



**Chesingei alias Joseph Kimutai Suter v County Land Registrar, Elgeyo Marakwet County & 3 others (Petition E006 of 2022) [2024] KEELC 6464 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
PETITION E006 OF 2022  
L WAITHAKA, J  
SEPTEMBER 25, 2024  
IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLES 22 AND 40 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**JOSEPH KIMUTAI CHESINGEI ALIAS JOSEPH KIMUTAI  
SUTER ..... PETITIONER**

**AND**

**THE COUNTY LAND REGISTRAR, ELGEYO MARAKWET  
COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a judgment delivered on 25<sup>th</sup> September 2023, this court entered judgment in favour of the petitioner and against the respondents in the following terms: -

“... the Petition has merit and is allowed in terms of prayer (a) and prayer (c) to the extent that the 4<sup>th</sup> respondent in conjunction with the 3<sup>rd</sup> respondent is directed to regularize the acquisition of the suit property in total compliance with the provisions of the Land Act, 2012 and the Land Value (Amendment) Act, 2019 within a period of nine (9) months



from the time of delivery of this judgment, failing which the 3<sup>rd</sup> respondent shall pay the Petitioner Kshs. 13,000,000/- for the one acre of the suit property it occupies or vacate the suit property.”

2. About 8 months from the date of delivery of the judgment, specifically on 24<sup>th</sup> May 2024, the 3<sup>rd</sup> respondent filed a notice of motion of even date seeking to inter alia set aside the judgment of the court on the ground that it was not served with the petition.
3. In support of the application, the 3<sup>rd</sup> respondent /applicant through the affidavit of Charles Mutai, its Elgeyo Marakwet County Elections Manager, disputes service of the petition on him or any authorized officer of the 3<sup>rd</sup> respondent. The deponent of the supporting affidavit states that the 3<sup>rd</sup> respondent got to know of the petition after it was served with the decree issued by the court pursuant to the judgment it seeks to be set aside. However, the deponent does not state when he was served with the decree, yet that is very important for determining whether the application was filed without inordinate delay. I will come to this point later.
4. The respondent/applicant has also not annexed a draft replying affidavit to the application to help the court determine whether it has an arguable defence to petition.
5. The application is vehemently opposed by the petitioner/ respondent on the following grounds: -
  - i. It is brought under the wrong provisions of the law as opposed to [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#);
  - ii. That other than disowning the stamp imposed on the pleadings as proof of service, the 3<sup>rd</sup> respondent/applicant has not demonstrated that the same is a forgery;
  - iii. That the applicant has not placed any material before the court to convince it that it may arrive at a different verdict if the judgment is set aside.
6. The petitioner points out that the Attorney General has since preferred an appeal against the judgment and contends that the filing of the appeal ousts the jurisdiction of this court to review its judgment.
7. Terming the application defective, for having been brought under the wrong provisions of the law, the petitioner/respondent contends that the applicant has not met the legal threshold for being granted the orders sought.
8. It is the petitioner/respondent’s case that he would be prejudiced if the orders sought are granted.
9. Both the 3<sup>rd</sup> respondent/applicant and the petitioner /respondent filed submissions reiterating the arguments advanced in the pleadings.

### **Analysis and Determination**

10. I have carefully considered the application by the 3<sup>rd</sup> respondent/applicant, the response thereto, and the submissions by the respective parties. I find the sole issue for the court’s determination to be whether the 3<sup>rd</sup> respondent/applicant has made up a case for being granted the orders sought, particularly the order for setting aside of the judgment of this court delivered on 24<sup>th</sup> May 2024.
11. With regard to that issue, whilst the 3<sup>rd</sup> respondent/applicant has raised a pertinent issue, which if proved would entitle him to grant of the orders sought, I note that in his supporting affidavit, the 3<sup>rd</sup> respondent/applicant acknowledges that he was served with the decree issued by this court pursuant to the judgment sought to be set aside. Regrettably, the applicant has not indicated when he received the decree yet the time he got to know about the judgment/decree of the court is an important factor



to consider in determining whether or not the application for setting aside the judgment was made without unreasonable delay.

12. As pointed out herein above, the instant application was filed eight (8) months after the judgment sought to be set aside was delivered. No explanation whatsoever has been offered by the applicant.
13. In the circumstances, I agree with the petitioner /respondent's submissions that the delay in bringing the application is inordinate.
14. To exercise the discretionary power vested in it of setting aside judgment to allow a party to defend the suit, the court considers a number of principles. These include a demonstration by the applicant that he/she has a defence on the merits. In that regard, see the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where Duffus P. (as he then was) stated: -

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits...”
15. In the circumstances of this case, where a regular judgment of the court was rendered after hearing some of the parties on the merits and demerits of the case, for the court to exercise its unfettered discretion of setting aside the judgment in order to allow the applicant an opportunity to defend the case, the applicant must demonstrate to the court that it has a defence on the merits of the case, something it has not done or even attempted to do.
16. In the circumstances, I agree with the petitioner /respondent that the 3<sup>rd</sup> respondent/applicant has not met the legal threshold of being granted the orders sought.
17. The upshot of the foregoing is that the notice of motion dated 24<sup>th</sup> May 2024 has no merit. Consequently, I dismiss it with costs to the petitioner/respondent.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. N. WAITHAKA**

**JUDGE**

**Ruling delivered virtually in the presence of:-**

Mr. Korir for the Petitioner/Respondent

Ms. Omalla holding brief for Mr. Kiptoo for the 3<sup>rd</sup> Respondent

N/A for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent

N/A for the 4<sup>th</sup> Respondent

Court Assistant: Alex

