Wabungo v Mwamvula & another (Environment and Land Appeal E003 of 2024) [2025] KEELC 3309 (KLR) (7 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3309 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND APPEAL E003 OF 2024

LL NAIKUNI, J

APRIL 7, 2025

BETWEEN

NDURYA KITSAO WABUNGO .... APPELLANT

AND

MGANGA MWAMVULA NYAWA .... 1ST RESPONDENT

CHENGO MGANGA MWAMVULA .... 2ND RESPONDENT

(Being an Appeal against the Ruling delivered on 23rd April 2024, in Mariakani Principal Magistrates Court in SPM ELC Suit No E006 of 2021, by [Hon. M. S. Kimani – SPM)

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains an appeal preferred by the Appellant, Ndurya Kitsao Wabungo through the Memorandum of Appeal dated 7th May, 2024 and the 157 Pages Record of Appeal dated 22nd May, 2024 respectively. It is against the Respondent herein.

2. Primarily, being aggrieved by the decision of the Trial Court from its pronouncement of a Ruling delivered on 23rd April 2024, the trial Court at Mariakani (Hon. M. S. Kimani SPM), in "The SPM – ELC Suit No. E006 of 2021 – Mganga Mwamvula Nyawa & Chengo Mganga – Versus – Ndurya Wabungo". In the decision, the Honourable Magistrate dismissed an Notice of Motion Application dated 18th January, 2024 with costs, the Appellant preferred this appeal. In essence, the said application sought to allow the Law firm of Messrs. Muriithi & Masore Law Advocates to come on record on behalf of the Appellant in place of Mr. Sharia Nyange of Kituo Cha Sheria and further for the Judgment delivered on 19th December 2023 to be set aside and the matter to commence "de novo" giving the Defendant (now the Appellant) be given an opportunity to be heard in the said matter which were declined.

3. The appeal was opposed by the Respondents herein who place reliance on the submissions on record and those filed at the trial court, the replying affidavit earlier filed in the trial court and the impugned ruling itself.

II. The Appellant's case

4. The appeal by the Appellant was based on the following grounds:-

   a. The Learned Magistrate exercised his jurisdiction wrongly by declining to set aside the Ex - Parte Judgement of 19th December 2023 despite being shown cogent and plausible explanations why the Appellant found himself in such an unenviable position

   b. The Learned Magistrate exercised his discretion wrongly when he misapprehended the true tenor and purport of the law on an advocate to cease acting for a party in a cause

   c. The Learned Magistrate exercised his discretion wrongly unduly censuring the Appellant's candour on why he was unable to approach court before delivery of the Ex - Parte Judgement.

   d. The Learned Magistrate exercised his discretion by removing the appellant from the seat of justice despite acknowledging existence of a meritorious defence on record.

   e. The Learned Magistrate exercised discretion wrongly by considering irrelevant matters and extraneous matters far removed from the species of the application before him

   f. Wholly the Learned Magistrate exercised his discretion wrongly by failing to uphold the fundamental duty of the court thereby visiting the Appellant injustice and undue hardship.

5. The Appellant sought for the following orders that:-

   a. The appeal be allowed.

   b. The orders dismissing the Notice of Motion application dated 18th January 2024 be set aside and substituted thereof with an order allowing the notice of motion application.

   c. The case be remitted to any other court of competent jurisdiction for expedited hearing and determination.

   d. The costs of this appeal be awarded to the Appellant.

III. The Respondents case

6. For good order, ease of flow and reference, the Honourable Court has decided to refer to the 43 Paragraphed Replying Affidavit dated 19th February, 2024 sworn by Chengo Mganga Mwamvula, the 2nd Respondent herein filed before the trial court and which forms part of the record of appeal. The court has identified the affidavit at Pages 121 to 124 of the record. In summary, it was averred as follows that:-

   a. The Appellant had admitted to having been fully aware of the suit before court as he had other matters before the court in Mariakani and which revolved around the suit property.

   b. In all the other cases, the Appellant was being represented by the Law firm of Messrs. Sharia Nyange & Company Advocates but the said advocate ceased acting and thus the Appellant represented himself.

c. It was stated that the Respondent's Advocate would from time to time call the Appellant and inform him of the proceedings especially on days after court attendance.

d. Further that the Appellant had been served with the hearing notice as per the affidavit of service of one Shem Abuodho a licensed process server which was annexed to the replying affidavit. The appellant was further served with the same hearing notice by the Respondent's Counsel on 13th October 2023.

e. The Appellant had failed to inform court why he could not arrest Judgement before its delivery and only acted upon the suit after service of the notice of entry of judgement dated 5th January 2024.

f. It was the duty of the Appellant to follow up on his case and the blame could not be shifted to the Appellant's Advocate at this juncture.

g. The Appellant stated that despite the numerous warnings and orders against the Appellant's trespass, he continued to boastfully invade and trespass upon the suit property hence disregarding the orders of the court.

h. Lastly, the Respondents stated that the Appellant's hands were tainted and he ought not to be given the audience of the court.

IV. Submissions

7. On 15th November, 2024 while all the parties were present in Court, they were directed to have the appeal disposed off by way of written submissions. Subsequently, all parties complied and the Judgement date was reserved and delivered on 8th April, 2025 accordingly.

A. The Written Submissions by the Appellant.

8. The Appellant through the Law firm of Messrs. Muriithi & Masore Law Advocates filed their written submissions dated 15th January, 2024. Mr. Muriithi Advocate commenced by providing Court the background of the appeal. He stated that the Appellant was aggrieved by the Ruling of the lower court of 23rd April, 2024. From the filed Memorandum of Appeal, the Learned Counsel stated that the appeal was based on six (6) grounds.

9. Fundamentally, he emphasised that this Court was clothed with Jurisdiction to hear and make a determination of this Appeal. Further, that the Court was called upon to exercise its limitless powers under the provision of Order 12 Rule 7 of the Civil procedure Rules, 2010 and thirdly that the Court would be exercising its discretion as clearly laid - down in the famous case of "Mbogo – Versus – Shah" (1968) EA 93 to wit that the Court's discretionary power was to be exercised to avoid injustice and hardship resulting from accident inadvertence or excusable mistake or error. His contention was that the Appeal raised triable issues the subject matter emanating from a land which were emotive and sensitive in nature.

10. On grounds 2 & 6 of the appeal. Their submission was that that in exercising its discretion, a Court must be correct on the rules and principles of law. To buttress on this point, the Counsel referred Court to the case of:- "Daqare Transporters Limited – Versus - Chevron Kenya Limited [2020] KECA 309[KLR". Where the Court held:-

> "It is trite that when a Court is called upon to exercise its discretion. It ought to do so judiciously. That is because discretional power id derived from the law and must be exercised

upon certain legal principles and according to the circumstances of each case, to the end of doing substantial justice to the parties”

11. The Appellant grieved that the trial court misapprehended the law on an Advocate ceasing to act for a party. The Counsel held that the law governing the an Advocate intending to cease from acting for a client is founded under the provision of Order 9 Rule 13 of the Civil Procedure Rules 2010. It provides that an application to cease acting ought to be made before court and the court will the make an order appropriately. Otherwise, an advocate is considered to be the advocate of a party until the final conclusion of a case including review or appeal in the event that the application to cease acting is not made.

12. In the instant case, the Appellant stated that Mr Sharia Nyange who acted for him never ceased acting for him. However, the said advocate failed to attend court when the matter came up for hearing on 25th October 2023 and other subsequent occasions. That the appellant only learnt of the matter having proceeded at the time it had already been slated for delivery of Judgement.

13. The Appellant made reference to the holding in the cases of:- “Mutua Waweru & Co Advocates - Versus - Gilphine Mokeira Omwenga & Joab Burudi Manyasi [2022] KEHC KLR & Antony Kabiru Kabuku – Versus – Mwende Wamugunda, Jackson Wamugunda, Charles Maina & Jsphat Mwangi (2015) KEHC 6741 (KLR) where courts held that an advocate could not casually drop out of a case without complying with the provision of Order 9 Rule 13 of the Rules. The Appellant maintained that the Lower court fell into error in stating that the Appellant was served with a hearing notice and thus was to blame for failing to attend court. Further, any service of a notice onto a party who already had engaged an Advocate and who was on record was irregular and therefore a nullity and so is any action taken thereafter.

14. On grounds 1 & 3 of the grounds of appeal. The Learned Counsel submitted that he was not aware that the Appellant’s Advocate had dropped from the case and was no longer representing him. He stated that after becoming aware of this, he approached another counsel who advised him the best course of action to take was to wait for the delivery of the Judgement then take appropriate action. The said Advocate further informed him that the matter had been slated for Judgement on 8th December, 2023. The said Advocate never filed a Notice of Change of Advocates to act for the Appellant. However, it was differed to 19th December, 2023 but at that time the Appellant had already gone to the village for Christmas festivities.

15. That the Civil Procedure Rules was crafted to accommodate the limited time of festivities running from 21st December to 13th January. Taking thatht by then the Appellant had not filed a Notice to Act in Person, there was no address upon which he would have been send the Judgement which was delivered electronically. The Appellant’s counsel on record submitted that the Appellant was being punished for being forthright and that should not be the case.

16. On ground 4 of the grounds of appeal. The Learned Counsel averred that by declining to set aside the Judgement and refusing to order that the matter be heard de novo, the trial court foreclosed any chance of the Appellant presenting his case yet he had on record a meritorious defence. The dispute pits kin against kin. The parties were duelling over ownership of all that parcel of land located at Ndugu ni Shakwa village, Viyunduni Sub – location, Makamani Location, Kinango Sub – County within the County of Kwale. Each party is laying claim over the suit land. Land was a very emotive and sensitive commodity and each party ought to be accorded an opportunity to be heard. It is for this very reason that it was imperative that the Appellant be given a chance to substantiate his defence on the merits for the matter to be resolved.

17. To buttress on this point, the Counsel placed reliance on the holding in the cases of:- “Okadale Commodities Limited – Versus - Sazit Company Limited & 2 Others [2024] KEEL 415[KLR] Lucy Bosire – Versus - Kehancha Div. Land Disputes Tribunal, Resident Magistrate Kehancha & Martha Jacob Matara[2013] KEHC 681[KLR]” where the Court held that:-

> “ Be that as it may this being a land matter and its emotive dimensions, I hold that the mistake of the Counsel by Plaintiff should not be visited upon the client. I am guided by the legal ration from a myriad of cases including "Gideon Mose Onchwati – Versus - Kenya Oil Company Limited & Another (2017) eKLR cited the case of “Shah-Versus-Mbogo(1967) EA 166 and court held:-
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> > “Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate is bound by the acts and omissions of the Advocates in the course of representation in applying that Principle, court must exercise care to avoid abuse of the system and or unjust or ridiculous results.Similarly, the Counsel cited the case of:- “Lucy Bosire – Versus - Kehancha Division Land Dispute Tribunal, Resident Magistrate Court Kehancha & Martha Jacob Matara [2013] KEHC 681 (KLR) held that:
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> > “In this case the dispute revolves around land which is very emotive subject in this country. Accordingly such maters ought to be heard on merits as far as possible so that parties do not feel that they were driven out of the seat of justice without being afforded an opportunity of being heard. In this case the blame is placed at the door steps of the applicant's erstwhile advocates. It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits

18. In a nutshell, the Leaned Counsel opined that the common thread in the above cases was that owing to the sensitivity of land in Kenya, disputes revolving land should be heard on merits to the greatest extent possible.

19. On Ground 5 of the grounds of Appeal. The Learned Counsel commenced by stating that at paragraph 33 of the Ruling (page 155 of the Record of Appeal), the trial court accepted the charge that the Appellant was a contemnor undeserving of court's discretion. That the Appellant disobeyed the court's orders at interlocutory stage and was still disobeying the final decree of the court.

20. First, the record would bear a true account that the Appellant had never been cited or convicted for contempt of court throughout the life of the case. The order that the Respondent and the trial court were alluding to (the order at page 133 of the Record of Appeal) spoke for itself that both parties had been cautioned against entering each other's land, cutting trees and constructing on the subject land during the pendency of the case. Such an order for status quo could not be stretched to be an indictment of contempt against the Appellant. The order bound both parties for purposes of preserving the land during trial.

21. Second, there was no evidence that the Appellant had disobeyed the final decree. No motion for contempt had ever been made to court post Judgment.

22. Third, the court was not being called upon to cite the Appellant for contempt and neither was he heard on any allegation of contempt. By finding the Appellant guilty of malevolence without there being any complaint and without hearing the Appellant, the court flouted the basic rule of natural justice of the Appellant's right to be heard. To them, these baseless allegations of contempt were irrelevant and distractive. They needed not unduly preoccupy the trial court's mind. It was a wrong exercise of discretion when a court takes into account irrelevant and extraneous matters. The Counsel referred Court to the case of: "Kenya Power &Lighting Co Ltd – Versus - Abdulhakim Abdulla Mohamed & Mulkys Importers Limited [2017] KECA 527 (KLR).

23. In conclusion, the Learned Counsel stated that the they had shown that the trial court wrongfully slammed the door shut on the Appellant. He prayed that this court allows the appeal.

B. The Written Submissions by the Respondents

24. The Respondents through the Law firm of Messrs. Anaya & Company Advocates while opposing the appeal filed their written submissions dated 27th January, 2025. Mr. Anaya Advocate commenced by praying that the appeal be declared an abuse of the court process, an act in futility to which the Appellant should be compelled to pay costs. The Learned Counsel submitted that they relied on the replying affidavit in the lower court, submissions and the impugned ruling.

25. The Respondents submitted that the principals established for the interference with the courts discretion and had not been proved by the Appellant. Further, while referring court to several cases being "Mathews Sankok Shompa – Versus – Kenya Commercial Bank Limited & Others Civil Appeal No. 529/2004' Habo Agencies Limited – Versus – Wilfred Odhiambo Musingo (2015) eKLR" - the Learned Counsel in summary from these decisions averred that it was not enough for an indolent Litigant to continue blaming his Advocate for all manner of transgressions in the conduct of the litigation including delay in prosecuting the case. The lamentations of the Appellant upon his former Counsel were unfounded as the same did not bar him from pursuing the matter on his own. On the contrary, the Courts have emphasised that parties must show interest and follow up their matters before Court even when they were represented by Counsels. Thus, the Learned Counsel argued that this lamentations by the Appellant about their former Advocate or any other Counsel were mere crocodile tears.

26. On the issue of service upon the Appellant which is disputed, it was submitted that the court decision in the case of:- "Anthony Kabiru Kabku - Versus - Mwende Wamugunda (Supra)" which had been relied upon by the Appellant, the facts were distinguishable from the ones of the instant case. In this case, the Appellant's Counsel was declining service and had not made an application to cease acting. The Learned Counsel held that acting in anticipation of this scenario and out of abundance of caution personally served the Appellant so as to put him on his toes which fact was not disputed. However, in "the Anthony Kabiru case" the Counsel was not traceable for service but later swore an affidavit stating he was available. That the Appellant's counsel herein had not denied service upon them. There was no affidavit sworn by Mr. Shange Nyange Advocate declining such service.

27. In conclusion, the Counsel submitted that a decision had already been made to the effect that the suit property belonged to the Respondents. That the Appellant's place of abode was at Vigurungani. He was therefore a trespasser on the suit property. The Respondent prayed for the Appeal to be dismissed with costs. The Respondents relied on the following authorities in their submissions:- "Ng'endo Versus Sorathia Investments Limited & 4 Others [2024] KECA 583[KLR] ; Mathew Sankok Shompa - Versus - Kenya Commercial Bank Limited and Others Civil Appeal No 529/2004 ;Habo Agencies Limited

- Versus - Wilfred Odhiambo Musingo [2015] eKLR; Rajesh Rughani - Versus - Fifty Investments Limited & Another [2005] eKLR.

V. Analysis and determination

28. I have keenly assessed the filed pleadings filed by the parties herein, the written submissions, the plethora of authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures in this impugned Appeal herein.

29. For the Honourable Court to reach an informed, Equitable and fair decision, it has condensed the subject matter into the following three (3) salient issues for its determination. These are namely:-

    a. Whether the instant appeal preferred by the Appellants herein has any merit whatsoever.

    b. Whether the parties herein are entitled to the reliefs sought.

    c. Who will bear the costs of the Appeal.

Issue No. a). Whether the instant appeal preferred by the Appellants herein has any merit whatsoever.

30. Before embarking on the issues of analysis under this Sub heading, it is imperative that the Court makes some elementary observations pertaining to any standard appeal. Fundamentally, this being a first Appeal, the court is guided by the provisions of Section 78 of the *Civil Procedure Act*, Cap. 21. The said provision of the law mandates the court to re-evaluate, and re-analyse the evidence afresh, and to come up with its own independent determination, having in mind that it did not have the benefit of seeing the witnesses. In the case of "Gitobu Imanyara & 2 Others – Versus - AG (2016) eKLR, the Court of Appeal held:-

    > "An Appeal to this Court from the trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that; - this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect".

31. Now turning to the issue as to whether the appeal herein is merited. To respond that query, there is need for the Honourable Court to decipher what is the main substratum of the appeal. To me, the Appellant has zeroed on one single issue – setting aside the Judgement delivered by the Lower Court for various reasons as elaborately founded and spread out from his six (6) grounds of appeal and the subsequent comprehensive submissions thereof. Hence, it is trite that a decision on whether to set aside or not set aside an exparte Judgement of ruling is discretionary. The said discretion is intended to be exercised so as to avoid injustice, and hardships, resulting from accident, inadvertence or excusable mistake or error, but is not designed to aid a party who had deliberately sought to obstruct justice, and has deliberately delayed the expeditious disposal of a matter as clearly set out from the now "classicus locus' case of "Shah – Versus - Mbogo & Another (1967) EA 116, where the Court held:-

    > "The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

32. Applying these legal principles to the instant appeal. The first point of departure for this court will be to establish whether the Judgement delivered by the Lower Court against the Appellant herein was

regularly or irregularly entered. The Court does that taking into account the fact that the ruling which is the immediate subject of the appeal before this court was over an application seeking to set aside a Judgement issued by the trial court and which was against the Appellant herein. Being aggrieved by the trial court's refusal to set aside its Judgement, the Appellant is now before this court. Therefore, in all fairness, in determining whether the application dated 18th January 2024 was merited, this court will first seek to determine the question of whether the Judgement by the trial court was regular or irregular?

33. Critically speaking, there is a distinction between a default Judgment, that is regularly entered and the one that is irregularly entered. To clearly appreciate this legal ratio, I seek solace from the Court of Appeal in the case of:- "James Kanyita Nderitu – Versus - Marios Philotas Ghikas (2016) eKLR", where the Court held as follows:

> " 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. See Mbogo & Another –versus - Shah (1968) EA 98, Patel – versus - E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –versus - Kubende (1986) KLR 492 and CMC Holdings –versus - Nzioka [2004] I KLR 173".
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> Juxtapose, in an irregular Judgement, the considerations are different. The Court further stated; "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. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

34. From the record before court, it is noted that the suit instituted by the Respondents (as Plaintiffs then) proceeded for hearing on 25th October 2023. Essentially, I emphasise that the issue of service on notice or pleadings onto parties herein will assist the Court a great deal in attaining a fair conclusion. Prior to the hearing of the suit, the Appellant's Counsel had been served by Shem Abudho, a Licensed Process

Server as per the Return of Service dated 23rd October 2023. At paragraphs 2 and 3 of the said Affidavit, it is averred as follows:-

> " That on 4th October 2023 I received instructions from M/s. Anaya & Company Advocates to serve a copy of a hearing notice dated the same day upon the Defendant's Advocate herein Nyange Sharia
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> That on the same day at around 11;00am I proceeded to the said advocates offices at Kituo Cha Sharia along Taratibu Road near Technical University of Mombasa where I met the secretary and upon introduction she received the hearing notice herein but declined to stamp on my service copy".

35. It is further stated and evident from the pleadings that not only was the Appellant's counsel served with the hearing notice but the Appellant was also served in person as evidenced by the affidavit of service sworn by Dominic Anaya Advocate. Under the contents of Paragraph 2 of the said Affidavit stated as follows:-

> " That on 13th October 2023 at around 10;00am I served a copy of the hearing notice dated 4th October 2023 upon the defendant at Mariakani Law Courts when he had come for Judgement in his case Mariakani Criminal 253 of 2020 - Republic - Versus - Nduria Kitsao Wabungo".

36. It is noted that thereafter, the matter proceeded for hearing wherein a final Judgement was entered against the Appellant herein. Therefore, as far as the Honourable Court is concerned, the Judgment entered in this matter by the Lower Court was a regular Judgment.

37. The Court of Appeal decision in the case of:- "CMC Holdings Limited – Versus - Nzioki (2004) KLR 173, where the Court held:-

> " 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."

38. In the appeal, the Appellant submits that he was not aware of what had transpired before court, that he relied on his advocate on record to fully represent him even at the hearing of the matter and the failure of his advocate to turn up in court cannot be vested on him. The Appellant does not admit that he was indeed served with the hearing notice but states that he had made efforts to track down the matter through another advocate and learnt that the suit had proceeded in his absence and that there was an impending Judgement. Certainly, and with due respect to the Appellant, I find this argument not worth any salt at all. Indeed, it does not assist the Appellant at all apart from weakening his appeal.

39. The court was left to wonder is the Appellant sought legal counsel from the advocate he purports to have consulted, why then did he not arrest the Judgement and/ or set aside the proceedings before the finality of the Judgement.

40. To me, I fully concur with the submissions by the Learned Counsel for the Respondents that this is a clear case of indolence on the part of the Appellant and wanting to unnecessarily blame his Advocate on record for all the transgressions arising from a litigation. Despite the fact that a litigant might have sought the services of an advocate in pursuing his/her interests in a suit, they have to keep in mind

that the suit belongs to them. The issues arising in the suit are to affect them directly based on the outcome and not Counsel on record. In as much as advocates owe duty of care to their clients, the clients owe the biggest duty of care to themselves by being vigilant and proactive in following up on the progress of their cases. Thus, this Court would find it self defeating to apportion any blame unto the Lower Court for arriving at the decision it rightfully did. In a nutshell, from the reasoning founded in this Judgement, I strongly hold that the Learned Magistrate was completely within his legal right whatsoever.

Issue No. b). Whether the parties are entitled to the reliefs sought.

41. Under this Sub – heading, the Honourable Court has fully appreciated that the Judgement which the Appellant is seeking to set aside was regular. By this stand alone aspect would have caused the appeal to be dismissed for being a nullity and being baseless. Be it as it may, the Courts do appreciate the provision of Article 159 (1) and (2) of *the Constitution* of Kenya, Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, Cap. 21; Sections 3 and 13 of the Environment & Land Court *Act, No. 19 of 2011*; Sections 101 of the *land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012 based on "the Oxygen Principles" and the inherent jurisdiction and powers of the Court to observe that mistakes do occur in the process of litigation. This was held so by the Court of Appeal, in the case of:- "Murai – Versus - Wainaina (No. 4) [1982] KLR 38", where it was held that:-

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

42. It is common practise that in instances of a regular Judgement having been entered against a party who seeks to set the same aside must proof to court that the defence on record raises triable issues and the doors of justice ought not to be closed on them and particularly where it is land matters in Kenya which its admitted as a source of livelihood are emotive and sensitive. I am guided by the practice by several Courts in this country which have severally held that they will not interfere with regular Judgement unless the Court is satisfied that's there is a Defence on merit which disclose triable issues. see the case of:- "Sebei District Administration vs Gasyali & others (1968) EA 300, where Sheridan J. observed that:-

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court".

43. Is the defence on record a good defence? The Plaintiff [Respondents] in the Plaint instituting this suit allege that the Appellant has trespassed upon their land which is the suit property herein and efforts to have him vacate the same have proved futile. In his defence the Appellant states at paragraph 5 of the defence that the suit property is registered in favour of Samburu Group Ranch and the Plaintiffs[Respondents] can therefore not lay a claim on the same.

44. In my opinion the issues raised in the defence are triable, in the interest of justice it will be proper to interrogate and establish the ownership of the suit property given the emotive and insecurity concerns that come along with land feuds especially in this region. I further opine that the rules of natural justice dictate that every person is given an opportunity to ventilate their case and have the same determined efficiently, expeditiously and lawfully. I am guided by the dictum in the case of: "Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR at page 7 the Court at the time referred to "The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc. Application No.18 of 2010, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

> "It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

45. For these reasons, therefore, the Appeal should be allowed based on the principles of natural Justice, Equity and Conscience by being according a second bite of the cherry to be heard.

Issue No. b). Who will bear the cost of the Appeal.

46. It is now well established that the issue of costs is at the discretion of Court. Costs mean the award that a party is granted at the conclusion of the legal action and proceedings of any litigation. The proviso of the Section 27 (1) of the *Civil Procedure Act*, cap. 21 holds that costs follow the events. By events it means the result and out come of the legal action.

47. In the instant Appeal, it is evident that the Lower Court was proper in making the decision it did being a regular Judgement in default the Appellant having been properly served but failed to take appropriate action. Hence, though the appeal has been allowed, it purely on the Court's inherent powers and in the interest of balancing the wheels of Justice. Hence, in the given circumstance, the Respondents in all fairness, are entitled to the costs of this appeal accordingly.

VI. Conclusion & Disposition

48. Consequently, upon conducting an indepth analysis of the framed issues herein and based on the Principles of Preponderance of Probabilities and the balance of convenience, the Honourable Court arrives at the following findings. These are:-

    a. That the appeal is allowed accordingly whereby the said Ruling delivered on..........be and is overturned and substituting with an Order allowing the Appellant's application dated 18th January, 2024.

    b. That the Ex - Parte Judgement delivered on 19th December 2023 by the Lower Court in Mariakani in SPM ELC Suit No. E006 of 2021 be and is hereby set aside.

    c. That the trial suit - Mariakani SPM ELC Suit E006 of 2021 be and is re - opened for "de novo" hearing at before any Magistrate other than Hon. M. S. Kimani (SPM), who delivered the impugned ruling.

d. That the matter to be Mentioned on 21st May, 2025 before the ELC, SPM (ELC) Court at Kwale which has the Jurisdiction so to do for taking direction hearing of the case before the said Court on priority basis.

e. That the costs of the Appeal be and is hereby awarded to the 1st & 2nd Respondents herein.

It is ordered accordingly.

JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 7TH DAY OF APRIL, 2025

....

HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT AT KWALE.

Ruling delivered in the presence of: -

a. Mr. Daniel Disii, the Court Assistant.

b. Mr. Muriithi Advocate for the Appellant.

c. Mr. Anaya Advocate for the Respondent.