

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E134 OF 2023

JACKSON KINYANJUI WAITHAKA

PLAINTIFF

VERSUS

ANTHONY MAINA 1ST

DEFENDANT

PENINA W. MAINA 2ND

DEFENDANT

REGISTRAR OF TITLES 3RD

DEFENDANT

RULING

1. Ex parte Judgement was entered for the Plaintiff in this matter on 29th May 2025. Subsequently, the 2nd Defendant filed the Notice of Motion dated 30th July 2025, in which she seeks the following Orders:

a) Spent.

b) Spent.

c) That this Honourable Court be pleased to set aside the ex-parte judgement entered on 29th May, 2025 against the 2nd Defendant/Applicant and all consequential orders and proceedings and any intended execution of the resultant decree against the 2nd Defendant/ Applicant.

d) That this Court be pleased to enlarge the time within which the 2nd Defendant/Applicant may file her statement of defence.

e) That the annexed draft statement of defence be deemed duly filed upon payment of requisite court fees.

f) That the costs of this application be in the cause.

2. The application is premised on grounds on its face and on the 2nd Defendant's supporting affidavit. She avers that together with her husband the 1st Defendant (now deceased), they

jointly acquired **Nairobi Block 105/7039, 7040 and 7041** from Embakasi Ranching Company Limited for valuable consideration, and were issued with Certificates of Lease, which she annexed. She explains that during the inception and pendency of the suit, the 1st Defendant was gravely ill with cancer and she was responsible for his care, including frequent hospital admissions within and outside the country but he eventually passed way in India on 29th March 2025. She states that judgement was entered herein on 29th May 2025, yet he had not been substituted.

3. She contends that she was under the genuine belief that the matter had been resolved amicably, having attended a meeting with officials of Embakasi Ranching Company Limited in the presence of the Plaintiff, during which it was acknowledged that her title documents were genuine thus the suit would be withdrawn. She reiterates that no hearing notices were effected upon her thus she did not participate in the suit and had no knowledge of the judgement but found out about it through a third party. Further, that she is

desirous of ventilating her defence which contains material facts of fraud and misrepresentation against the Plaintiff. She attached her draft statement of defence and avers that the Plaintiff will not suffer prejudice that cannot be compensated by way of damages.

Response

4. The Plaintiff filed a replying affidavit in opposition. He avers that this Court's judgement has already been executed and that the 1st and 2nd Defendants' certificates of Lease have been revoked and fresh titles issued to him. Further, that after filing pleadings herein, his advocates were unable to reach the 1st and 2nd Defendants for service of pleadings and summons. He claims by sheer luck, his daughter was approached by brokers sourcing for buyers for the 1st and 2nd Defendants and she played along, expressed interest and sought to meet the said buyers to execute necessary documents for sale at his advocates offices and when they

appeared, his advocates served them with pleadings and summons herein but they refused to sign the return copy.

5. He explains that since his advocates could not prove service of summons, he orally made an application to serve by substituted means and to amend plaint on 9th October 2023. Subsequently, the amended plaint dated 3rd November 2023 was served via registered post while summons to enter appearance were served via the standard newspaper on 20th December 2023 but the 1st and 2nd Defendants did not enter appearance. He annexed copies of postal corporation of Kenya receipts and a newspaper excerpt dated 20th December 2023.
6. He also contends that there is no evidence that the 1st Defendant was bedridden at the time of filing suit. He claims that he was forced to file this suit because attempts to resolve the issues amicably did not materialize as summons to attend meetings at Embakasi Ranching Company Limited were not honoured by the 1st and 2nd Defendants.

7. He asserts that the annexed draft defence does not disclose any triable

issues as he has been in possession of the suit property uninterrupted for twenty (22) years while the 1st and 2nd Defendants fraudulently acquired title documents in 2019.

8. The application was canvassed by way of written submissions.

Submissions

9. The 2nd Defendant reiterates that at no point was service of hearing notices effected upon her thus she had no opportunity to attend, respond or defend the proceedings and as a consequence, the ex parte judgement entered herein was irregular and this Court has discretion to set it aside as a matter of right. Further, that the 1st Defendant's serious illness, ultimately resulting in death, also constitutes a ground that is excusable.

10. She also submits that the judgement of 29th May 2025 is fatally defective to the extent that it purports to bind the 1st Defendant who died on 29th March 2025, three (3) months prior to the delivery of judgement, noting that the matter came up for mention on 1st April 2025 without any formal substitution. To this end, she relied on the following decisions: **CKM V ENM & another (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR)** and **Ongayi & another v Muyeyeli & 3 others (Civil Appeal E133 OF 2022) [2024] KEHC 14280(KLR)**.

11. She cites the case of **Sebei District Administration v Gasyali & others [1968] EA 300** to submit that her defence raises serious triable issues which ought to be heard on merit and urges the Court to invoke its inherent jurisdiction and uphold Article 159(2)(d) and Article 50 of the Constitution by allowing the application, which she contends is filed timeously after the judgement was issued and to consider that the Plaintiff will not suffer prejudice.

12. To buttress her averments, the 2nd Defendant relied on the following decisions: **Mohamed & another v Shoka (1990) KLR 463, David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR, CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 1439KLR)** and **Wachira Karani v Bildad Wachira Civil Suit no.101 of 2011 (2016) eKLR.**

13. On his part, the Plaintiff reiterates his averments in his affidavit in opposition, that the 1st and 2nd Defendants were served physically at his Advocates' offices, via registered post and vide the standard newspaper thus the judgement herein does not meet the threshold for an irregular judgement. He also submits that it is only after the 2nd Defendant's title was revoked that she rushed to Court but equity aids the vigilant not the indolent. Further, that the 2nd Defendant being in good health, had an obligation to notify the Court of the demise of the 1st Defendant and could also have informed his lawyers of his illness in good faith.

14. To buttress his averments, the Plaintiff relied on the following decisions: **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** and the case of **Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1982-1988) KAR 1036.**

Analysis and Determination

15. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the ex parte judgement entered on 29th May, 2025 should be set aside and the 2nd Defendant granted leave to file her defence.

16. The 2nd Defendant claims that this Court's judgement entered on 29th May 2025 is irregular because she was not served with summons, pleadings and hearing notices and for reason that judgement was entered against the 1st Defendant, three (3) months after

he had passed away and before he was substituted. She contends that she has a triable defence.

17. On his part, the Plaintiff insists that the 1st and 2nd Defendants were properly served in the manner outlined in his supporting affidavit. Further, that the suit was heard when the 1st Defendant was alive.

18. Before I make a determination on whether to set aside the impugned judgement or not, I wish to establish whether the said judgement was regular. In **James Kanyiita Nderitu & Another [2016] eKLR**, the Court of Appeal brought out the distinction between regular default judgement and irregular default judgment and stated as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others.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 justiae, 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....”

19. The Court has discretion to set aside judgment on sound reasons. The Court of Appeal stated as follows in **Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another [2017] eKLR**:

“The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the Appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties...”

20. Further, in **CMC Holding Limited v Nzioki [2004] KECA 143 (KLR)**, it was held that:

“The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for 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 a draft defence is annexed to the application, raises triable issues.”

21. The 2nd Defendant also contended that judgement was entered against the 1st Defendant three (3) months after his death. In **CKM v JMM & another [2024] KECA 293 (KLR)**, the Court of Appeal stated that:

“It is basic that the rules of natural justice and fair play would require that where a party to a suit dies and the cause of action survives him, his estate has to be heard through the estate’s legal representative before a decision can be rendered. In any case, any decision made against such an estate can only be satisfied by the legal representative. If, one may ask, the impugned judgment were to be executed, against whom would it be executed? It is only under the Law of Succession Act that a deceased person can be succeeded.”

22. On perusal of the Court record, I note the matter proceeded exparte. The Plaintiff confirmed to Court that he had served the Defendants. I note on the 9th October, 2023, the Court

had allowed the Plaintiff to serve the Defendants via substituted service. Further the matter had proceeded for hearing on the 26th February, 2025 after which judgement was delivered on the 29th May, 2025 after the 1st Defendant's demise. The Plaintiff has not indicated whether he served the Defendants with a judgement notice nor did he inform the Court that they had attempted to negotiate this matter out of Court together with Embakasi Ranching Company Limited.

23. Based on the facts as presented while associating myself with the decisions quoted and applying them to the circumstances at hand, even though the Plaintiff served the 1st and 2nd Defendants through substituted service, I find that the ex parte judgement entered herein was irregular since the 1st Defendant was deceased by the time it was delivered. I opine that there was need for his legal representative to be heard before any decision was to be rendered. I note the Plaintiff insists that the Decree has been executed, but in my view this is improper as it concerns a deceased person's

estate and there is no indication if there have been succession proceedings. On perusal of the draft defence, I also find that it also raises triable issues. In the foregoing, I find that there is sufficient cause warranting the setting aside of the ex parte judgement.

24. In the circumstances, I find the instant Notice of Motion application merited and will allow it in the following terms:

- a. That the ex-parte judgement entered on 29th May, 2025 against the 2nd Defendant/Applicant and all consequential orders and proceedings and any intended execution of the resultant decree against the 2nd Defendant/ Applicant be and is hereby set aside.**
- b. That the 2nd Defendant/Applicant is granted leave of fourteen (14) days to file and serve her statement of defence.**
- c. Upon service, the Plaintiff to file and serve a reply to defence in fourteen (14) days if need be.**
- d. Costs in the cause.**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
24TH DAY OF MARCH, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ms Bett for Applicant

Court Assistant: Joan

ORIGINAL