



**Mwamutsi & another (Representing the Estate of Ali Muriani Mwafungo)
v Bahari & another (Environment and Land Appeal E033 of 2022)
[2025] KEELC 6093 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E033 OF 2022
FM NJOROGE, J
SEPTEMBER 22, 2025**

BETWEEN

**MOHAMED MWAMUTSI 1ST APPELLANT
AMOS MWAFUNGO NYONGA 2ND APPELLANT
REPRESENTING THE ESTATE OF ALI MURIANI MWAFUNGO**

AND

**SAMUEL BAYA BAHARI 1ST RESPONDENT
BAHARI MWAFUNGO 2ND RESPONDENT**

JUDGMENT

1. The amended memorandum of appeal stated 21st September 2022 has the following grounds:
 - a. That the learned trial magistrate erred in law and fact in proceeding to hear and allow the respondents' application for review of judgment dated 18th October 2021 when she was not the trial Court;
 - b. That the learned trial magistrate erred in law and in fact in holding that the evidence of one parcel of land can be used to determine and or confirm ownership rights to other parcels of land;
 - c. That the landed magistrate erred in law and fact in failing to note that parcels of land in issue had valid title deeds which could not be revoked without enjoining the Registrar of Lands to the proceedings;



- d. That the learned magistrate erred in law in making a finding on Plot Number 589/Pangani/Maereni which was never in issue in the pleadings or proceedings hence essentially evicting the appellants from their land and/or home as their ancestral homes are built on this plot;
 - e. That the learned magistrate erred in law in failing to appreciate the magnitude of the dispute and the evidence referred to in the appellants' supporting affidavit sworn on the 26th April 2022 and thus are called the appellants' an opportunity to present such evidence.
 - f. That the landed magistrate erred in law and in fact in dismissing the appellants' application dated 26th April 2022.
 - g. That the landed magistrate erred in law and in fact in failing to consider the strong and weighty submissions dated 5th July 2022 by the appellants.
2. The appellant proposes that the appeal be allowed and the rulings by the Hon. Rita Amwayi SRM be set aside and the application dated 26th April 2022 be allowed.
 3. They appeal was disposed of by way of written submissions. The appellant filed their submissions dated 5th May 2025. The respondents filed their submissions are dated 27th May 2025.

Appellants' Submissions.

4. The appellants gave the background of this appeal, stating that three consecutive suits Number 87 Of 2010, Number 8 Of 2010 and Number 89 Of 2010 were filed at the Kaloleni Magistrates' Court. They were finalized by R.K. Ondieki PM vide a judgment written on 26th June 2016 and delivered by L.N. Wasige PM on 14th September 2021. The appellant questions the validity of the judgment delivered after such a lengthy delay. The appellant also avers that when eventually judgment time came, the court wrote only one judgment in respect one property, being Plot No 587 Pangani/Maereni which forced the respondents to seek a review of the judgment in order for it to be adopted and/or applied on the other properties. Hon Wasige, RM, directed that the appellants be personally served with the review application; that is when the appellants came to know the status of the proceedings and so they gave instructions to their current counsel, to seek to set aside the judgment in its entirety. Hon Amwayi, Principal Magistrate, heard the two applications. She allowed the application for orders to apply the single judgment to the other properties and dismissed the appellants' application for setting aside judgment. The appellants have averred that the manner in which the trial was conducted does not merit the drastic orders that emanated there from; that the gravity of the impact of the judgment can be seen in the application of one judgment arrived at ex parte over the other properties with the resultant effect of evicting the appellants and their families from their ancestral lands. The appellants accused the magistrate of failing to analyze the pleadings and the issues before her. They state that she only entered judgment in favour of the respondents because the appellants were not represented and/or did not adduce evidence to controvert the respondents' version of events.
5. It is stated that the court in its judgment determined the suit solely on the basis of a grant of a letter of administration ad litem and no other exhibit, and also without any analysis of the evidence; that the court did not make any findings on the admissions of the respondents too. Therefore, it is argued, it was wrong for Hon Amwayi to allow the application of the judgment on the other properties.
6. According to the appellants, they were denied the right to a hearing or the right to a fair trial despite the fact that they had filed their defences to the suits; that the court was made aware as long ago as 12th April 2016 that their counsel had closed offices; that the appellants could not follow up on the matter due to their advanced age and frail health; that the court never made remarks on the record as



- to whether fresh service had been affected as it had earlier ordered upon being told that the appellants' advocate had closed office; that it is not therefore crystal clear that the court was satisfied that service had been affected before it proceeded with the hearing that yielded the judgment. Besides, it is urged that the court should have ordered that the applicants be served personally.
7. The appellants state that the judgment was written purely based on the proceedings of 26th April 2016 and that the court ignored the other proceedings in which the defendants had cross-examined the respondents. James Kanyita Nderitu And Another Versus Marios Philotas Chikas & Another 2016 eKLR and Shah Versus Mbogo 1967 EA 166 and Patel Versus East African Cargo Handling Services Limited 1974 EA 75 were cited in this regard.
 8. The appellants stated that though they had in their application stated that they had a strong defence with triable issues, including the issue of jurisdiction which, if they were allowed to prosecute, would change the outcome of the case the court did not address itself to that defence in its analysis of the material before it while dealing with the application. They point out that paragraph 8 of their defense raised the issue of jurisdiction of the court but the learned Magistrate failed ignored or refused to address himself to that issue.
 9. The appellants also state that the respondents never notified the court that the suit properties were the subject of the land adjudication process even as the suit was proceeding. Later on the decision of their Appeal to the Minister issued on 6th September 2013 which was during the pendency of the suit. That decision confirmed the appellants as the bona fide registered owners of the suit property which decision the respondents have not challenged in any court.
 10. It is therefore urged that the judgment of the trial Court amounts to an appeal or review of the Minister's decision by the back door, which proceedings in any event the court had no jurisdiction to entertain due to the provisions of Section 29 of the Land Adjudication Act. The appellants add that the proceedings in the lower Court did not amount to the type of proceedings in which the court was entitled to interfere with the adjudication process; that it was illegal for the court to consider the suits before it because the respondents' testimony in the hearing clearly showed that the suit land was still the subject of adjudication; that the respondents' testimony alone was sufficient to make the court down its tools pending the conclusion of the adjudication process. Joseph S Tootio and 12 Others Versus District Land Adjudication and Settlement Officer Narok South and 24 Others Nitiangau Ole Nkoyo and 30 Others 2021 KEELC 2622 KLR was cited in this regard.
 11. The appellants also stated that they had raised the issue of res judicata before the trial court and that the courts' attention had been drawn to Kaloleni Civil Case Number 24 Of 1976 and Mombasa High Court Case Number 600 Of 1977 yet the court never addressed those issues.
 12. It has been submitted that Samuel Baya Bahari died in 2018 before the delivery of the judgment. He was the plaintiff in Civil Suits Number 88 and 89 of 2010. The suits thus abated as no attempt had been made to substitute him and the plaintiff in the other suit Number 87 of 2010 could not move court for review of judgment in a matter where he had no capacity to do so.
 13. The appellants aver that they have a right to a fair hearing which encompasses the right to legal representation; that Order 9 CPR provides that where there is a change of advocate or a party decides to act in person having previously engaged an advocate, after judgment has been passed such change or intention to act in person shall not be effected without an order of the court made upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the incoming advocate or party intending to act in person. It is urged that the appellants were made aware of the judgment through the plaintiff's application for review and it was at that juncture that they sought to change their legal representation.



14. The appellants argue that they exhibited that they did not participate in the suit and that the reasons for such default were explained, being failure on the part of their counsel, which they aver should not be visited upon them. They cite *Joswan Kenyatta Versus Civicon Limited 2020 eKLR* for that proposition.
15. It is also the case of the appellants that Hon. Amwayi erred in finding that the appellants never took any steps between 2010 and 2022 because, according to them, the record shows that they participated in the suit including by filing their defences and cross-examining the plaintiff at the initial stages of the suit; that it was only on 12th April 2016 that the respondents' counsel notified Court that the appellants' counsel had closed his firm; that despite this the respondents proceeded with their case and closed it on 24th April 2016 on which day the court proceeded to hearing without confirming that it was satisfied that service had been properly effected upon the appellants; that in her ruling the magistrate failed to consider the delay between the date the judgment was first scheduled, that is, 23rd June 2016 and 6th December 2021 during which period the appellants could not be said to have been in slumber. The then ongoing proceedings at the Land Adjudication Office which advanced all the way to the Minister's decision is given as another reason why the appellants should not have been deemed to have been in slumber.
16. The appellants also maintain that their titles could not have been legally extinguished without the involvement of the Land Registrar since titles had already been issued.
17. The appellants maintain that material non-disclosure is a grave offence especially on the part of a litigant coming before a court of equity since the rule is that he who comes to equity must come with clean hands and must also be prepared to do equity. It would not therefore be equitable if the court overlooked the respondents' defaults in obtaining a judgment and the respondents using the same judgment to acquire ownership of land. *Regina Munyiva Kioko Versus Kenya Tourist Development Corporation 2012 eKLR* was cited in support of this argument.
18. In the final analysis the appellants urged a need for a retrial of the cases and indicated that they seek leave to defend the cases before the magistrate's court.

Respondents' Submissions.

19. The respondent's submissions were brief. On their part, they maintain that the trial court directed that all the 3 cases be consolidated and Civil Case Number 89 Of 2010 Samuel Baya Bahari Versus Mohamed Mwamutsi and Anor was adopted as the lead file whereupon the court set the matter down hearing and the defence never appealed the order of consolidation. They admit that the judgment was delivered on 14th September 2021 in the consolidated suit. Upon receipt of the judgment, they noted that there was an error apparent on the face of the record since the judgment only addressed one plot of land, that is number 587, which was the subject of Civil Case Number 88 of 2010 file and the application dated 18th October 2021 seeking review of the judgment and correction of the error.
20. The respondents agree that the application for setting aside was filed by the appellants on 26th April 2022 which they opposed and which was dismissed while their application for review was allowed.
21. They averred that the trial Court considered the established principles for setting aside of a valid judgment; that the court addressed the issue of the appellants' failure to follow up on their advocate and their failure to file witness statements or documents in support of their defences.
22. They succinctly state that the appellants' duty in the appeal is to demonstrate how the trial Court made an error in dismissing their setting aside application which it had taken the appellants 10 years to file. They aver that *Shah Versus Mbogo and Patel Versus East Africa Cargo Handling Services Limited*



(supra) have emphasized that the discretion of the court in such an application will not be exercised in favor of an indolent party who seeks to obstruct the course of justice through prolonged delay.

23. The respondents fault the appeal grounds number 2, 3, 4, and 5 in the memorandum of appeal as delving into the merits of the case instead of addressing the issue of their application for setting aside dated 26th April 2022 and the ruling dated 30th August 2022. They maintain that such issues were not canvassed at the time of arguing the application dated 26th April 2022 and they are new matters which in any event are not relevant to the arguing of an application for setting aside a valid judgment of the court. The respondents also maintain that there is no evidence provided that the appellant's advocates' offices were closed or that they were prevented in any way from appointing another advocate or even appearing in person to defend themselves since the case belonged to them; that the court should not apply principles of equity in applications for setting aside; that it is now settled that where a former advocate is guilty of inaction the applicant has a responsibility to demonstrate they showed interest and followed up on the case. The case of Pyramid Hauliers Limited Versus James Omingo Nyaanga & 3 Others 2019 eKLR was cited in support of that proposition. It was argued that the appellants were not deserving of the court's discretion since they had been indolent, and that the learned magistrate correctly applied the principles of law on the material before her and exercised her discretion in rejecting the application to give a correct and well-reasoned ruling. The right of the appellants to be heard must thus be balanced against the respondents' right to a speedy and fair trial. The respondents urged this court to dismiss the appeal.

ANALYSIS AND DETERMINATION.

24. Three consecutive suits Number 87 Of 2010, Number 8 Of 2010 and Number 89 Of 2010 were filed at the Kaloleni Magistrates' Court. They were finalized by R.K. Ondieki PM vide a judgment written on 26th June 2016 and delivered by L.N. Wasige PM on 14th September 2021. Defences were filed by the appellants in all the three suits. Hearing began on 19/4/2011 before Hon Wewa S.R., SRM. She gave an order consolidating the three cases with Case No 89/2010 being the lead file. Samuel Baya Bahari gave evidence and claimed parcel no 588 is his. The matter was adjourned and it came up several times before it finally came up on 26/4/2016 before Hon R.K. Ondieki who heard the evidence of the 2nd respondent herein the absence of the appellants and their counsel, whereupon the respondents' case was marked closed and the matter was adjourned to 17/5/2016 for submissions. On that date, at the request of counsel for the respondents in the absence of the appellants and their counsel, it was again rescheduled to 7/6/2016 for submissions. On the latter date, the respondent's counsel confirmed she had filed submissions and the court gave a judgment date (23/6/16) in the absence of the appellants and their counsel. Judgment was however not delivered as scheduled but it was delivered on 14/9/2021.
25. After judgment the 2 applications dated 18/10/2021 and 26/4/2022 respectively were filed. The application dated 18/10/21 filed by the respondents sought the following order:
- “ That this honourable court be pleased to review and/vary the judgment made on 14/9/2021 in respect of Civil Suit No 87 of 2010 and align the judgment with the order of consolidation of the three suits.”
26. The application dated 26/4/22 by the appellants sought the following orders:
- a. That leave be granted to M/S Anaya & Company Advocates to act for the defendants in the place of M/S Mungatana & CO Advocates;



- b. That this honourable court be pleased to set aside and/or vacate the judgment of 14th September 2021 in entirety and all consequential orders and allow the defendants to defend the suit herein unconditionally;
 - c. That the orders herein to apply in Kaloleni Civil Suit No 88 & 89 of 2010;
 - d. That costs of this application be provided for.
27. In two distinct rulings dated 30/8/2022 respectively, the lower court allowed the review application and dismissed the setting aside application. It is those two rulings that have spawned the present appeal.
28. Upon consideration of the 2 applications, the grounds of appeal and the submissions of the parties the issues for determination herein are distilled as follows:
- a. Whether grounds number 2, 3, 4, and 5 in the memorandum of appeal as delving into the merits of the case instead of addressing the issue of their application for setting aside dated 26th April 2022 and the ruling dated 30th August 2022;
 - b. Whether the learned trial magistrate erred in hearing and allowing the application dated 18/10/21 while she was not the trial court;
 - c. Whether the learned trial magistrate erred in allowing the application dated 18/10/21;
 - d. Whether the learned trial magistrate erred in dismissing the application dated 26/4/2022;

Whether grounds number 2, 3, 4, and 5 in the memorandum of appeal as delving into the merits of the case instead of addressing the issue of their application for setting aside dated 26th April 2022 and the ruling dated 30th August 2022

29. Regarding this first issue, it is noteworthy that the grounds raised as nos 2, 3, and 4 are relevant in the determination of the 2nd issue while ground no 5 is relevant in considering the 3rd issue framed for hearing herein above. That will be clear from the manner in which this court will discuss the two issues herein below.
30. This court is able by scrutiny of the rulings in question vis-a-vis the judgment to determine whether the ruling of the Magistrate had the effect of holding that the evidence regarding one parcel of land could be used to determine or confer ownership rights to other parcels. The court can also examine whatever evidence was placed before the Magistrate by way of affidavit to determine whether she erred in failing to note that the parcels already had titles as at the date of her ruling and if so, she erred in deciding as she did despite that evidence having been placed before her.
31. It will be a matter of scrutiny of the applications, the affidavit evidence alongside the contents of the pleadings and the proceedings in the consolidated suit that will enable the court to determine issues arising from ground no 4.
32. Regarding ground 5, this court notes that it is a query regarding the propriety of the magistrate's exercise of discretion; this court will only need to examine the record to determine whether the discretion was properly exercised.
33. In the light of the foregoing, I therefore do not agree with the respondents' contention that grounds number 2, 3, 4, and 5 in the memorandum of appeal as delving into the merits of the case instead of addressing the issue of their application for setting aside dated 26th April 2022 and the ruling dated 30th August 2022;



Whether The Learned Trial Magistrate Erred in Hearing and Allowing the Application Dated 18/10/21 While She Was Not the Trial Court.

34. It would have helped this court a lot for the appellant to indicate whether the magistrate who wrote the judgment remained deployed to Kaloleni Law Courts at the time of the hearing of the review application. The law is that if the judge or judicial officer who delivered the decision sought to be reviewed has left the station on transfer or otherwise, his successor in the station may handle a review application on a matter decided by the departed judge or magistrate. There being no such evidence of transfer or otherwise, I find the material before me insufficient to enable a decision on the issue and ground no 1 in the memorandum of appeal is rejected.

Whether The Learned Trial Magistrate Erred in Allowing the Application Dated 18/10/21;

35. While setting aside is a matter of judgment is a matter of either discretion or jurisdiction, Review is a purely a matter of jurisdiction. Order 45 grants a court the jurisdiction of review which must be exercised within certain parameters of which the respondents chose “error on the face of the record”.
36. According to the respondents, the error lay in that though the cases had been consolidated yet the judgment in respect of the consolidated files only addressed the parcel of land in one of the cases, to wit, parcel no 587 which was the subject of SRMCC No 88 Of 2010. The judgment excluded the parcels in the other cases. It was stated as one of the grounds for the application as follows:
- “ The failure by the court to write a consolidated judgment for the three (3) files amounts to an error apparent on the face of the record that should be rectified by this court.”
37. Is this an admission by the respondents, in their own application, to the effect that judgment was not written in respect of the other two files and the other two parcels, that is, suits Number 87 Of 2010 and Number 89 Of 2010? I think it amounts to an admission. However, this court must examine the entire judgment in order to arrive at its own conclusion as to whether judgment was written in respect of only one suit and one parcel.
38. The title written on the judgment by the trial magistrate reflects an awareness that the three suits had been consolidated, and also that even as at the writing of the judgment Civil Case Number 89 Of 2010 Samuel Baya Bahari Versus Mohamed Mwamutsi and Anor remained the lead file. However, throughout the said judgment the trial court referred to only one plaintiff Samuel Baya Bahari who is named as such in Civil Suit Number 89 Of 2010. Only one parcel is mentioned and that is Parcel No 587 which is wrong and confusing because that parcel is the subject of Civil Suit Number 88 Of 2010. The proper parcel for Civil Suit No 89 Of 2010 ought to have been No 588. That is an error on the face of the record that the respondents never addressed. The conclusion this court arrives at after reading the entire judgment is that it was in respect of only one case, and even then, it gave final orders in respect of a parcel that was not the subject of that case.
39. It being clear that the magistrate who wrote the judgment dealt with Civil Suit No 89 alone, made a mistake in referring to the wrong parcel number even in that judgment, and did not even address the issue of two other parcels involved in the consolidated suit, the conclusion of this court is that the judgment is fatally flawed. Reviewing it however, the magistrate stated that only one case, No 88 Of 2010, was decided. The reviewing magistrate was not in a position to conclude that the trial magistrate had addressed parcels other than No 587 in his judgment. In the midst of the confusion outlined herein above, she had no basis for concluding that Case No 88 Of 2010 was the case that was decided in the judgment; there was also no basis to conclude that the trial magistrate consciously applied the evidence



adduced at the trial to those other cases and only failed to connect it to the other parcels involved in those cases. I agree with ground no 2 of the memorandum of appeal. The evidence given in respect of only one parcel, which is what the trial magistrate considered, could not be applied to other parcels indiscriminately. Consequently, the reviewing magistrate had no grounds for reviewing the judgment in order to apply the judgment to the other cases.

40. Regarding grounds, no 3, 4, 5 and 7 in the memorandum of appeal, this court notes that there was strong evidence in support of the application for setting aside, particularly at paragraph 17 of the supporting affidavit, that titles had already issued to all the three land parcels in question in 2011. Where a title has already issued, a court of law must be cautious not to issue orders that would nullify the title without first hearing the registered owner as to how they came to be registered proprietors thereof. The registered owners of the other two parcels not addressed by the impugned judgment had a right to a hearing before their titles could be cancelled. Granting the review application was improper because it had the effect of applying a judgment in respect of one parcel to their parcels while their history may not have been the same. However, contrary to the insinuation in ground 3 of the memorandum of appeal, the participation of the Land Registrar as a party in land cases is not a necessity as long as litigants claiming title show how they came to be registered as owners of land. The mere failure to hear the registered owners was an injustice to them especially if their homes were erected on those plots. It is clear that the learned review magistrate erred in law in failing to consider the effect of the evidence placed before her by way of the affidavit supporting the setting aside application. Had she done so she would have noted that the application of the judgment in respect of one parcel to the others would have far reaching ramifications on the appellants' rights to a fair hearing secured by the provisions of Article 50 of *the Constitution*. The effect of the application of the judgment in respect of Plot No 587 to the other parcels can not be arbitrarily deemed to have been the desire of the trial court that gave the judgment. Ground No 3 of the appeal therefore partially succeeds while Ground Nos 4 and 5 succeed wholly.

Whether The Learned Trial Magistrate Erred in Dismissing the Application Dated 26/4/2022;

41. The application dated 26/4/2022 sought a setting aside of the judgment and leave to be granted to the defendants to defend the suit unconditionally. They appear to have made their application in Civil Case No 87 Of 2010 while the trial magistrate had dealt with Case Number 89 of 2010. That however is not of much significance because the suits had already been consolidated. In full appreciation of the fact that the judgment had only been issued in respect of one particular case among the three consolidated suits, the appellants made a prayer seeking that the orders of setting aside once issued be applied to the other suits. If the judgment was to be set aside, it would have to vacate the final orders made, whether or not they applied to one or all the suits. In this case the judgment was flawed because it affected only one suit while it should have applied to all of them. It was therefore proper for the application to be made in any of the suits by any party to the suit who felt aggrieved. To the appellants, while making their application, they were only intent on correcting the wrong inflicted upon them by the magistrate's failure to hear their case. They ably demonstrated that they never gave evidence at the hearing. They drew the attention of the court to the fact that the trial court was made aware that their advocates had closed office and that there is nothing on the court record to show that the court ensured, before the hearing proceeded, that they were personally served; that the court never made any remarks to confirm that the appellants were sufficiently served or at all; that in the midst of their woes occasioned by representational problems, the appellants could not follow up on the matter due to their advanced age and frail health.
42. This court notes that the consolidated suits came up for hearing before the trial magistrate on 12/4/2016 whereupon he was informed by counsel for the respondents that the appellants' counsel



had closed their firm. He ordered that fresh service be effected without specifying that the same was to be effected upon the appellants personally, and he set the next date of hearing as 26/4/2016. The record shows that come 26/4/2016 the trial magistrate simply launched into the hearing of the case straightaway without noting on the file as to whether the plaintiff's counsel, who was present, had effected service in any manner upon the appellants. It was on that date that the respondents' case was closed and a date for submissions issued, it being 17/5/2016. On the date of submissions, the counsel for the respondents appeared and mentioned that Mungatana appears for the appellants. There is however no note made by the trial magistrate that Mungatana was present at that sitting. There is no doubt in my mind that had that counsel been present notes of what he submitted before court would be appearing on the court record. It is impossible that counsel could appear in such a matter and a coincidence happens that the magistrate erroneously fails to note down his attendance in the coram and at the same time fails to write down what he states in submission. This state of affairs continued for two more mentions on 7/6/2016 and on 6/9/2021. On 14/9/2021 judgment was read in the absence of the appellants. The contents of the record match with the contention of the appellants that they never knew what was going on in court since they were not served.

43. In respect of the setting aside application the court observed that the counsel for the appellants had been served but failed to attend court. With all due respect to the review court, there is no record showing that the trial magistrate confirmed that he was satisfied that service had been properly effected upon the appellants in any manner before the hearing went on and before the respondents closed their case. The magistrate concluded that since the appellants did not file any documents and witness statements, it was clear that they did not intend to call any witnesses or rely on any documents. This court finds no proper basis for such a conclusion.
44. Where a court of law finds that there was service and the judgment was regular, it may exercise its discretion to set aside on grounds that it may deem proper depending on the nature of the case. However, where a court finds that there was no service at all or that there was insufficient service, setting aside the judgment becomes purely a matter of jurisdiction. The dictates of Article 50 of *the Constitution* demand that any person who has a dispute that could be resolved by application of the law should be granted an opportunity to ventilate the dispute before an impartial court or tribunal. I think the review court hardly ever considered this aspect of the case, and merely proceeded to note that the matter had been consolidated and ruled in favour of the review application and dismissed the setting aside application.
45. Besides the issue of non-service, it has already been indicated by the appellants that the court process was running parallel to the land adjudication process such that titles in their names were issued pursuant to that latter process on 10th November 2010 while the consolidated suit was still pending. Though the appellants aver that the issue of jurisdiction was raised in the defence, the only preliminary objection distinct from the defence is that of jurisdiction on the basis that the court lacked jurisdiction due to Section 3(9) of the Land Disputes Tribunals Act and not the *Land Adjudication Act*. However, each of the defences also alluded to a preliminary objection on the basis of the want of locus standi on the part of the respondents to institute the suits. Nevertheless, the issue of jurisdiction is, according to the renowned case of Owners of Motor Vessel Lillian "S", primal and the court ought to have taken it up from the pleadings and dealt with it before delving into all the other issues. Thus the trial court ought to have addressed itself to such an issue in its judgment or before judgment, which it never did. Speculation as to whether or not the preliminary objection could have met any measure of success is not of any consequence at this stage. The significant fact is that it was not tried at all prior to judgment being given on all the other issues. Trial of the jurisdictional issue, to my understanding of the law, does not require mandatory participation of parties, and the court may even raise the issue of jurisdiction suo moto. The outcome of the foregoing analysis is that had the review Magistrate scrutinized all these



facts and taken them into consideration, she would have seen the need to set aside the judgment of the trial court, especially on the issue of non-service and want of jurisdiction.

46. The analysis above leads this court to the ineluctable conclusion that the magistrate failed to exercise her discretion in the proper manner and thus wrongly dismissed the appellant's application while also wrongly granting the review application. Consequently, the present appeal succeeds and I issue the following orders:

- a. That the rulings of Hon R. Amwayi dated 30/8/2022 and all the consequential orders arising from the two applications dated 18/10/2021 and 26/4/22 respectively are hereby set aside and are substituted with the following orders of this court:
 - i. The application dated 18/10/21 is hereby dismissed;
 - ii. The application dated 26/4/22 is hereby allowed;
 - iii. The judgment dated 14/9/2021 and all consequential orders are hereby set aside and the defendants are granted unconditional leave to defend the consolidated suits;
- b. The costs of this appeal and the costs of the two applications dated 18/10/2021 and 26/4/22 respectively are to be borne by the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

