



Byegon v Agricultural Finance Corporation; Chelgoi (Proposed Interested Party) (Environmental and Land Originating Summons E006 of 2023) [2025] KEELC 2868 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2023
LA OMOLLO, J
MARCH 27, 2025**

BETWEEN

ROBERT KIPKEMOI BYEGON PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION DEFENDANT

AND

GRACE CHELANGAT CHELOGOI PROPOSED INTERESTED PARTY

RULING

Introduction.

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 22nd July, 2024. It is expressed to be brought under Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 10 Rule 11 of the Civil Procedure Rules and Article 159 of *the Constitution* of Kenya.
2. The Defendant/Applicant seeks the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to set aside and or vary the default judgement entered for the Plaintiff against the Defendant only in default of entering appearance and filing a defence together with any consequential decree and orders of the Court as the Court may deem fit and just.
 - c. Spent



- d. That this Honourable Court be pleased to enjoin the Interested Party to the suit, as the Interested Party has been in occupation of the suit parcel Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71.
 - e. That the Honourable Court be pleased to compel the Plaintiff to provide proof of service of the pleadings, in the Plaintiffs application for adverse possession.
 - f. That this Honourable Court be please (sic) to compel the Land Registrar Kericho to effect a caution on the land as there is a chance of the suit parcel being Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 being transferred to a third party thereby rendering nugatory the chances of the Defendant to claim back its proprietorship.
 - g. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit sworn by one Fozia Gakii the Legal Officer of the Defendant/Applicant.

Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Originating Summons dated 18th May, 2023 where he sought for the determination of the following questions;
- a. Whether the Plaintiff has gained proprietary rights over all that parcel of land known as Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 by virtue of continued uninterrupted possession of an initial period of ten (10) years and a further twenty (20) years adverse to the title acquired, albeit illegally, by the Defendant on 27th August, 2001? (sic)
 - b. Whether having not been evicted from 27th August, 2001 to date vide any legal process, the Plaintiff should be declared a bona fide proprietor of all that parcel of land known as Kericho/Kipchorian/Lelu Block 5 (Kebeneti)/71 and be registered as such.
 - c. Whether costs of the suit should be provided for.
5. No response was filed by the Defendant/Applicant.
6. This Court in its judgment delivered on 2nd May, 2024 issued the following orders;
- a. The Plaintiff has acquired title deed by adverse possession over LR No. Kericho/Kipchorian/Lelu Block 5 (Kebeneti)/71.
 - b. The land LR No. Kericho/Kipchorian/Lelu Block 5 (Kebeneti) 71, be registered in the names of the Plaintiff and the Defendant be ordered to sign the same, within 30 days of the delivery of this judgement.
 - c. The Plaintiff shall have the cost of this suit at a lower scale since the same was undefended.
7. The application under consideration first came up for hearing on 29th July, 2024 when the Court directed that it be served upon the Plaintiff/Respondent.
8. The application came up for hearing on 8th October, 2024 which hearing was adjourned to 4th November, 2024. On 4th November, 2024 the hearing of the application was adjourned to 3rd December, 2024 after counsel for the Plaintiff/Respondent sought for more time to file a response to the application.



9. On 3rd December, 2024 the Court issued directions that the application be heard by way of written submissions. On 5th February, 2025, the matter was mentioned to confirm filing of submissions and reserved for ruling.

The Defendant/Applicant's Contention.

10. The affidavit in support of the application is sworn by Fozia Gakii the legal officer of the Defendant/Applicant.
11. She contends that the Court entered default judgment in this suit and delivered judgement on 2nd May, 2024. The Court found that the Plaintiff/Respondent had acquired land parcel No. Kericho/Kipchorian/Lelu Block 5 (Kebeneti)/71 by adverse possession and he was awarded costs of the suit.
12. She also contends that the Defendant/Applicant has never been served with the summons to enter appearance or any pleadings in this matter.
13. She further contends that the Defendant/Applicant became aware of this matter on 18th July, 2024 when the proposed Interested Party informed it that she had been forcefully evicted by persons alleging that they were representing the Plaintiff/Respondent.
14. It is her contention that upon receiving this information, the Defendant/Applicant requested its Advocates on record to find out more information and they lodged an application for mapping in the judiciary e-filing system. She adds that the said Advocates received approval on 18th July, 2024 which enabled them to access the documents filed.
15. It is also her contention that upon perusal, it became clear to them that the pleadings were not served and the suit was not defended thereby prejudicing the interests of the Defendant/Applicant.
16. It is further her contention that upon reading the judgement, the Defendant/Applicant noted that there was a misrepresentation of facts as the Plaintiff/Respondent has not been in possession of the suit property. She adds that it is the proposed Interested Party who has been in possession.
17. She contends that on or about the 20th day of February, 2001 the suit parcel was sold at a public auction that was conducted by Dawning Agencies and Auctioneers. The Defendant/Applicant was declared the highest bidder after bidding Kshs. 960,000/= thereby acquiring the suit parcel.
18. She also contends that upon transfer of the suit parcel to the Defendant/Applicant's name, the Plaintiff/Respondent lodged a caution on it barring the Defendant/Applicant from transacting any further with the suit parcel.
19. She further contends that the Plaintiff/Respondent offered to buy back the said parcel of land from the Defendant/Applicant vide the letter dated 24th February, 2003.
20. It is her contention that the Defendant/Applicant filed Kericho PMCC No. 333 of 2006 where it sought that the Court restrains the Plaintiff/Respondent from trespassing on the suit property and the caution registered thereon be removed by order of the Court.
21. It is also her contention that the Defendant/Applicant sought to remove the caution registered on the suit parcel and it wrote to the Kericho County Land Registrar. The Land Registrar issued the Plaintiff/Respondent with a 'Notice of Intention to Remove a Caution (Form LRA 71)' but the Plaintiff/Respondent ignored the said notice and the Land Registrar failed to remove the caution.



22. It is further her contention that the Defendant/Applicant filed Kericho PMCC No. 19 of 2022 where it sought orders against the Land Registrar Kericho and the Plaintiff/Respondent for the lifting of the caution lodged on the suit parcel.
23. She contends that the Plaintiff/Respondent's counsel on record in the said matter filed the present proceedings and sought orders of adverse possession but failed to serve the Defendant/Applicant with the pleadings.
24. She ends her deposition by stating that unless the Court issues orders of stay of execution of the judgement and decree, the suit property may be transferred to third parties thereby rendering nugatory the chances of the Defendant/Applicant to claim back its proprietorship.

The Plaintiff/Respondent's Response.

25. In response to the Defendant/Applicant's application the Plaintiff/Respondent filed Grounds of Opposition dated 2nd September, 2024. They are as follows;
 - a. That the Notice of Motion is misconceived, frivolous, incompetent and vexatious otherwise a gross abuse of the Court process and should be summarily dismissed with costs.
 - b. That the issue of service of this Court's processes in this matter was duly considered and having been satisfied on the mode of service which was vide the known email address of the Defendant herein, to wit, legalfc@gmail.com the Court made a finding that service was proper hence the issue is Res Judicata.
 - c. That the Defendant has the option of appealing against the decision of this Court.
 - d. That the Plaintiff is opposed to reopening of the proceedings in this matter as it amounts to inviting this Honourable (sic) to sit on appeal in its own case.
 - e. That the Plaintiff is opposed to enjoinderment of an Interested Party who is a stranger to the Plaintiff without leave of the Court. Further no notice of appointment of Advocates has been filed.
 - f. That the Plaintiff reads mischief on the part of the Defendant as it wants to take advantage of transfers in this Honourable Court to reinvent the wheel. (sic)
 - g. That for the foregoing reasons, the application dated 22nd July, 2024 has no merit and should be dismissed with costs to the Plaintiff.
26. The Plaintiff/Respondent also filed a Replying Affidavit sworn on 4th November, 2024.
27. The Plaintiff/Respondent depones that the proposed Interested Party is a total stranger to the present proceedings as the suit is between him and the Defendant/Applicant. He adds that the Proposed Interested Party should therefore not be joined to the suit.
28. He also depones that he instituted the present proceedings through his advocates on record. He adds that his advocates on record served the Defendant/Applicant with a Notice of Motion, Originating Summons and a mention Notice via an email sent on 26th June, 2023.
29. He further depones that his advocates on record filed an affidavit of service sworn on 24th July, 2023.
30. It is his deposition that his advocates on record also served a subsequent mention notice on 5th October, 2023 on the Defendant/Applicant. He adds that an affidavit of service was filed and it was sworn on 12th October, 2023.



31. It is also his deposition that despite service, the Defendant/Applicant never entered appearance or filed any response to the application.
32. It is further his deposition that it was therefore not true that the Defendant/Applicant became aware of the existence of this matter on 18th July, 2024 when the proposed Interested Party was forcefully evicted.
33. He depones that the proposed Interested Party is a total stranger to the proceedings and the Court should therefore strike her name from the Court record.
34. He also depones that the Court was satisfied with the mode of service, fixed the matter for formal proof and the hearing proceeded ex parte on 7th February, 2024.
35. He further depones that he filed his submissions on 6th March, 2024 as per the directions of the Court and the Court delivered its judgement on 2nd May, 2024 where it found that he had acquired land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti) 71 by way of adverse possession. He adds that he has now been issued with a title deed for the suit parcel.
36. It is his deposition that shortly after the Court delivered its judgement, the Defendant/Applicant filed the application under consideration with the intention of denying him the fruits of his judgement.
37. It is also his deposition that the allegations that the Defendant/Applicant was not served with summons to enter appearance or the pleadings is not true.
38. It is further his deposition that the Court considered the issue of service and was satisfied with the mode of service which was made vide the known email address to wit legalafc@gmail.com The Court made a finding that service was proper hence the issue was res judicata.
39. He depones that it is evident that the Defendant/Applicant has no triable defence which is why it never entered appearance or filed a defence.
40. It is also his deposition that the Defendant/Applicant has not attached a draft defence to warrant the exercise of this Court's discretion.
41. It is further his deposition that the introduction of a proposed Interested Party is a ploy by the Defendant/Applicant to further delay the suit to his detriment and the detriment of his family.
42. He depones that the proposed Interested Party has no better claim than the Defendant/Applicant.
43. He denies that the judgement is flawed with misrepresentation of facts and depones that he has been in occupation of the suit parcel.
44. He also depones that he has been in uninterrupted occupation for a period of ten years. He adds that he has been in occupation of the suit parcel for a further period of twenty years which period was adverse to the occupation of the Defendant/Applicant after it acquired the title on 27th August, 2001.
45. He further depones that he has been advised by his advocates on record that the Defendant/Applicant has not met the threshold for setting aside and/or stay of execution of the judgement delivered by this Court.
46. It is his deposition that the Defendant/Applicant has the option of filing an appeal against the said judgement. He adds that he is opposed to the reopening of the present proceedings as it amounts to inviting the Court to sit on appeal in its own case.



47. He ends his deposition by stating that he is advised by his advocates on record that the instant suit (sic) is fatally defective, incompetent, bad in law and should be struck out.

Issues for Determination.

48. The Defendant/Applicant filed its submissions on 4th February, 2025 while the Plaintiff/Respondent filed his submissions on 11th February, 2025.

49. The Defendant/Applicant submits on the following issues;

- a. Whether the Defendant/Applicant is entitled to the prayers sought in the application.
- b. Whether the matter is res judicata.

50. With regard to the first issue, the Defendant/Applicant reiterates that judgement in this matter was obtained irregularly as it (Defendant/Applicant) was not properly served.

51. The Defendant/Applicant also submits that it was not served with any Notice of Entry of Judgement in order for it to get the opportunity to either appeal or review the judgement.

52. The Defendant/Applicant further submits that the application under consideration has been brought without undue delay and that the Plaintiff/Respondent will not suffer any prejudice if the judgement is set aside.

53. The Defendant/Applicant relies on Article 159 (2) (a) & (d) of *the Constitution* of Kenya, Sections 1A (1), 1B (1) (a) of the *Civil Procedure Act*, Order 10 Rule 11 of the Civil Procedure Rules, the judicial decisions of Patel v EA Cargo Handling Services Ltd [1974]EA 75, Shah v Mbogo [1967] EA 166, Shanzu Investments Ltd v Commissioner of Lands [1993]eKLR, Shabir Din v Ram Parkash Anand [1955] 22 EACA 48, Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2003) (Judgement) and submits that the Plaintiff/Respondent failed to disclose to the Court that he was not in possession of the suit parcel as it was the proposed Interested Party who has been in possession for a period of twenty years.

54. The Defendant/Applicant submits that the Court has the discretion to set aside regular ex parte judgement but the said discretion must be exercised judiciously.

55. With regard to the second issue, the Defendant/Applicant relies on Section 7 of the *Civil Procedure Act*, the judicial decisions of Abok James Odera vs John Patrick Machira Civil Application No. Nai 49 of 2001, Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, Gurbachan Singh Kalsi vs Yowani Ekori Civil Appeal No. 62 of 1958, Mburu Kinyua vs Gachini Tuti [1978] KLR 69; [1976-80] 1KLR 790 and Churanji Lal & Co. vs Bhajjee [1932] 14 KLR 28, Mungai v Gachuhi & another [2005] eKLR and urges the Court to allow its application as prayed.

56. The Plaintiff/Respondent submits on the following issues;

- a. Whether the Applicant is entitled to the order of setting aside.
- b. Whether the Applicant is entitled to the order of stay of execution.
- c. Whether the intended Interested Party should be enjoined to the suit.

57. With regard to the first issue, the Plaintiff/Respondent relies on the judicial decision of Fidelity Commercial

Bank Ltd vs Owen Amos Ndung'u & another HCC No. 241 of 1998 (UR) and submits that the Defendant/Applicant was duly served with the applications and mention notices in this matter.



58. The Plaintiff/Respondent also submits that it has attached to his replying affidavit copies of the affidavits of service.
59. The Plaintiff/Respondent further submits that the Defendant/Applicant did not controvert the said affidavits of service.
60. The Plaintiff/Respondent also submits that the issue of service is res judicata as it was considered by the Court on 18th October, 2023 before it issued the date of 7th February, 2024 for hearing. He relies on the judicial decision of James Kanyiita Nderitu vs Marios Philotas Ghikaa & another [2016] eKLR in support of his submissions.
61. The Plaintiff/Respondent submits that the judgement in this matter was regularly entered. He relies on the judicial decision of Philip Keipto Chemwolo & Mumias Sugar Co. Ltd vs Augustine Kubende [1986] eKLR as was cited in Ecobank Kenya Limited v Minolta Limited & 2 Others [2018] eKLR and submits that the Defendant/Applicant did not attach a draft defence to warrant the setting aside of the judgement.
62. The Plaintiff/Respondent relies on the judicial decision of General Properties Limited v Saika Two Estate Developers Ltd (Environment & Land Case 209 of 2019) [2022] KEELC and urges the Court to dismiss the application.
63. On whether an order of stay of execution should be granted, the Plaintiff/Respondent relies on Order 42 Rule 6(2) of the Civil Procedure Rules, the judicial decision of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR and submits that the Defendant/Applicant will not suffer substantial loss as he (Plaintiff/Respondent) has been in uninterrupted possession of the suit parcel.
64. On whether the Interested Party should be joined to the suit, the Plaintiff/Respondent relies on Order 1 Rule 10(2) of the Civil Procedure Rules, the judicial decisions of Central Kenya Ltd vs Trust Bank & 4 Others [CA No. 222 of 1998](#), Telkom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, Francis Karioki Muruatetu & another v Republic & 5 Others Petition No. 15 as consolidated with No. 16 of 2013 [2016] eKLR, Human Rights Alliance v Mumo Matemu & 5 Others [2015] eKLR and submits that the Proposed Interested Party has no better claim than the Defendant/Applicant and does not therefore meet the criteria to be joined to the suit.

Analysis and Determination.

65. I have considered the application, the response thereto and the submissions. It is my view that the following issues arise for determination;
 - a. Whether the issue of service is res judicata.
 - b. Whether the Court should set aside the judgement delivered on 2nd May, 2024.
 - c. Whether Grace Chelagat Chelogoi should be joined to the suit as an Interested Party.
 - d. Whether an order should be issued to compel the Land Registrar Kericho to place a caution on land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti) 17.
 - e. Who should bear costs of the application.



A. Whether the issue of service is res judicata.

66. Section 7 of the [Civil Procedure Act](#) provides as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

67. The Court of Appeal in *Salama Beach Hotel Limited & 3 others v Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates* [2019] eKLR stated thus;

“32. It follows therefore, in determining whether a suit or application is res-judicata, whichever the case may be, all the elements outlined in Section 7 must be satisfied conjunctively. That is:

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

68. The Plaintiff/Respondent contends that the issue of service upon the Defendant/Applicant was addressed by the Court on 18th October, 2023 and it was satisfied that the Defendant/Applicant was properly served. Therefore, the issue of service as raised by the Defendant/Applicant is res judicata.

69. In response the Defendant/Applicant submits that the issue of res judicata is not applicable in the present proceedings as the matter was not determined on merit.

70. A perusal of the Court record shows that on 18th October, 2023 the Court issued the following orders;

“The Originating Summons shall proceed by viva voce evidence. The same shall be treated as a Plaint and the affidavit in support as the statement. Formal proof shall now proceed on the 7th February, 2024.”

71. The question of service upon the Defendant/Applicant was not an issue for determination before this court and there was no ruling on it. It cannot, therefore, be said to be res judicata. I must also point out that Courts depend on affidavits of service for persuasion that a party has been properly served. Very often, this persuasion is based on facts deponed upon by the person effecting service. Does that mean that these facts cannot be challenged? Certainly not. It is for this reason that a party may ask to cross examine a deponent on facts deponed. That is to say, facts deponed in an affidavit of service or any other affidavit for



that matter are deemed true until those facts are challenged. When a Court relies on them or is persuaded by them, as it did in this case, the fact of such reliance or persuasion should not be used to estop an opposing party to question the veracity of facts deponed.

72. I find that the question of service upon the Defendant/Applicant is not res judicata.

B. Whether the Court should set aside the judgement delivered on 2nd May, 2024.

73. The Defendant/Applicant is seeking that this Court sets aside the judgement delivered on 2nd May, 2024 on the ground that it was not served with the pleadings in this matter.

74. The Defendant/Applicant contends that it only became aware of the present proceedings when the proposed

Interested Party was allegedly evicted from the suit parcel.

75. In response, the Plaintiff/Respondent contends that the Defendant/Applicant has always been served with the pleadings in this matter.

76. The Plaintiff/Respondent also contends that the Defendant/Applicant was served vide the following email address; legalafc@gmail.com.

77. The Plaintiff/Respondent has attached to his replying affidavit a copy of an Affidavit of Service sworn by one Onesmus Langat on 24th July, 2023.

78. He depones that he received an application and a mention notice on 26th June, 2023 which he emailed to the Defendant/Applicant through the email address info@agrifinance.org.

79. Attached to the said affidavit is a copy of a mention notice dated 5th October, 2023 and a copy of an email sent from onesmuslangat@gmail.com to info@agrifinance.org.

80. The Plaintiff/Respondent has also attached to his Replying Affidavit a copy of an affidavit of service sworn on 12th October, 2023 by one Onesmus Langat.

81. He depones that he served the Defendant/Applicant with a mention notice via the email address info@agrifinance.org on 5th October, 2023.

82. A perusal of the Court record shows that the Plaintiff/Respondent filed the Originating Summons dated 18th May, 2023 on 19th May, 2023.

83. The Court record shows further that the Plaintiff/Respondent also filed a Notice of Motion application dated 18th May, 2023.

84. There is an affidavit of service on record which is sworn on 24th July, 2023 which is the same affidavit of service that is attached to the Plaintiff/Respondent's Replying Affidavit.

85. Attached to the said affidavit of service is an email sent by onesmuslangat@gmail.com to info@agrifinance.org forwarding a mention notice and an application.

86. It is important to note that the Plaintiff/Respondent had filed the Originating Summons together with a Notice of Motion application and it is therefore not clear which of these two documents was sent to the said email address.

87. The other affidavit of service on the Court record is the one sworn on 12th October, 2023 whose contents have been set out in the preceding paragraphs.



88. From the two affidavits of service, this Courts notes that some of the pleadings in this matter were served through the email address info@agrifinance.org instead of legalafc@gmail.com.
89. This Court also notes that the email address provided by the Defendant/Applicant in the application under consideration is legalafc@gmail.com.
90. The Plaintiff/Respondent confirms that the Defendant/Applicant's email address is legalafc@gmail.com and yet the affidavits of service show that service was allegedly done via info@agrifinance.org.
91. Given the said circumstances, it is my view that the Defendant/Applicant was not properly served with the pleadings in this matter.
92. In the judicial decision of *Kiuvu & another v Machakos County Assembly Service Board* (Petition E004 of 2023) [2024] KEELRC 1909 (KLR) (25 July 2024) (Ruling) the Court held as follows;
- “Under Order 22 B(1) of the Civil Procedure Rules, service of Court processes through email is deemed as proper once the processes are sent to the recipient's last known email address. Further, the time of receipt of the process is deemed to be the time it (the process) was delivered to the recipient's email.”
93. Service through email is deemed to be proper when the documents being served are sent to the recipient's last known address. There is no mention whether the e-mail address info@agrifinance.org was the last known e-mail address of the Defendant/Applicant.
94. I have every reason to believe that service of pleadings upon the Defendant/Applicant was not proper for the reason that the email address is incorrect.
95. The Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] KECA 799 (KLR) held as follows;
- “It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in a suit.”
96. In the judicial decision of *John Muthee Ngunjiri v Ali Ibrahim* [2021] eKLR the Court held as follows;
- “12. Where a Defendant in an application to set aside an ex parte judgment demonstrates that he was not served with summons, it follows that any ex parte judgment must have been obtained irregularly and the Court in such instance will set aside the ex parte judgment unconditionally and will grant the Defendant leave to defend the suit. Even where a regular judgment was obtained after due service the Court may for sufficient cause and upon the Applicant demonstrating he has a defence on merits, set aside the ex parte judgement on such terms as may be just.
13. In the case of *Patel -vs- East African Cargo Handling Services Ltd* (1974) EA75 the Court of Appeal per Duffus, V.P stated as follows:-



“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 there is a defence on merits. In this respect defence on merits, does not mean in my view, a defence that must succeed it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”

97. As stated in the preceding paragraphs, the Defendant/Applicant is seeking that this Court exercises its discretion and sets aside the judgement delivered on 2nd May, 2024 on account of lack of proper service.

98. My view is that the Defendant/Applicant has demonstrated that it was not served with the pleadings in this matter and nothing is easier than to set aside the judgment delivered on 2nd May, 2024.

C. Whether Grace Chelagat Chelogoi should be joined to the suit as an Interested Party.

99. Order 1 Rule 10(2) of the Civil Procedure Rules states as follows: -

“The Court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

(Emphasis mine)

100. The Supreme Court in Francis K. Muruatetu and another v. Republic & 5 others [2016] eKLR set out the following elements the Court has to consider when determining an application for joinder of an Interested Party;

“a. The Personal interest or stake that the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

b. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

c. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

101. In the judicial decision of Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR the Court held as follows;

“In my view, for one to convince the Court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the Court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation.



Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the Court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.” [Emphasis mine]

102. The Defendant/Applicant is seeking that Grace Chelagat Chelogoi be joined to the suit as an Interested Party. It contends that the proposed Interested Party is the one who has been in occupation of the suit parcel and she is therefore a necessary party to the suit.
103. The Plaintiff/Respondent submits that the proposed Interested Party has not met the threshold of being joined to the suit.
104. As was held in the above cited judicial decisions, the Court in determining whether to join a proposed Interested Party to the suit must consider the stake the said party has in the suit, the prejudice they are likely to suffer and the case they intend to make before the Court.
105. In the present case, other than alleging that the Proposed Interested Party was in possession of the suit parcel, the Defendant/Applicant has not demonstrated the stake that the proposed interested party has in this suit, how her presence will assist in the settlement of the questions involved in the suit, any prejudice the proposed Interested Party is likely to suffer if she is not joined to the suit.
106. Curiously, it is the Defendant/Applicant who seeks that the proposed Interested Party be joined to this suit. It is not clear whether the Proposed Interested Party is aware that the Defendant/Applicant wants her to be joined to the suit and/or whether she is interested in being joined to the suit.
107. I decline to make an order for joinder of the Proposed interested party to this suit.

D. Whether an order should be issued to compel the Land Registrar Kericho to place a caution on land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti) 17.

108. The Defendant/Applicant is seeking that this Court issues an order to compel the Land Registrar, Kericho to place a caution on land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti) 17 to prevent it from being transferred to a third party.
109. The Plaintiff/Respondent did not address this issue in his response and submissions.



110. Section 71 of the *Land Registration Act* provides as follows;

- “(1) A person who—
- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
 - (b) is entitled to a licence; or
 - (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.
- (2) A caution may either—
- (a) forbid the registration of dispositions and the making of entries;
or
 - (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.”

111. In the judicial decision of *Hussein Ali Dima & another v Land Registration (Kajiado Lands Office) & 2 others* [2019] eKLR the Court while considering a similar application held as follows;

“Section 71(4) of the *Land Registration Act* gives the Land Registrar the power to accept and or reject a caution. Since the act of registering a caution is administrative, I opine that the Applicants should have sought for orders of judicial review if indeed the Land Registrar declined to register the same or filed an application for injunction within the now Chief Magistrate’s Court Case no. 337 of 2014.”

112. In the above cited judicial decision, the Court held that the registration of a caution is an administrative process and in the event the Land Registrar declines to register a caution, the remedy available is filing an application for judicial review.

113. In the present matter the Defendant/Applicant has not disclosed whether it applied for registration of a caution and whether the Land Registrar declined to do so. If the land registrar declined, the present proceedings would not be the proper forum to seek that he be compelled to register it.

114. Consequently, I decline to grant an order compelling the Land Registrar to register a caution on land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti) 17.

B. Who should bear costs of the application.

115. On the question of costs, it is now settled 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.

116. Taking the foregoing into consideration. The application dated 22nd July, 2024 partially succeeds and I order as follows:

- a. The Judgment delivered by this Honourable Court on 2nd May, 2024 is hereby set aside.
- b. The Applicant shall file and serve its response to the Originating summons within 7 days of the date hereof.
- c. The suit shall be set down for directions within 14 days.
- d. Cost of the application shall abide the outcome of the suit.

117. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 27TH DAY OF MARCH, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Mainga for the Defendant/Applicant.

Miss Cherono for Langat for the Plaintiff/Respondent.

Court Assistant; Mr. Joseph Makori.

