



**Simba v Weruma & 2 others (Environment and Land Appeal  
E015 of 2024) [2025] KEELC 3342 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3342 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

**AK BOR, J  
APRIL 2, 2025**

**BETWEEN**

**SULUVANO NJERU SIMBA ..... APPELLANT**

**AND**

**LAURENZIA WERUMA ..... 1<sup>ST</sup> RESPONDENT**

**PETER NYAGA SIMBA ..... 2<sup>ND</sup> RESPONDENT**

**TARSIANA MARIGU NJAGATIRI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The suit before the Magistrate’s court was instituted by the plaintiff filed on 11/12/2020. The appellant failed to enter appearance or file a defence and following which the respondents requested for interlocutory judgment against him on 31/3/2021. Being satisfied that the appellant had failed to enter appearance or file a defence despite being served, the court entered interlocutory judgment against him on 28/4/2021. The matter proceeded for formal proof hearing on 18/1/2022 when the respondents were heard and a judgment was delivered in their favour on 5/7/2022.
2. The appellant filed the application dated 30/3/2023 seeking to set aside the judgment whose ruling is the subject matter of this appeal. In the application, he did not deny that he was served with the summons to enter appearance but explained that he failed to enter an appearance or file a defence because his advocate failed to do so on his behalf despite him instructing him to do so. He attached a draft defence to demonstrate that he had a defence that raised triable issues.
3. The issues for determination in this appeal are whether the trial court exercised its discretion properly when it declined to set aside the interlocutory and final judgment and whether the appeal should be allowed and the ruling of the trial court set aside.



4. The power to set aside an interlocutory judgment is purely discretionary. In *CMC Holdings Ltd v James Mumo Nzioki* [2004] KECA 143 (KLR) the Court of Appeal held that in an application for setting aside *ex parte* judgment, the court exercised its discretion and that the discretion must be exercised upon reasons and must be exercised judiciously. Further, that the was meant to ensure that a litigant did not suffer injustice or hardship as a result of an excusable mistake or error. The court went on to state that it would not be proper use of such discretion if the court were to turn its back to a litigant who clearly demonstrated an excusable mistake, inadvertence, accident or error.
5. In *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] KECA 470 (KLR), the Court of Appeal made a distinction between a regular and an irregular judgment and the factors to be considered in setting aside such judgments. The court observed that in a regular default judgment, the defendant was served with summons to enter appearance but failed to enter appearance or file defence resulting in default judgment. Such a defendant was entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and grant him leave to defend the suit. The court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account factors such as the reason advanced for the failure by the defendant to file his memorandum of appearance or defence, the length of time that has elapsed since the default judgment was entered, whether the intended defence raised triable issues, the 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
6. The appellant was properly served with summons to enter appearance and the trial court's judgment was entered regularly. The reason the Appellant for failing to enter an appearance or file a defence was that his advocate failed to file the defence despite him giving instructions and paying the advocate fees. Although an advocate's negligence or omission may in some instances justify setting aside a judgment, litigants are expected to follow up on their cases diligently. There is no indication in this case that the appellant made attempts to find out the progress of the case since the suit was filed in 2020. The appellant's other explanation that he assumed courts were closed due to the Covid-19 pandemic is not persuasive because it is a matter of public knowledge that judicial proceedings continued both physically and virtually during the pandemic. This fact is supported by the lower court proceedings which show that the respondents testified physically in court on 18/1/2022.
7. The judgment of the lower court was delivered on 5/7/2022. The Defendant sought to file his defence on 31/3/2023, after more than eight months had lapsed which is inordinate. The reasons given for the delay are not persuasive. The court has looked at the draft defence exhibited by the appellant, which contains mere denials and does not raise any triable issues.
8. Setting aside the judgment at this stage would greatly prejudice the respondents who have already secured a valid judgment in their favour. The overriding objective of the court is to do justice to both parties. The appellant failed to act diligently after he was served with the suit papers.
9. The trial court properly exercised its discretion in declining to set aside the interlocutory judgment. There is no basis to interfere with the Magistrate's Court's decision.
10. The appeal fails. The appellant shall bear the costs of the appeal.

**DELIVERED VIRTUALLY AT EMBU THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

**K. BOR**

**JUDGE**

In the presence of: -



Ms. Wanjiku Cynthia for the Appellant  
Ms. Nyawira Mwinja for the Respondent  
Diana Kemboi- Court Assistant

