



**Murundo v Amugune (Environment and Land Appeal E012 of 2024)  
[2025] KEELC 5275 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5275 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**E ASATI, J  
JULY 10, 2025**

**BETWEEN**

**ROBERT MAKAA MURUNDO ..... APPELLANT**

**AND**

**JOHN HENRY AMUGUNE ..... RESPONDENT**

*(Being Appeal from the Rulings read on 9/4/2024 and 27/8/2024  
by Hon. B. Omollo - SRM in Vihiga MCELC No. 56 of 2021)*

**JUDGMENT**

**Background**

1. A brief background of the appeal herein as can be gathered from the record of appeal filed herein dated 7<sup>th</sup> February 2025 is that the appellant was the plaintiff and the Respondent the defendant in Vihiga PMC ELC Case No. 56 of 2021(the suit).
2. The appellant had, vide the plaint dated 25<sup>th</sup> August 2021, sued the Respondent in respect of a parcel of land known as E. Bunyore/Ebunangwe/2586 (the suit land) on a claim of trespass. The appellant sought, in the suit, for orders of permanent injunction, general damages for trespass, costs of the suit and interest.
3. The record of appeal shows that the hearing of the suit proceeded ex parte as the Respondent failed to enter appearance and file defence after service with Summons to Enter Appearance, whereupon the appellant testified and closed his case and judgement delivered in his favour on 28<sup>th</sup> August 2022. The court granted the appellant an order of permanent injunction and costs of the suit.
4. The record shows further that as the appellant commenced the process of execution of the judgement so as to recover the costs of the suit, the Respondent filed an application dated 28<sup>th</sup> July 2023 seeking that the judgement entered in favour of the appellant be vacated and/or set aside and that the suit be



- fixed for hearing on merit. The record shows that the application was heard and ruling dated 9<sup>th</sup> April, 2024 delivered allowing the application.
5. The Respondent was granted 7 days to file and serve his Statement of Defence. The Respondent was also ordered to pay Kshs 20,000/= as thrown away costs within 30 days of the date of the ruling and each party ordered to bear own costs of the application. The court further made a default clause that in case of default, the order setting aside the ex parte regular Judgment shall lapse and the appellant be at liberty to proceed with the matter.
  6. The appellant being dissatisfied with the ruling filed Vihiga ELC Appeal No. E012 of 2024 vide the Memorandum of Appeal dated 1<sup>st</sup> May 2024 challenging the ruling dated 9<sup>th</sup> April, 2024 on the grounds that;-
    1. The learned trial Magistrate erred in law when she made a finding that the Respondent has not annexed to the affidavit in support of the application a draft defence and then determined that the Respondent defence had raised triable issues to warrant setting aside the ex parte regular judgement.
    2. The learned trial Magistrate erred in law and principle when she did not appreciate the effect of the Respondent's failure to annex a draft defence-
    3. The learned trial Magistrate erred in law when she set aside the ex parte regular judgement without establishing that the appellant had in his evidence raised a triable issue-
    4. The learned trial Magistrate erred in law when she set aside the ex parte regular judgement without establishing that the Respondent had offered a plausible explanation of not filing the defence in time.
    5. The learned trial Magistrate erred in law and fact by ignoring the appellant's evidence that the Respondent's Motion dated the 28.7.2023 was based on defective Supporting Affidavits.
    6. The learned trial Magistrate erred in law and fact by ignoring the fact that the Respondent's Supporting Affidavit was not commissioned by the Respondent in the presence of a Commissioner for Oaths.
    7. The learned trial Magistrate erred in law and fact by ignoring that the annexures to the Respondent's Supporting Affidavits are not properly serialized.
    8. The learned trial Magistrate erred in law and fact by ignoring the crucial issues raised by the appellant.
    9. The learned trial Magistrate erred in law and fact by not being fair to the appellant .
    10. The learned trial Magistrate erred in law and fact by not appreciating the elements required to be proved by the Respondents before setting aside the ex parte regular judgement.
    11. That the findings of the learned trial Magistrate were against the weight of the available evidence.
  7. The record shows further that the trial court made another ruling dated 27<sup>th</sup> August 2024 allowing the Respondent another chance to pay the thrown away costs and serve his defence upon the appellant within given timelines and directed the parties to set down the suit for hearing on merit.
  8. Dissatisfied with this ruling, the appellant filed another appeal Vihiga ELC Appeal No. E016 of 2024 vide the Memorandum of Appeal dated 1<sup>st</sup> September 2024 on the grounds;



1. That the learned Trial Magistrate erred in law and fact by sitting on an appeal of her decision contained in Ruling delivered on 9/4/2024.
2. That the learned Trial Magistrate erred in law and that by failing to appreciate that due to the lapse of the order setting aside the *ex parte* regular judgement the Trial Court was *functus officio*.
3. That the learned Trial Magistrate erred in law and fact by setting down the matter hearing without an express order setting aside the *ex parte* judgement delivered on 23/9/2022.
4. That the learned Trial Magistrate erred in law and fact by failing to reinstate the order setting aside the *Ex parte* regular judgement which had lapsed.
5. That the learned Trial Magistrate erred in law and fact by allowing the Respondent's application without an affidavit evidence filed by the Respondent explaining why he defaulted to comply with the court orders on time.
6. That the learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondent's application for a chance to defend was made after an unreasonable time.
7. That the learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondent's application for a chance to defend did not meet the legal threshold for the grant of the same.
8. That the learned Trial Magistrate erred in law and fact by failing to give a Ruling Date of the Party and Party Bill of costs on 27/8/2024 when there was no order staying the trial court.
9. That the learned Trial Magistrate erred in law and fact by exhibiting bias against the appellant.
10. That the learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondent had been given an opportunity to defend himself more than once but wasted.
11. That the learned Trial Magistrate erred in law and fact by failing to appreciate that fair trial applied to both the Appellant and Respondent.
12. That the learned Trial Magistrate erred in law and fact by wrongly applying her analysis of the principle of fair trial to favour only the Respondent.
13. That the learned Trial Magistrate erred in law and fact by failing to consider the prejudice the appellant suffered when he proceeded with his matter in compliance of the trial magistrate orders after the default of the court's orders.
14. That the learned Trial Magistrate erred in law and fact by entertaining the Respondents application after disobedience of court orders.
15. That the learned Trial Magistrate erred in law and fact by failing to inquire if the Respondent had filed and served their defence upon the appellant before 27/8/2024.
16. That the learned Trial Magistrate erred in law and fact by disregarding the appellant's evidence on record.
17. That the learned Trial Magistrate erred in law and fact by granting the Respondent prayers to pay throw away costs and file defence which prayers were not prayed by the Respondent.
18. That the findings of the learned Trial Magistrate were against the weight of the available evidence.



9. Vide directions given on 12<sup>th</sup> March 2025 the two appeals were consolidated to be heard together by way of written submissions.

### **Submissions**

10. Written submissions dated 15<sup>th</sup> March 2025 were filed on behalf of the appellant by the firm of Bikundo & Company Advocates. Counsel submitted that although the Respondent had stated that he had a good defence he did not annex a copy of defence to the application dated 28<sup>th</sup> July 2023. That the trial Magistrate erred in referring to a defence which was not annexed. That the failure to annex a draft defence by the Respondent denied the trial Magistrate a chance to tell whether the Respondent had an arguable defence and thus the trial court was not able to exercise its discretion properly.
11. Counsel submitted further that the trial Magistrate in her ruling delivered on 9<sup>th</sup> April, 2024 correctly observed that the court must be satisfied that the applicant has offered a very plausible explanation as to why they failed to file their Memorandum of Appearance and Statement of Defence within the prescribed period before such judgement can be set aside and varied but erred by failing to establish in the ruling dated 9<sup>th</sup> April, 2024 that the Respondent had offered a plausible explanation of not filing the defence in time.
12. That the trial Magistrate erred in ignoring the issues raised by the appellant that the Affidavits failed to conform to the requirements of section 5 of Cap 15 and that the same ought to be struck out. Counsel relied on the case of CMC Motors Group Limited -vs Bangeria Arap Korir t/a Marben School & Another (2013) eKLR and submitted that the annexures were not properly marked for identification by the Respondent and should have been rejected. That the trial court was not fair to the appellant as it ignored issues raised by the appellant.
13. Counsel submitted that the trial Magistrate failed to appreciate that the Respondent failed to prove that he was entitled to the prayers in the application.
14. That the trial court erred in sitting on appeal of its own decision in the ruling delivered on 9<sup>th</sup> April, 2024. That when the Respondent defaulted to comply with the orders in the ruling dated 9<sup>th</sup> April, 2024, the ex parte regular final judgement reverted and the appellant began to execute the same by filing Bill of costs dated 18<sup>th</sup> December 2022. That the orders given by the trial Magistrate on 27<sup>th</sup> August 2024 did not set aside the regular ex parte final judgement delivered on 23<sup>rd</sup> September 2022 and was therefore erroneous as a defence could not be filed on a concluded case where judgement had already been delivered. That the orders setting aside the ex parte judgment had already lapsed after non-compliance. That the Respondent had not applied for review of the orders issued on 9<sup>th</sup> April, 2024. That the trial court was functus officio.
15. Counsel submitted further that the trial Magistrate erred in failing to give a ruling date for the party and party bill of costs. That the trial court exhibited bias by giving the Respondent several chances to redeem himself after non-compliance of the orders. That the findings of the trial Magistrate in the ruling delivered on 27<sup>th</sup> August 2024 was not supported by cogent evidence led by the Respondent. Counsel urged the court to allow the appeal.
16. On behalf for the Respondent no submissions were filed. Affidavit of Service sworn by Dennis Bikundo Advocate on 28<sup>th</sup> April, 2025 shows that the Respondent's advocates were served with both the directions of the court given on 12<sup>th</sup> March 2025 and the appellant's submissions on 21<sup>st</sup> March 2025.



## Issues for determination

17. The two appeals list a total of 28 grounds of appeal. A careful consideration of the said grounds of appeal reveal that the appellant's grievance relates to the setting aside ex parte regular judgment as follows; -
  - a. Whether or not the Respondent had demonstrated and proved grounds for setting aside of the judgement.
  - b. Whether or not the Affidavits sworn by the Respondent in support of the application were proper.
  - c. Whether or not the trial court erred in granting the orders in the ruling read on 27<sup>th</sup> August 2024.
  - d. Costs of the appeal.

## Analysis

18. This being a first appeal the court has an obligation to examine the evidence that was placed before the trial court in support of and in opposition to the applications that resulted in the rulings appealed against.
19. The substantive prayer in the application dated 28<sup>th</sup> July 2023 before the trial court was for an order to vacate and/or set aside the ex parte regular judgment.
20. The grounds shown on the Notice of Motion in support of the application were that the Defendant / Applicant (who is the Respondent in the Appeal herein) was never served with pleadings, that he had a good defence to the plaintiff (Appellant's) claim, that he had been condemned unheard and that the application had been brought without inordinate delay.
21. A reading of the ruling dated 9<sup>th</sup> April, 2024 shows that the trial court found that the applicant had been properly served with pleadings on 22<sup>nd</sup> February 2022 but that he did not take any action of filing a response within the stipulated period. That there was a return of service to prove this which was filed in court on 15<sup>th</sup> March 2022.
22. One of the factors to consider in an application seeking to set aside an ex parte judgment is the explanation tendered for not filing pleadings and non-appearance/attendance within the time provided by law.
23. Having been properly served the applicant had no plausible explanation for failing to take the appropriate action within the time provided by law. His explanation that he was not served with pleadings but only learnt of the existence of the judgement upon being served with hearing. Taxation Notice dated 9<sup>th</sup> May 2023 was not true.
24. The other factor that the court considers is whether the applicant has a good defence to the claim. The applicant claimed that he had a good defence to the plaintiff's suit. In paragraph 9 of his Supporting Affidavit sworn on 28<sup>th</sup> July 2023 he deposed that he had a good defence to the plaintiff's claim. Although he indicated that he had annexed a copy of the draft defence and marked it as JHA-1, no such annexure was attached to the Supporting Affidavit and no such document exists in the court file as can be confirmed from the trial court's record and the record of appeal.
25. Perusal of the ruling shows that the trial court directed itself properly by noting that the court must also consider whether the draft defence raises triable issues which should be allowed to go for trial.



The court then proceeded to find that the applicant had a triable defence for which he was desirous of being heard on merits of the claim against him. It appears the court based its findings on the contents of the Supporting Affidavit where the applicant explained the nature of his case. The court stated that it gathered that the dispute related to determination of issues of proprietary interest in respect of the suit land. That the suit land belonged to one Hezron Amakaa Murundo who died in July 2015 and buried on 1<sup>st</sup> August 2025 yet the plaintiff (Appellant) had transferred the property to himself on 23<sup>rd</sup> December 2025 which transfer was by fraud as the parties had not obtained Letters of Administration to the Estate of the deceased.

26. The question that emerges is whether the only way for the court to determine whether an applicant has a good defence that raises triable issues is by perusing the draft defence and what is the effect of failure to annex draft defence to an application seeking to set aside ex parte judgement. While it is desirable to have a draft defence annexed to the application which draft defence should outline the particulars of the applicant's defence to the claim, failure to do so is not fatal as the nature of the defence may still be outlined in the affidavits and documents in support of the application. See decision of the Court of Appeal in Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd NRB CA Civil Appeal No 220 of 1995 [1996] eKLR
27. I find that in the present case, from the contents of the Affidavit in Support of the application, the court was able to determine whether the applicant had a good defence or not. The court also took into account constitutional provisions in article 50 and 159 in arriving at its decision and in exercising its discretion in favour of the applicant/Respondent herein.
28. The court in addition to setting aside the judgement and allowing the Defendant to file his defence within given timelines, compensated the appellant by way of thrown away costs.
29. For the foregoing reasons, this court finds that the trial court did not err in allowing the application as ground for grant of the orders sought had been demonstrated. The appeal challenging the ruling dated 9<sup>th</sup> April, 2024 namely; appeal No. E012 of 2024 must therefore fail.
30. Appeal No. E016 of 2024 challenges the ruling read on 27<sup>th</sup> August 2024. The ruling dated 9<sup>th</sup> April, 2024 had a default clause in the following terms;

In default of any of the orders above made, the order setting aside the ex- parte regular judgement shall lapse and the plaintiff shall be at liberty to proceed with this suit.”
31. The record shows that the Respondent failed to comply with the orders in the Ruling dated 9<sup>th</sup> April, 2024. He failed to file defence and to pay the costs within the timelines given. The effect was that the order setting aside the judgement lapsed, the judgement was reinstated and the plaintiff/appellant herein was at liberty to proceed. So, the appellant proceeded and presented his Bill of Costs for assessment.
32. The record shows that on 27<sup>th</sup> August 2024 when the matter came for the bill of costs, the court ruled that in the greater interest of justice of the case, it will allow the Respondent another chance, proceeded to direct the defendant/Respondent to pay the thrown away costs by close of business of 27<sup>th</sup> August 2024 and to serve the plaintiff with statement of defence within the same timelines. The court also directed the parties to set down the suit for hearing.
33. The appellant's complaint as contained in the grounds of appeal and the submissions is that there was no formal application to set aside or review the ex parte regular judgement that had been reinstated. And that it was erroneous for the trial court to make the orders while the judgement subsisted.



34. The record shows that the trial court relied on the provisions of articles 25, 50, 159 of *the Constitution* and held that as a court of equity it had to make a distinction between that which was a matter of substance and that which was a matter of form and uphold the substance. The court did not however address its mind to the judgement which had been restored by virtue of the default clause in the earlier ruling and the Respondent's default and/or non-compliance.
35. To proceed to file and serve defence, pay thrown away costs and set the suit down for hearing in the subsistence of the judgement was not just a matter of form but a matter of substance which could invalidate any ensuing trial.
36. I find that the trial court erred in making an order allowing the Respondent to file defence and set the suit down for hearing while the ex parte regular judgement was still subsisting. Secondly it is clear from the proceedings that the Respondent had been given sufficient opportunity to redeem his position but failed to seize the opportunity.
37. The court finds that appeal No. E016 of 2024 has merit and allows it. The ruling dated 27<sup>th</sup> August 2024 is hereby set aside. Costs of appeal No. E016 of 2024 are awarded to the Appellant.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Ajevi- Court Assistant.

Bikundo for the appellant.

N/A for the Respondent.

