.
102. The Defendant/Applicant relies on Order 22 Rule 18 of the Civil Procedure Rules, the judicial decision of *Charles Karuri Mbutu vs Samuel Muhoro Civil Appeal No. 127 of 1999* and submits that the Plaintiff/Respondent will not be prejudiced if the ex parte judgement is set aside and the suit heard on merit.
103. The Defendant/Applicant also submits that he will be prejudiced if he is not given a chance to be heard in Court.
104. The Defendant/Applicant further submits that he has brought the application under consideration in good faith.
105. It is the Defendant/Applicant's submissions that the Respondent can be compensated with costs in order for the matter to be heard and determined on merit.
106. On the other hand, the Plaintiff/Respondent submits that the Defendant/Applicant's application has been overtaken by events.
107. The Plaintiff/Respondent relies on Order 5 Rule 8(1) of the Civil Procedure Rules and submits that the Defendant/Applicant was served with the pleadings filed in the present suit.
108. The Plaintiff/Respondent submits that the Defendant/Applicant is seeking an equitable remedy and yet his conduct does not meet the approval of Courts of equity.



109. The Plaintiff/Respondent relies on the judicial decision of CMC Holdings Limited versus Nziok [2004] eKLR and submits that the Defendant/Applicant has not made a prima facie case with a probability of success for the Court to vary and/or set aside its judgement.
110. The Plaintiff/Respondent also submits that the Defendant/Applicant has not demonstrated how he will be prejudiced if the orders sought are not granted.
111. The Plaintiff/Respondent further submits that the Defendant/Applicant is abusing the process of the Court and has wasted precious judicial time by filing numerous applications in order to defeat her interests.
112. It is the Plaintiff/Respondent's submissions that the Defendant/Applicant's defence consists of mere denials and it does not therefore raise any triable issues.
113. The Plaintiff/Respondent then submits on the following issues;
  - a. Whether the Defendant/Applicant deserves the orders sought in the application.
  - b. Who should bear costs of the application.
114. On the first issue, the Plaintiff/Respondent submits that the Court is functus officio and the application under consideration should not be allowed.
115. On the second issue, the Plaintiff/Respondent relies on Section 27 of the *Civil Procedure Act* and submits that the Defendant/Applicant's application should be dismissed with costs.

#### **Analysis and Determination.**

116. I have considered the Defendant/Applicant's application, the response thereto, the supplementary affidavit and the rival submissions.
117. It is my view that the following issues arise for determination;
  - a. Whether the judgement delivered on 27<sup>th</sup> September, 2019 should be set aside.
  - b. Who should bear costs of the application.

#### **A. Whether the judgement delivered on 27<sup>th</sup> September, 2019 should be set aside.**

118. The Defendant/Applicant is seeking that the Court sets aside the judgement delivered on 16<sup>th</sup> October, 2019. A perusal of the Court record shows that judgement in this matter was delivered on 27<sup>th</sup> September, 2019 and not 16<sup>th</sup> October, 2019 as alleged by the Defendant/Applicant.
119. The Defendant/Applicant contends that he was not served with the pleadings filed in the present suit.
120. The Defendant/Applicant also contends that he was served with the decree issued by this Court on 17<sup>th</sup> December, 2019 which necessitated him to file the application dated 3<sup>rd</sup> February, 2020.
121. It is the Defendant/Applicant's contention that his application dated 3<sup>rd</sup> February, 2020 was struck out on a technicality on 2<sup>nd</sup> June, 2022.
122. It is also the Defendant/Applicant's contention that after the application was struck out, he informed his advocates on record that they will settle the matter at home.
123. It is further the Defendant/Applicant's contention that the matter was not settled and the Plaintiff/Respondent executed the decree but hived off 3 acres of the suit parcel of land instead of 1 ½ acres.



124. The Defendant/Applicant contends that the Plaintiff/Respondent is the wife of his deceased brother.
125. The Defendant/Applicant also contends that the suit parcel of land initially belonged to his deceased mother one Tapkelal W/O Misik who transferred it to him during her lifetime.
126. The Defendant/Applicant further contends that the suit property is not family property and he therefore did not need to undertake any succession proceedings before registering the land in his name.
127. It is the Defendant/Applicant's contention that his defence raises triable issues and the judgement should therefore be set aside so that he can defend the suit.
128. Among the documents attached to the affidavit in support of the application is a letter dated 12<sup>th</sup> March, 2025. The letter is written by the Bureti Sub-County Surveyor whose name is not legible and it is addressed to the Officer Commanding Station (OCS) Cheplanget Police Station. The subject of the letter is not legible but the letter states that the Sub-County Surveyor was to implement a Court order on Friday, 21<sup>st</sup> March, 2025.
129. Attached to the said letter is a Court order issued on 14<sup>th</sup> June, 2022 in the present suit. Among the orders issued by the Court is an order requiring the Defendant/Applicant to subdivide and transfer 1.5 acres of the suit property to the estate of Kikwai Arap Chumo for onward transmission to the Plaintiff/Respondent.
130. The Defendant/Applicant has attached a copy of the decree issued in the present suit on 16<sup>th</sup> October, 2019.
131. A copy of a land certificate of land parcel No. Kericho/Litein/625 has also been attached. It shows that Joshua Kimngetich Kirui is the registered proprietor and the title deed was issued on 22<sup>nd</sup> November, 1983.
132. A copy of the decree issued in Nakuru HC Civil Case No. 177 of 2003 William Kipngetich Kirui alias Joshua Kipngetich Kirui vs Lelatich Arap Soi on 26<sup>th</sup> September, 2007 has been attached. The following orders were issued;  

“That the Defendant's statement of defence filed herein dated 1<sup>st</sup> December, 2003 is hereby struck out and a summary judgement is hereby entered as;

  - a. That there is no proper sale agreement between the Plaintiff and the Defendant over all that parcel of land known as Kericho/Litein/625 hence the Defendant should give vacant possession.
  - b. An injunction is hereby issued restraining the Defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the disputed land.
  - c. Costs to the Plaintiff.”
133. The Defendant/Applicant has attached three affidavits of service sworn by Joseph Cheruiyot Chepkwony. The affidavits of service are sworn on 9<sup>th</sup> October, 2018, 21<sup>st</sup> March, 2019 and 2<sup>nd</sup> May, 2019.
134. In the affidavit of service sworn on 9<sup>th</sup> October, 2018, Joseph Cheruiyot Chepkwony deposes that on 20<sup>th</sup> September, 2018 he served the Defendant/Applicant in Ngata Village, Njoro Sub-County with copies of the Originating Summons, Affidavit in support of the application and the annexures.



135. In the affidavit of service sworn on 21<sup>st</sup> March, 2019, Joseph Cheruiyot Chepkwony deposes that on 12<sup>th</sup> February, 2019, he served the Defendant/Applicant in Ngata Village, Njoro Sub-County with a hearing notice bearing the same date.
136. In the affidavit of service sworn on 2<sup>nd</sup> May, 2019, Joseph Cheruiyot Chepkwony deposes that on 9<sup>th</sup> April, 2019 he served the Defendant/Applicant in Ngata Village, Njoro Sub County with a hearing notice dated 8<sup>th</sup> April, 2019.
137. In all the three affidavits of service, Joseph Cheruiyot Chepkwony deposes that the Defendant/Applicant accepted service but declined to sign.
138. The Plaintiff/Respondent on the other hand contends that the suit parcel of land is family land and it was to be subdivided equally between the Defendant/Applicant and her deceased husband one Kikwai Charara.
139. The Plaintiff/Respondent also contends that the said parcel of land was registered in the name of Tapkelal W/O Misik (deceased).
140. The Plaintiff/Respondent further contends that the Defendant/Applicant fraudulently subdivided and transferred the suit parcel of land without undertaking succession proceedings for the estate of Tapkelal W/O Misik.
141. It is the Plaintiff/Respondent's contention that she filed the present suit and the Defendant/Applicant was served with the pleadings filed herein.
142. It is also the Plaintiff/Respondent's contention that despite service, the Defendant/Applicant opted not to file a Statement of Defence.
143. It is further the Plaintiff/Respondent's contention that the Defendant/Applicant's application is an afterthought and ought to be dismissed.
144. Among the documents attached to the Plaintiff/Respondent's Replying Affidavit is a copy of the judgement delivered on 27<sup>th</sup> September, 2019 and a copy of the decree issued on 16<sup>th</sup> October, 2019.
145. A copy of an affidavit of service sworn by Joseph Cheruiyot Chepkwony on 2<sup>nd</sup> December, 2019 has been attached. He deposes that he served the Defendant/Applicant with a Notice of Entry of Judgement and the decree issued by this Court at his home in Kirobon Farm, Nakuru County. He also deposes that the Defendant/Applicant accepted service by appending his signature at the back of the copies of the said documents.
146. The Court of Appeal in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR) held as follows;

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the Court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered;



whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173). In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.” (Emphasis mine)

147. In the above cited judicial decision, the Court held that in a regular default judgement, the Defendant would have been served with summons to enter appearance but for one reason or another failed to enter appearance or file a Statement of Defence. In an irregular default judgement, judgement would have been entered against a Defendant who would not have been properly served with summons to enter appearance.
148. In the present matter, this Court will first determine whether the judgement was regularly or irregularly entered.
149. The Defendant/Applicant contends that he was not served with the pleadings filed in the present suit while the Plaintiff/Respondent contends that he was served.
150. A perusal of the Court record shows that an affidavit of service was filed on 16<sup>th</sup> October, 2018. It is sworn by Joseph Cheruiyot Chepkwony on 9<sup>th</sup> October, 2018. He deposes that he served the Defendant/Applicant with the Originating Summons and all the accompanying documents on 20<sup>th</sup> September, 2018 in Ngata Village, Njoro Sub County which is within Nakuru County.
151. There is also an affidavit of service on the Court record that is sworn by Joseph Cheruiyot Chepkwony on 2<sup>nd</sup> May, 2019. He deposes as follows;

“2. That on the 9th April, 2019, I received instructions from the firm of M/S BII V.K & Co. Advocate, Manyatta Enterprise Building, 1<sup>st</sup> Floor, P.O BOX 331-20210, Litein to serve upon the Defendant herein William Kipngetich Kirui Alias Joshua Kipngetich Kirui with Hearing Notice dated 8<sup>th</sup> April, 2019.

3. That on the same date, I travelled to the Defendant’s place at Ngata village in Njoro Sub-County within Nakuru County and on arrival at the Defendant’s home which is known to me having served him with summons to enter appearance in the company of the plaintiff herein earlier. I met the Defendant at 11.30 a.m at his home, I had to introduce myself to him and the purpose of my visit whereby I served the said Hearing Notice.



4. That the said Defendant accepted the service but declined to sign and I now hereby return principal copy of the same to this Honourable court as duly served.
  5. The said Defendant was personally known to me at the time of service since I had earlier served him with Summons to Enter Appearance.
  6. That the facts deposed to hereinabove are true to the best of my knowledge, information and belief.”
152. The summary of the affidavit of service sworn on 2<sup>nd</sup> May, 2019 by Joseph Cheruiyot Chepkwony is that he served the Defendant/Applicant with a hearing notice dated 8<sup>th</sup> April, 2019. The process server also deposes that he knew the Defendant/Applicant as he had earlier served him with Summons to enter appearance in the Company of the Plaintiff.
153. Order 5 Rule 15 of the Civil Procedure Rules provides that, the serving officer shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.
154. Order 5 Rule 16 acknowledges that disputes might arise as to whether or not a person was served and for this reason, the said rule provides as follows;
- “On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.[Emphasis Mine]
155. An affidavit of service creates a presumption of service. Therefore, a party who wishes to contest service must, in my view, place before the court evidence of fraud or improper service. The procedure for placing such evidence before the court is set out in Order 5 Rule 16. At the conclusion of this procedure a court would either declare that the summons has been duly served or order such service as it thinks fit.
156. In *Agigreen Consulting Corp Limited v National Irrigation Board* 2020KEHC3507(KLR) the Learned Judge cited the decision of the Court of Appeal in *Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR*, wherein the Court of Appeal quoting Chitale and Annaji Rao; *The Code of Civil Procedure Volume II* page 1670 stated that:
- “There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service. (Emphasis mine)
157. It follows, therefore, that it is not enough for a party to simply deny service. Such party must put the process server in the witness box, cross examine him/her and the Court must, after this cross-examination, make a finding as to whether the service was proper or not.
158. Taking the foregoing into consideration, I find that the Defendant/Applicant had notice of the suit for the reason that there are affidavits of service on record which speak to him being served with the



Originating Summons, affidavit in support of it and annexures thereto plus the hearing notice dated 8<sup>th</sup> April, 2019.

159. Consequently, I find that the judgement rendered in the present suit is a regular judgment.
160. Having found that the judgment entered herein is regular, whether or not this court sets aside the judgment is discretionary. I am further reminded that the said discretion is unfettered but has to take into consideration factors such as:
  - a. The reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be;
  - b. The length of time that has elapsed since the default judgment was entered;
  - c. Whether the intended defence raises triable issues;
  - d. The respective prejudice each party is likely to suffer;
  - e. Whether on the whole it is in the interest of justice to set aside the default judgment, among others.
161. It is important to note that judgment in this matter was delivered on 27<sup>th</sup> September, 2019.
162. It is also important to note that prior to filing the instant application, the Defendant/Applicant admits to filing a previous application dated 3<sup>rd</sup> February, 2020 seeking to set aside the judgement of the Court.
163. A perusal of the Court record shows that the Court delivered a ruling on 2<sup>nd</sup> June, 2022. In the said ruling the Defendant/Applicant's application dated 3<sup>rd</sup> February, 2020 was struck out. The Court in striking out the said application held as follows at paragraph 21:

“Having found that the procedure set out by the law under order 9 rule 7 of the Civil Procedure Rules was not followed by Messers Ochieng Ghai & Co Advocates, it goes (sic) that the said firm is not properly on record and has no legal standing to move the Court on behalf of the Defendant/Applicant. The application before me dated the February 3, 2020 is therefore struck out with cost.”
164. The Defendant/Applicant confirms that after his initial application was struck out, he did not take any steps in the present suit until he filed the application under consideration on 21<sup>st</sup> March, 2025.
165. It is evident that a period of two years eight months lapsed between 2<sup>nd</sup> June, 2022 when his initial application was struck out and 21<sup>st</sup> March, 2025 when the application under consideration was filed.
166. The Defendant/Applicant attempts to explain this delay by contending that since the Plaintiff/Respondent is one of his family members, he thought that they would settle the matter at home.
167. It is important to note that the Defendant/Applicant has not informed the Court whether any such attempts to settle the matter at home were made and/or the outcome of the attempted settlement.
168. Further, the Defendant/Applicant contends that the Plaintiff/Respondent went silent for four years before she commenced execution. I must mention that this is inconsequential for the reason that a judgment creditor has a period of 12 years to execute a judgment of the court.
169. The Defendant/Applicant also contends that on 19<sup>th</sup> March, 2025 their area Chief informed him that the sub-county surveyor was to survey the suit parcel of land on 20<sup>th</sup> March, 2025 as per the terms of the judgement of this Court.



170. It was soon after he received the said information from the area Chief that he filed the application under consideration.
171. It is evident that it is the commencement of the execution process that woke the Defendant/Applicant from his slumber and he thereafter rushed to file the application under consideration.
172. In the judicial decision of *Peter Wafula Khaemba v Mary Chelimo Sirima & 6 others* [2019] KEELC 498 (KLR) the Court held as follows;

“The Court has unfettered discretion in cases of setting aside judgments but the same must be done judiciously. There is no explanation of the delay in bringing this application. The defendant admits that she is in occupation and this Judgement was delivered on 29<sup>th</sup> September 2017 with subsequent orders being granted on 7<sup>th</sup> November and 29<sup>th</sup> January 2019. It cannot be possible that she just came to know of the order on 4<sup>th</sup> July 2019. This explanation is not adding up. Either she is being economical with the truth about service or she does not stay on the suit land as claimed. The application has been brought after more than 2 years.

Ordinarily the Court would set aside judgments if the applicant satisfies the Court that he or she has a defence with triable issues, whether there would be prejudice to the Plaintiff and the explanation of the delay. The applicant did not offer any explanation for the delay.”(Emphasis mine)

173. The application under consideration has been filed six years post judgement, setting aside the said judgement will be prejudicial to the Plaintiff/Respondent. The Defendant/Applicant admits that the survey exercise has already taken place though he has a litany of complaints in relation to the process. For example, he says that the Plaintiff/Respondent has hived off more than 1.5 acres, that the Plaintiff/Respondent has taken the more productive portions of the suit parcel and that the Plaintiff/Respondent did not involve him in the survey exercise. All these, therefore, means that the decree of this Court has been executed.
174. The question whether or not the Defendant/Applicant’s defence raises triable issues is neither here nor there given the delay in the filing of the application under consideration.
175. In the judicial decision of *Mbogo vs Shah* EALR [1968] EA 93 the Court held as follows;

“A Court’s discretion to set aside an *ex parte* judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

176. In the present matter, it is my view that the Defendant/Applicant has not sufficiently demonstrated why this court should exercise its discretion and set aside its judgement.

#### **B. Who should bear costs of the application.**

177. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.



**Disposition.**

178. Taking the foregoing into consideration, I find that the Defendant/Applicant's application dated 20<sup>th</sup> March, 2025 lacks merit and it is hereby dismissed with costs.

179. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 12<sup>TH</sup> DAY OF MARCH, 2026.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Miss Cherotich for Gai for the Defendant/Applicant.

Mr. Bii for the Plaintiff/Respondent – Absent

Mr. Makori – Court Assistant

