

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC NO. 598 OF 2012
FORMERLY HCCC No. 33 OF 2010

KIBET MELIPLAINTIFF/RESPONDENT

-VERSUS-

SUSAN ROPDEFENDANT/APPLICANT

R U L I N G

1. The Defendant (hereinafter referred to as **“the Applicant”**) did file a Notice of Motion Application dated 21.07.2025 (hereinafter referred to as **“the present Application”**) seeking the following Orders against the Plaintiff (hereinafter referred to as **“the Respondent”**): -
 - a) **THAT this Application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.**
 - b) **THAT this Honourable Court be pleased to issue interim orders of stay of execution of the Decree dated 13.02.2025 arising from the Judgement delivered on 13.02.2025 in this case pending hearing and determination of this Application.**
 - c) **THAT this Honourable Court be pleased to set aside judgment delivered in this case, the decree arising therefrom and all consequential orders thereto.**

- d) THAT leave be granted to the defendant to file her witness statements and documents out of time and hear and cross examine the plaintiff.**
- e) THAT the application be heard inter partes on such date and time as this Honourable Court may direct.**
- f) THAT Costs of this application be in the course.**

2. The above prayers are premised on the grounds outlined in the body of the present Application as well as the facts in the Applicant's Supporting Affidavit dated 21.07.2025, which can be summarised as follows; -

- i. The Applicant herein was never given a hearing and/or opportunity to be cross-examined during the hearing.
- ii. As such, the matter did proceed ex-parte and a Judgement delivered in favour of the Plaintiff herein.
- iii. The Applicant did state that she had filed a Statement of Defence which was on record but did not prosecute the same at the hearing.
- iv. The Applicant did plead that she has an arguable defence case with high chances of success.
- v. The Applicant's prayer was therefore the Ex-parte Judgement pronounced on the 13.02.2025 be set-aside and she be given leave to present her Defence and be cross-examined on the fair.
- vi. Upon the Ex-parte Judgement pronounced on the 13.02.2025 being set-aside, the Court does grant the

applicant leave to file additional witness statements and other documents in support of her case.

- vii. The Applicant did state that the Orders sought in the present Application were in line with the principle of fair hearing and would not prejudice the Respondent in any manner if granted as sought.
3. The present Application was duly served on the Respondent herein who did file a Replying Affidavit dated 30.09.2025 in opposition of the same.
4. In the Replying Affidavit dated 30.09.2025, the Respondent did plead the following facts in opposition to the present Application; -
- i. First and foremost, the Respondent did plead that the present Application was an afterthought by the Applicant geared towards defeating the Orders contained in the Decree issued herein.
 - ii. The Court had indeed pronounced a Judgement in this matter on the 13.02.2025 in favour of the Applicant against the Respondent.
 - iii. As at the time of filing the present Application, the Decree emanating from the Judgement pronounced on the 13.02.2025 had already been implemented.
 - iv. In essence, this Court was functus officio as the dispute before the Court had been resolved and there was no pending issue for determination.
 - v. Further to the above, the Respondent did plead that the Applicant upon being served with the pleadings thereof did enter appearance and file a Statement of Defence thereof.

- vi. During the hearing, the Respondent did state that the Applicant was represented by a Counsel who took the evidence of the Respondents witnesses as well as did cross-examine them until close of the Plaintiff's case.
 - vii. However, during the Defence hearing, the Counsel for the Respondent and the Respondent herself did abscond attending Court without any justification thereof.
 - viii. Based on the Respondents absconding of her own hearing dates, the Court did declare the Applicant's case closed.
 - ix. Thereafter, a Judgement was pronounced on the 13.02.2025.
 - x. In essence, the Respondent did plead that the judgement pronounced on the 13.02.2025 was not an ex-parte judgement but a regular judgement pronounced as a lawful hearing.
 - xi. The Respondent did file state that the present Application had been filed after an inordinate delay which had not been explained by the Applicant.
 - xii. As such, the prayers sought in the present Application were not justified and would re-open a fairly determined case thereby resulting to an abuse of the Court process and denying the Respondent the fruits of the judgement pronounced on the 13.02.2025.
5. The Replying Affidavit dated 30.09.2025 was duly served on the Applicant who did file a Supplementary Affidavit dated 09.02.2026.

6. In the Supplementary Affidavit dated 09.02.2026, the Applicant did state as follows in answer to the Replying Affidavit dated 30.09.2025; -
 - i. To begin with, the Applicant did admit that a Counsel had been retained for the purposes of defending this suit.
 - ii. However, the Applicant herein did become indisposed and was directed to have total bed rest for a period for many days.
 - iii. Thereafter, the Applicant did state that she had been frustrated in-law and could not communicate with the Counsel on Record to give the proper way forward for the hearing of this suit.
 - iv. It was only after the Judgement was pronounced on the 13.02.2025 that the Applicant became aware of the Judgement.
 - v. The Applicant did plead that it was only fair and just that she is given a chance to prosecute and tender evidence on behalf of the Plaintiff.
7. After the Applicant filed her Supplementary Affidavit, the Court did direct that the present Application be canvassed by way of written submissions.
8. The Applicant did file his submissions dated 09.02.2026 while the Respondents did file their submissions dated 06.03.2026.
9. The Court has indeed perused the present Application, the Affidavits filed in support thereof, the Respondent's Replying Affidavit, as well as the submissions by the parties and identifies the issues for determination as follows: -

**ISSUE NO.1- WAS THE HEARING OF THE CASE EX-PARTE
AS ALLEGED BY THE APPLICANT?**

**ISSUE NO.2- WAS THE APPLICANT GRANTED A HEARING
DURING TRIAL?**

**ISSUE NO.3- ARE THERE SUFFICIENT GROUNDS TO SET-
ASIDE THE JUDGEMENT?**

**ISSUE NO.4- IS THE APPLICANT ENTITLED TO LEAVE
FOR PURPOSES FOF FILING ADDITIONAL
DOCUMENTS FOR HEARING?**

**ISSUE NO.5- IS THE APPLICANT ENTITLED TO THE
PRAYERS SOUGHT IN THE PRESENT
APPLICATION?**

**ISSUE NO.6- WHO BEARS THE COSTS OF THE PRESENT
APPLICATION?**

10. The Court having duly identified the above-mentioned issues for determination, the same will be discussed as provided herein-below.

**ISSUE NO.1- WAS THE HEARING OF THE CASE EX-PARTE
AS ALLEGED BY THE APPLICANT?**

11. The first issue for determination is the nature of hearing that was conducted before the judgement dated 1.3.02.2025 was pronounced.
12. According to the Applicant, the hearing undertaken prior to the judgement was ex-parte.
13. In other words, the Applicant did insist that she was never given an opportunity to present her defence and/or cross-examined by the Respondent herein.
14. As such, the Respondent was denied a fair hearing and the judgement pronounced thereafter was therefore an ex-parte judgement.
15. The Respondent on the other hand did oppose the Applicant's allegations.
16. The Respondent did plead that the Applicant was present during the hearing of the matter until the Defence case when for reasons best known to her failed to attend her own hearings.
17. Due to this failure by the Applicant to prosecute her own case, the Court did make a finding that the Applicant's case had been closed and a judgement pronounced thereafter.
18. The Respondent was therefore of the view that the Judgement pronounced on the 13.02.2026 was lawful, regular and merited.
19. The ***Black's Law Dictionary 9th Ed. at Page 657*** defined the term ex parte as that which is:
“Done or made at the instance and for the benefit of one party only, and without notice to, or argument

by, any person adversely interested; of or relating to court action taken by one party without notice to the other...”

20. At Page 1324, it defines ex parte proceeding as a proceeding in which not all parties are present or given the opportunity to be heard.
21. The interpretation of the Court as regards an ex-parte hearing and/or judgement is a hearing and/or judgement that had been undertaken by a Court of law without notice to an adverse party named in the proceeding and/or judgement.
22. In other words, for a party to demonstrate that a proceeding and/or a judgement is ex-parte, the party must demonstrate that it did not have notice of either the proceeding and/or judgement in dispute.
23. The failure to be notified of any proceeding and/or judgement would then by extension mean that the proceeding and/or judgement was without the hearing of the party not notified of the same.
24. In the present application, it is not in dispute that the Applicant herein was notified of the proceedings against her by the Respondent.
25. It is also not in dispute that the Applicant did enter appearance and file a Statement of Defence in answer to the Respondent’s claim against her.
26. It is also not in dispute that the Applicant herein did attend the hearing of the Respondent’s case who is the Plaintiff until the closure of his case.

27. Thereafter, the matter was fixed for the Defence case which was for the Applicant to present her testimonies and documentary evidence.
28. Unfortunately, the Counsel for the Applicant did file an Application seeking to cease acting for lack of instructions.
29. Upon the court granting the said leave for the Applicant's Counsel to cease acting, the Applicant never attended Court thereafter or procure an Advocate to prosecute her case.
30. It is after numerous adjournments on the instance of the Applicant's absence that the Court did mark her case closed and did proceed to write the judgement pronounced on the 13.02.2025.
31. In essence, this Court is of the considered view that the Applicant herein was well aware of the proceeding before the Court and cannot say that she did not have notice of the same.
32. As such, the proceedings and judgement pronounced on the 13.02.2025 were not ex-parte as alleged by the Applicant.
33. Instead, the Court is of the finding that the proceedings and judgement pronounced on the 13.02.2025 were regular, lawful and legal in all aspects of the law.

**ISSUE NO.2- WAS THE APPLICANT GRANTED A HEARING
DURING TRIAL?**

34. The second issue is whether the Applicant herein was granted a hearing before the Judgement was pronounced on the 13.02.2025.

35. According to the Applicant, she was never given an opportunity to present her defence and be cross-examined by the Respondent during the hearing thereof.
36. The Respondent on the other hand did plead that the Applicant was granted an opportunity to be heard but did fail to attend court and give her testimony as well as her documentary evidence.
37. As stated earlier, there is no dispute that the Applicant herein did file a Statement of Defence against the claim by the Respondent.
38. According to the civil procedure rules and the Constitution, the filing of the Statement of Defence was the first step in ensuring that the Applicant would be heard and was in fact enjoying the right to be heard.
39. The second step that is expected by law in the right to be heard is the attendance of the actual hearings and presentation of documentary evidence.
40. According to the proceedings before this Court, the Applicant herein did attend the hearing of the Respondent's case where witnesses were called and documentary evidence presented before the Court.
41. The Applicant during this time did enjoy the third step of a fair hearing by cross-examining the Respondent's witnesses as well as their documentary evidence until completion of the Respondent's case.
42. According to the proceedings, the Applicant herein was unable to prosecute her case as a Defendant before this Court.

43. Based on the proceeding of 13.02.2023, the first witness called by the Applicant was one JUDITH CHEPKOECH CHERUTICH who sought to rely on a Power of Attorney registered on the 11.02.2012.
44. The Power of Attorney registered on the 11.02.2012 was duly objected to by the Counsel representing the Respondent and witness known as JUDITH CHEPKOECH CHERUITICH was stood down in order to procure the original Power of Attorney intended to be relied upon thereof.
45. Thereafter, the witness known as JUDITH CHEPKOECH CHERUTICH never came back to court dispute the numerous hearing dates that were fixed by the Court.
46. Finally, on the 25.09.2024, the Court did make an Order that the Applicant's case had been closed due to none prosecution and parties were directed to prepare and file their submissions.
47. Clearly before, the Court is of the considered view and finding that the Applicant herein was given sufficient time and opportunity to prosecute her defence but from the 13.02.2012 to the 25.09.2024, no action was taken.
48. As such, the allegation that the Applicant was never given a fair hearing as envisaged in law is misguided and misleading.
49. It is actually the Applicant that failed to attend Court and prosecute its Defence for a period of over two years hence the order to close the Defence case due to lack of prosecution.

**ISSUE NO.3- ARE THERE SUFFICIENT GROUNDS TO SET-
ASIDE THE JUDGEMENT?**

50. The third issue is whether the Court should set-aside the judgement pronounced on the 13.02.2025.
51. The Applicant's two main grounds for setting aside the judgement pronounced on the 13.02.2025 is that the same was ex-parte and she was not given an opportunity to be heard.
52. Nevertheless, in Issue No.1 and 2, the two main grounds advanced by the Applicant were exhaustively discussed and appropriate findings pronounced therein.
53. The provisions of Order 17 Rule 4 of the Civil Procedure Rules, 2010 states as follows; -

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”

54. Based on the Orders of the Court made on the 25.09.2024, the Applicant's case was indeed closed and the Court had the powers to proceed and make its judgement thereof.
55. This Judgement was finally pronounced on the 25.09.2024.
56. In essence, this Court is of the finding that the Judgement pronounced on the 25.09.2024 was regular, procedural and lawful and there is no basis upon which the same can be set-

aside based on the two main grounds advanced by the Applicants in the present Applicant.

ISSUE NO.4- IS THE APPLICANT ENTITLED TO LEAVE FOR PURPOSES FOF FILING ADDITIONAL DOCUMENTS FOR HEARING?

57. Keeping in mind the finding of this Court in Issue No.3 to the effect that there are no justifiable reasons to set-aside the Judgement pronounced on the 25.09.2024, then the said judgement still stands and leave for purposes of filling addition documents cannot be granted as the hearing was concluded and the Court is now functus officio.

ISSUE NO.5- IS THE APPLICANT ENTITLED TO THE PRAYERS SOUGHT IN THE PRESENT APPLICATION?

58. Based on the findings in Issue No. 1 to 4 hereinabove, the Court is of the view that the present Application is not merited and therefore the prayers sought herein cannot be granted.

ISSUE NO.6- WHO BEARS THE COSTS OF THE PRESENT APPLICATION?

59. Costs are usually awarded to the winning party.

60. In the present Application, the same is not merited and therefore the Applicant is condemned to pay the costs.

CONCLUSION

61. In conclusion, the following Orders are hereby issued in determination of the present Application; -

A. THE NOTICE OF MOTION APPLICATION DATED 21.07.2025 NOT MERITED AND THEREFORE DISMISSED FORTHWITH.

B. THE APPLICANT IS CONDEMNED TO PAY COSTS OF THE APPLICATION TO THE RESPONDENT HEREIN.

DATED, SIGNED and DELIVERED at ELDORET this on this 22ND DAY OF APRIL,2026.

**EMMANUEL.M. WASHE
JUDGE**

IN THE PRESENCE OF:

Court Assistant: Brian

Advocate for Applicant: Mr. Kiboi

Advocate for Respondent: Mr. Isiaho