



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL SUIT NO. 26 OF 2018 (O.S.)

ABIJAH MUTHONI MUEMBU
RESPONDENT

VERSUS

EUSTACE MUTEMBEI ISLOM
APPLICANT

RULING

1. This matter proceeded *ex parte* on 2nd July 2025 and judgement reserved for 30th April 2026. The Applicant filed an application dated 27th February 2026 with the intention of arresting the judgment and setting the *ex parte* proceedings aside.
2. The court deems it fair and reasonable to consider the same before making any decision to proceed with writing the judgement as expected by the Respondent.

3. The application dated **27th February, 2026** filed by the Applicant, Eustace Mutembei Islom, seeks for **ORDERS THAT:-**
1. **Spent.**
 2. **Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Order of Stay of further proceedings.**
 3. **This Honourable court be pleased to set aside the proceedings conducted by this Honourable Court on the 2nd July, 2025 on this matter and to allow the Respondent to defend this suit and order fresh proceedings.**
 4. **Such further and/or other Orders be made as the court may deem fit and expedient.**
 5. **Costs of this application be in the cause.**
4. The application is based on the grounds thereof and supported by affidavit sworn by Eustace Mutembei Islom on **27th February, 2026**.
5. He avers *inter alia* that the suit property comprises land parcels **Ngong/Ngong/38211** and **Ngong/Ngong/38218** together with developments at his rural home, which he claims to have acquired solely over a period of approximately fifteen years using his personal income without any contribution from the Applicant.
6. He further deposes that he is a serving officer in the Kenya Defence Forces and has been deployed to various foreign

jurisdictions over time, including Somalia, Burundi, Malawi, Zambia and Australia, which deployments are supported by travel documents, official clearances and identification records annexed to the affidavit.

7. He explains that during the hearing conducted on or about **2nd July, 2025**, he was outside the court's jurisdiction on official duty and was therefore unable to attend court or give instructions. He states that he had entrusted the matter to his previous advocates but did not receive any communication regarding the progress of the case, despite making efforts to follow up, as evidenced by call logs and correspondence annexed to the affidavit.
8. Upon his return, he further avers, that he fell seriously ill and was hospitalized for a considerable period, which hindered his ability to pursue the matter, as supported by the medical records exhibited. The Respondent further states that upon recovering and perusing the court file, he discovered that the matter had proceeded in his absence and was pending judgment, prompting him to instruct new counsel to come on record.
9. He contends that the dispute concerns property he solely acquired through his service and that it would be unjust for the matter to be determined without affording him an opportunity to be heard and to present his defence. He therefore urges the court, in the interests of justice, to set aside the proceedings conducted in his absence and allow the matter to be heard afresh on its merits, asserting that

the application has been made promptly upon discovery of the status of the case and that no prejudice will be occasioned to the Applicant if the orders sought are granted.

10. The application is opposed vide replying affidavit sworn by Abijah Muthoni Muembu on **14th March, 2026**. She avers *inter alia* that the application is premised on misrepresentation and it is intended to mislead the court. She contends that the suit properties, namely **Ngong/Ngong/38211** and **Ngong/Ngong/38218** together with the developments on the rural home, were acquired during the subsistence of the marriage and not solely by the Respondent as alleged.
11. She maintains that documentary evidence, including sale agreements and demonstrates joint acquisition. She further deposes that although the Respondent is a serving officer in the Kenya Defence Forces, his alleged deployments did not prevent him from participating in the proceedings, noting that the matter proceeded virtually and that he was duly served with the hearing notice for **2nd July, 2025**. She challenges the authenticity and sufficiency of the annexed deployment documents, asserting that they do not account for the relevant period of hearing and, in some instances, show only brief travel durations inconsistent with his claim of prolonged absence.
12. The Applicant also disputes the Respondent's reliance on illness, contending that the medical records produced are

outdated and do not relate to the material time of the hearing. She further avers that the Respondent was at all material times aware of the proceedings, failed to act diligently and cannot attribute his inaction to his former advocates.

13. She emphasizes that the Respondent was served, entered appearance and participated in earlier stages of the suit but failed to attend court without sufficient cause. It is her position that the application is an afterthought brought in bad faith and amounts to an abuse of the court process intended to delay the conclusion of the matter. She therefore urges the court to dismiss the application with costs and to allow the proceedings and pending judgment to stand.
14. The Applicant has filed written submissions dated **30th March, 2026** and the Respondent has filed written submissions dated **13th April, 2026**.

ANALYSIS AND DETERMINATION

15. I have gone through the application, the response thereto and the rival submissions and address them as follows.
16. The issues arising for determination are twofold i.e. whether the Applicant has met the threshold for grant of an order of stay of proceedings and whether sufficient cause has been shown to warrant setting aside the proceedings conducted on **2nd July, 2025**.

17. I have taken time to read the application and, in my view, it is merited for the simple reason that although the Applicant was represented by counsel, I believe because of exigencies of work he was unable to attend to the matter. At the same time there was no reason why his counsel then did not attend court. He cannot however be punished for the mistake of the counsel. I think the above adage fits well in the current situation.
18. It is conceded by the Respondent that the Applicant previously participated in the proceedings and I think the court records attest to this.
19. In any case what is the justice of the case except to hear both parties sufficiently and give a proper judgement without prejudicing either of them.
20. I do not see any prejudice the Respondent stands to suffer and more so being a family issue, it is better to grant each one of them their respective day in court.
21. I shall however condemn the Respondent to pay thrown away costs of Kshs. 30,000 to the Respondent payable before the next hearing date.
22. **In the premises:-**
 - (a) **The proceedings of this court dated 2nd July 2025 are hereby set aside and the Applicant ordered to pay to the Respondent the sum of Kshs 30,000.00 before the next hearing date and in default execution to issue.**

(b) The matter be set down for hearing afresh expeditiously.

Dated signed and delivered at Nairobi via video link this 30th day of April 2026.

**H K CHEMITEI
JUDGE**