



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kalama v Kidzumba (Environment and Land Appeal E002 of 2023)  
[2025] KEELC 4529 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
FM NJOROGE, J  
JUNE 17, 2025**

**BETWEEN**

**KARISA CHARO KALAMA ..... APPELLANT**

**AND**

**KENGA KARISA KIDZUMBA ..... RESPONDENT**

*(Being an appeal from the Ruling of Honourable Nelly Chepchirchir,  
PM, in Mariakani MCELC Land Case No. 32 of 2019- Kenga Karisa  
Kidzumba –vs- Charo Kalama, which was delivered on 11th July 2023)*

**JUDGMENT**

1. Kenga Karisa Kidzumba sued Karisa Charo Kalama in Mariakani Principal Magistrates Court in ELC Land Case Number 32 Of 2019. He sought the following prayers:
  - a. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that peace of comprising of 50 acres in Kilifi County Kinangoni Location in Miyani sub location;
  - b. A declaration that the defendant whether by themselves or their servants, agents, family members or otherwise however are wrongfully in occupation of the suit property and are accordingly trespassers;
  - c. A declaration that the defendant whether by themselves or their servants agent family member or otherwise howsoever they do not (sic) right to bury their dead on the suit property;
  - d. Permanent injunction restraining the defendant whether by themselves or their agents servants or otherwise how forever from remaining on or continuing in occupation of the suit property;
  - e. Vacant possession of the suit property and damages for trespass;



- f. Costs of this suit together with interest and or any such other or further relief as this honorable court may deem appropriate.
2. In in the body of the plaint it was claimed by the plaintiff that the suit property comprising 50 acres is community land which at all material times the plaintiff was holding in trust and only behalf of his family members and that the plaintiff had at all material times lawfully and rightfully in possession thereof for over 60 years. The plaintiff denies any family relations with the defendant. He also denied that the defendant has ever had any occupation of the suit property. The plaintiff admits that there was at one time in the year 2015 a dispute involving Chengo Kagola Kenga who is a close family member to the defendant. The dispute was resolved through a land conflict meeting at the chief office on 30<sup>th</sup> December 2015 with the plaintiff being declared the undisputed owner of the unsurveyed 50 acres of land and the same was recorded in the minutes.
3. Later on in 2019 the defendant attempted to inter his late brother Katana Charo Kalama on the suit land which attempt the plaintiff terms as illegal. The plaintiff avers that his interest in the suit land was validly and properly obtained through customary right of occupancy.
4. Alongside that playing was fired and notice of motion also dated 6<sup>th</sup> December 2019 in which the plaintiff sought the following prayers:
  - a. That this honorable Court be pleased to grant an order of injunction restraining the defendant respondent by themselves their servants agents family members and or employees or anyone claiming under the defendant or otherwise how forever from burying their late brother Katana Charo Kalama and/or dealing in any manner whatsoever thereon and or in any other way purporting to alienate the property of the applicant all parcel of and surveyed community land measuring 50 acres or thereabouts in Kilifi county Kinagoni location pending hearing and determination of this application;
  - b. That this honorable Court be pleased to Grant an order of injunction restraining the defendant respondent by themselves their servants agents family members and or employees or anyone claiming under the defendant or otherwise how forever from burying their late brother Katana Charo Kalama and or dealing in any manner whatsoever they are on and or in any other way purporting to alienate the property of the applicant all parcel of and surveyed community land measuring 50 acres or thereabouts in Kilifi county Kinagoni location and determination of the main suit;
  - c. That the costs of this application be provided for.
5. The grounds provided for the application are at the foot thereof, and are stated as follows:
  - a. The suit property was rightfully acquired by the plaintiff/applicant's family through community tenure system;
  - b. The family thus acquired customary right of occupancy of the 50 acres through the family tree for over a period of 60 years and they had been enjoying peaceful occupation and use during that period;
  - c. The dispute had earlier been resolved between the plaintiff's family and one Chengo Kagola Kenga in 2015 by the chief;
  - d. The defendant brother had passed on and the family members of the deceased had resolved that the deceased would be buried on their ancestral land which is located far away from the suit land but the defendant had insisted that the deceased should be buried on the suit land;



- e. The defendant's family does not have any color of right over the suit land;
- f. The defendant and their family were allowed to cultivate and reside on a portion of the said suit land by the applicant's elder brother the late Charo Karisa Kidzumba;
- g. The defendant is not related to the plaintiff by way of family ties and his family had been accommodated on the suit land simply on humanitarian grounds.

### **Response to The Application**

6. The defendant filed a replying affidavit dated 19<sup>th</sup> December 2019. The gist of that affidavit is as follows: that the plaintiff has uttered false grounds for his application, the defendant's great great grandfather Kalama Kitsitsa was the earliest member of his family to settle on the land more than 100 years ago and he belongs to his lineage; the plaintiff's father Karisa Kidzumba hailed from Mdzimure in Kaloleni, but came to the suit land while looking for pasture for his cows during a drought that occurred 40 years ago; that he was allowed to set up temporary shelter and graze his cows on the suit property by one Kagola Kenga; that later on the plaintiff's father passed on in Kawala area of Rabai and he was buried on the suit land due to the friendship that he had with Kagola Kenga; that thereafter his family remained on the suit property; that later on Kagola Kenga passed on and a dispute arose thereafter between the two families over ownership of the land, Chengo Kagola Kenga the defendant's uncle, escalated the dispute to the area chief Kinagoni Location who constituted a committee which after hearing the parties made an award in favor of Chango Kagola Kenga on the 26<sup>th</sup> August 2015.
7. It is averred that the decision of that committee was not appealed by the plaintiff's side. In that decision of 26<sup>th</sup> August 2015 the plaintiff's clan was given 2 acres of the suit property while the defendant's clan known as the Waparwa Weupe clan awarded the rest of the property. However, to date, the plaintiff's side has failed or declined to hand over the suit property as directed in the award. The deponent avers that his family was not party to the proceedings that led to the purported determination of 30<sup>th</sup> December 2015, and the first the determination of 26<sup>th</sup> August 2015 is still binding and has not been set aside on appeal or review.
8. It is also averred as follows by the defendant:
  - a. That only members of the same clan can be buried in the same burial ground, that it was intended to bury the deceased next to his mother's grave; that many other members from the defendant's family and from the Waparwa Weupe clan are also buried on the same burial ground.
  - b. That the plaintiff and his family or clan have their own graveyard within the 2 acres which was awarded to them on 26<sup>th</sup> August 2015 out of the suit property. The plaintiff is therefore not entitled to the defendant's family graveyard or to the larger suit property, and would not suffer any loss if the orders sought in his application were not granted.
  - c. That it is indeed the defendant's family who would suffer monetary loss in terms of expenses for the preservation of the deceased remains pending the hearing of the suit. That due to the plaintiff's misrepresentation the ex parte order obtained ought to be set aside and the motion dated 6<sup>th</sup> December 2019 be dismissed with the costs.
9. It is noteworthy that the defendant filed a defense and counterclaim dated 23<sup>rd</sup> December 2019 in which the matters set out in the replying affidavit were reiterated and in which is sought a following orders in the counterclaim:



- a. A declaration that the suit property plot is rightfully owned by the Waparwa Weupe clan which he belongs to save for the two acres awarded to the Wakiza clan which clan the defendant by counterclaim belongs to by virtue of the decision made on the 26<sup>th</sup> August 2015 in the proceedings conducted by a committee constituted by the area Chief Kinagoni location which proceedings were between one Chengo Kagola Kenga the plaintiffs by counter claim uncle on the ones side and the defendant by counterclaim and his family on the other side
  - b. The defendant by counterclaim and or his family and or his authorized agents and or servants and employees and members of the Wakiza clan to hand over vacant possession of the suit property to the plaintiff by counterclaim failure to which they be evicted from the plot and their buildings and or structures thereon be demolished at the defendant's costs;
  - c. A permanent injunction be issued to restrain the defendant by counterclaim and/or his family and or his authorized agents and or servants and employees and members of the Wakiza clan from trespassing and or encroaching and or dealing with the suit plot in any way whatsoever;
  - d. damages for loss of use;
  - e. Mesne profit from the 26<sup>th</sup> August 2015 to date;
  - f. Cost of the counterclaim.
10. The plaintiff filed as supplementary affidavit dated 3<sup>rd</sup> January 2020 reiterating the matters in his supporting affidavit and further stating as follows:
- The plaintiff's family's occupation of the suit property was accompanied by other acts for example alienation of 12 acres for the construction of Miyani Primary School and two acres to the World Vision; that his son was misled by the defendant's family and he is not well versed with the land issue;
11. The dispute resolution of 26<sup>th</sup> August 2015 was biased against the plaintiff's side and was conducted contrary to the principles of natural Justice as the plaintiff's evidence as the senior most person in the hierarchy of his family tree was never recorded on how his family acquired the suit land. Also, the plaintiff's witnesses evidence was not taken. Consequently, when the defendant's family wrote demanding that the plaintiff's family vacate the land, the latter reported the matter to the County Commissioner's Office and the defendant's side was summoned by the Assistant County Commissioner for the resolution of the dispute but ignore the summons. Consequently, the County Commissioner proceeded and awarded the plaintiff's clan the suit land in the absence of the defendant's side. The minutes and decisions of those proceedings were availed to the defendants and acknowledged and the parties proceeded to leave peacefully thereafter until the defendant wanted to bury the remains of his brother on the suit, land which action prompted this suit.
12. The plaintiff resulted to Section 42 of the Community Lands Act Number 27 Of 2015 for the proposition that he was rightfully before the court because that Section states that where all efforts of resolving and dispute under this act fail, a party to the dispute may refer the matter to court. It is averred that the defendant himself never forwarded the decision-made on 26<sup>th</sup> August 2015 to court for confirmation. The plaintiff concluded by stating back there is no graveyard for members of the respondent's clan on the suit property.



### Written Submissions of the Parties.

13. The application was disposed by way of written submissions which both parties filed before the trial court in the ruling on the motion was delivered on 4<sup>th</sup> February 2020. In the ruling, the learned trial Magistrate citing the renowned case of *Giella Versus Cassman Brown* held at the plaintiff/applicant had failed to demonstrate a legitimate interest known in law but which can be protected by a court of equity. She also held that the applicant has not demonstrated a prima facie case with high chances of success at the main trial, that he has not shown what injuries he stands to suffer for which damages would not be an adequate remedy. She observed that the applicant had stated in his pleadings that he is the owner of the suit property, which has not been surveyed. She found that the suit property has not been adjudicated and individual interests there to have not been ascertained, and that it would be an exercise in futility for the court to determine the ownership of the suit property. Applying the balance of convenience, she observed that search balance tilts heavily against the grant of the orders sought and dismissed their application with costs to the respondents.
14. The plaintiff later on filed a Notice of Motion dated 23<sup>rd</sup> August 2022 seeking the following orders:
  - a. That leave be and is hereby granted do the plaintiff to file defence to the counterclaim dated 23<sup>rd</sup> December 2019;
  - b. That costs of the application be in the cause.
15. The grounds upon which that application were brought are stated at the foot thereof and in the supporting affidavit of the plaintiff of the same date. They are that, briefly, the applicant's erstwhile advocate was not attending court despite misleading the applicant to believe that he was attending to this matter; the defendant had filed a counterclaim which the said advocate failed to file a response to despite having full instructions from the plaintiff, that it is only fair and just and in line with the spirit of Article 159 of *the Constitution* of Kenya 2010 that the applicants be accorded leave to respond to the substantive issues of law and facts; that unless the orders sought are granted the overriding objective and the principles of natural justice shall have been violated, thus occasioning the plaintiff a grave injustice. It was urged as one of the grounds that the failures of the plaintiff's erstwhile advocate to file a response to the counterclaim should not be visited upon the plaintiff who was innocent.
16. In the supporting affidavit it was averred that the plaintiff's erstwhile advocate had not been attending court despite instructions and the brain to you appointed the firm of Omurwa Advocates to come on record and represent them in the matter. After coming on record the new firm advised the plaintiff that his previous advocates had not filed the response and or defense to the counterclaim. It was stated that the application had been filed timeously and without undue delay.
17. In opposition to that application, the defendant filed grounds of opposition dated 22<sup>nd</sup> September 2022 and a replying dated 7<sup>th</sup> October 2022.
18. The gist of the grounds of opposition was that the Motion dated 23<sup>rd</sup> August 2022 was res judicata by virtue of the orders made on 14<sup>th</sup> December 2021 made by the court in the Motion dated 12<sup>th</sup> August 2021; that the motion lacked merit and that it had been brought after inordinate delay, and with no reasonable explanation for the delay, and that it was an attempt to abuse the process of the court.
19. In the replying affidavit filed on 7<sup>th</sup> October 2022 the defendant reiterated the history of the matter and added as follows: that pre-trial directions were taken on 5<sup>th</sup> January 2021 and the matter fixed for full hearing on 13<sup>th</sup> April 2021 on which date the suit was not heard; that one 22<sup>nd</sup> June 2021, neither the plaintiff nor his counsel was in court and the plaintiff's suit was dismissed with costs and the defendant



testified in support of the counterclaim which was undefended; subsequently the defendant case was closed and parties directed to file written submissions on the counterclaim; that his advocate filed and served submissions on the counterclaim; that the plaintiff has all throughout the litigation had counsel acting for him in the matter. The defendant refuted the allegation that the plaintiff's earlier advocates were not attending court and averred that they failed to attend court only once on 22<sup>nd</sup> June 2021 when the plaintiff's suit was dismissed. That the plaintiff filed a motion dated 12<sup>th</sup> August 2021 seeking to reopen the plaintiff's case in order to take the plaintiff's evidence for the court to grant the plaintiff leave to file a response to the counterclaim; that motion was dismissed with costs by a ruling dated 14<sup>th</sup> December 2021 and thus the present motion is res judicata; that if the motion dated 23<sup>rd</sup> August 2022 is allowed the plaintiff would be prejudiced because he has already testified and his witnesses have also testified; that the plaintiff's current advocate took over 1 year to file the application after he was appointed and no reasons have been given for the delay in lodging the motion. That clearly, the plaintiff does not have any defense to the counterclaim and that such ought to have been exhibited in the motion and that the plaintiff cannot hide behind the provisions of Article 159 of *the Constitution* of Kenya 2010 and the principles of natural justice. The defendant suggested that it is in the interests of fairness and justice to have the application dismissed.

20. The plaintiff filed a supplementary affidavit 3<sup>rd</sup> January 2023. In that affidavit he reiterated that the firm of Kagwima Karanja and Company advocates had failed to attend court thus leading to the dismissal of the suit; that they had full instructions by then; that they failed to file defence to the counterclaim and/or attend court leading to the dismissal of the suit, after which the consequence was that the counterclaim proceeded undefended. He pointed out that the application dated 12<sup>th</sup> August 2021 and the application dated 23<sup>rd</sup> August 2022 were materially different and thus the application before Court presently is not res judicata. The deponent avers that the defendant would not be prejudiced because he would be accorded and opportunity to file further reply to defense and eventually examine his witnesses, which are devices set out in the law to avert any prejudice to any party. On his part however, he would be driven from the seat of justice unheard if the application was not granted. To the supplementary affidavit was annexed a draft defence to counterclaim which was marked as "KKK1".
21. The application was disposed of by way of written submissions which both parties filed on different dates. A ruling thereon was delivered on 11<sup>th</sup> July 2023 in which the court allowed the application in the following terms:
  - a. The plaintiff is granted leave to file his defense to the counterclaim out of time and the annexed draft defence to counterclaim is deemed as duly filed the same to be served upon payment of the requisite court fees in an event not later than 10 days from the date of this ruling;
  - b. The defendant shall be granted leave of 14 days upon service to file and serve reply to defense to the counterclaim;
  - c. Matter is set for mention to confirm compliance on 15<sup>th</sup> August 2023;
  - d. Cost in the cause.
22. The Appellant being dissatisfied with the said Ruling and/or order appeals against the said Ruling and or Order on the following grounds: -
  1. That the Learned Trial Magistrate erred in law and in fact by holding that the Respondent's Notice of Motion dated 23<sup>rd</sup> August, 2022, was not res judicata despite the fact that relief similar to that sought in the said application has been sought by the Respondent in an earlier application; the Notice of Motion dated 12<sup>th</sup> August, 2021, which application was dismissed with costs in a Ruling delivered on the 14<sup>th</sup> December, 2021.



2. That the Learned Trial Magistrate erred in law and in fact by misdirecting herself on the doctrine of res judicata and thereby arrived at a decision which is manifestly wrong.
  3. That the Learned Trial Magistrate erred in law and in fact by wrongly exercising her discretion to grant the relief sought by the Respondent in the Notice of Motion dated 23<sup>rd</sup> August, 2022.
  4. That the Learned Trial Magistrate erred in law and in fact by delivering a Ruling which flies in the face of the principle that parties to a suit should not litigate in installments.
  5. That the Learned Trial Magistrate erred in law and in fact in allowing the Respondent's application.
  6. That the Learned Trial Magistrate erred in law and in fact by delivering a ruling in total disregard of the provisions of law.
23. The Appellant prays to this Court that:
- a. The appeal be allowed, the ruling delivered on the 11<sup>th</sup> July, 2023, in be set aside and the Notice of Motion dated 23<sup>rd</sup> August, 2022, in Mariakani MCELC Case No. 32 of 2019- Kenga Karisa Kidzumba –vs- Karisa Charo Kalama be dismissed with costs.
  - b. The costs of this appeal be borne by the Respondent.

#### **Analysis And Determination.**

24. The issues arising for determination in the present appeal are as follows:
- a. Whether the Learned Trial Magistrate misdirected herself on the doctrine of res judicata and thereby arrived at the wrong decision when she failed to find that the application dated 23/8/2022 was res judicata;
  - b. Whether the Learned Trial Magistrate erred in law and in fact by wrongly exercising her discretion to grant the relief sought by the Respondent in the Notice of Motion dated 23<sup>rd</sup> August, 2022.
25. On the first issue this court notes that the learned trial Magistrate noted in her ruling that the application dated 12/8/2021 was dismissed as it was premised on the wrong provisions of the law, yet the application dated 23/8/2022 was premised on Order 7 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules. She consciously dealt with the latter application after having satisfied herself that it was not res judicata.
26. The application dated 12/8/2021 sought orders that:
- a. The court be pleased to re-open the plaintiff's case in order to take the plaintiff's evidence;
  - b. That the court be pleased to grant leave to the plaintiff to file a response to the counterclaim.
  - c. That the costs of the application be in the cause.
27. Ruling on that application was delivered on 14<sup>th</sup> December 2022. In that ruling the trial Magistrate found that the application was brought under the wrong provisions of the law having been brought under Order 40 rules 1(a), (b) and 2 CPR which provide for injunctions and dismissed it without addressing the merits. On that account alone, I find that the application dated 23/8/22 is not res judicata since the issues raised in the first application were not resolved on their merits in the ruling dated 14/12/2022.



28. The second issue involves the exercise of discretion by the learned trial Magistrate. She allowed the Motion dated 23/8/22. First, I must mention that the learned trial Magistrate relied on Jomo Kenyatta University of Agriculture and Technology Vs Musa Ezekiel Oebal 2014 eKLR Ca 217/2009 in which it was stated that the purpose of clothing the Court with discretion to set aside ex-parte judgment is:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”

29. The plea of the applicant before the trial Magistrate as contained in the application dated 23/8/22 was that in the event that the application was not allowed, that is, if he was not allowed to file the defence to the counterclaim he would be driven from the seat of justice unheard. The reason given for the plea is that the applicant’s erstwhile advocate had failed to attend court and had failed to file a counterclaim despite having had all the material instructions which could enable him to do so.

30. At this point this court must state that though the applicant owns the case, reasonable services were expected from the advocate he employed; that advocate had filed the plaint.

31. In this court’s view, the parties’ claim in the plaint and the counterclaim before the trial court below were diametrically opposed claims which were each an answer to the other. However, the rule is that since a counterclaim is a considered a distinct claim apart from the plaint, in practice, a defence ought to be filed in response to it. It is this defence that the plaintiff’s erstwhile advocate failed to file.

32. Was the respondent herein wrong in stating before the Magistrate in his application that he had furnished his erstwhile advocate with all the proper instructions? the pointer to the answer to that question lies in the fact that I have already stated that the plaint and the counterclaim were merely diametrically opposed claims in respect of the suit land where every party claimed ownership thereof. Therefore, though the issue of whether there were any instructions given to the advocate or not is usually a confidential matter between the advocate and his client, it is not difficult to see that in a case where the defence to the counterclaim is clearly derivable from the matters pleaded in the plaint, that advocate does not need any other instructions to file a defence to the counterclaim. In some cases that defence to the counterclaim takes the form of a reiteration in one paragraph, of the matters pleaded in the plaint and it suffices. In the circumstances, the respondent can not be faulted for ostensibly not having issued his advocate with clear instructions. It was for that advocate to exercise his professional diligence and file, while notifying his client who is deemed not to know the procedural requirements of suits unless advised by a legal expert, of the need to file a defence to the counter claim, and to indeed file such a defence to counterclaim in the matter. The respondent had in his application pleaded that the mistakes of his erstwhile advocate ought not be visited upon him. This plea found favour in many a judicial precedent including Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd versus Augustine Kubende (1982-1988) KAR, Belinda Murai & 9 others v Amos Wainaina [1979] eKLR and others. It is not beyond this court to think that unless the appellant herein could point to any default attributable to the respondent as a person in the conduct of the suit before the learned trial Magistrate, then the learned trial Magistrate was right to consider the pleas in the application before her and grant the application dated 23/8/2022. In law, a broad discretion is granted by the law to a court to allow the filing of documents out of time. That is what the application dated 23/8/2022 sought to do in respect of the defence to counterclaim. The court’s discretion is usually exercised in order to avert any hardship to an innocent party. It matters not that in this case the consequence of allowing the application would be to make supplemental orders; as long as the learned trial Magistrate had found it necessary to exercise her discretion in favour of the filing of the defence to the counterclaim, any



supplemental orders would be necessary if they met the interests of justice and levelled the arena to facilitate a just contest between the parties.

33. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd versus Augustine Kubende (1982-1988) KAR the Court of Appeal addressing the issue of discretion to set aside an interlocutory judgment stated:

"The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."

34. In the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76 the court stated as follows regarding the exercise of discretion in a setting aside case:

"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

35. In the case Nairobi Civil Case No. 1079 Of 1980 Sammy Maina Versus Stephen Muriuki the court observed as follows:

"As I have already stated in this suit there was a valid defence and nobody has suggested that the defence filed was a sham. What happened was that the applicant did not turn up on the day of the hearing. His advocate also failed to turn up. He (the applicant) says that he was not aware that the suit was to proceed and that he was relying on his advocate. Hence the applicant/ defendant should not be penalised due to his advocate's faults (see Shabir Din v Ram Parkash Anand (1955) 22 EACA 48)."

36. In Mbogo v Shah [1968] EA 93, the court held that:

.....discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice". (See Jomo Kenyatta University of Agriculture and Technology vs Musa Ezekiel Oebal (2014) e KLR CA 217/2009 ).

37. It must be stressed here that whenever the court is being urged by a party to either set aside a judgment or to allow the filing of a pleading out of time the main aim of such a plea is, unless the contrary can be demonstrated by the respondent, to allow the hearing of the matter on its merits to obviate the possibility of some party being driven away from the seat of justice on a procedural technicality without the merits of their case being heard.

38. Article 50 of *the Constitution* provides as follows:

50. fair hearing



- (1) every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Article 159 (2)(d) provides as follows:

- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
  - (a) justice shall be done to all, irrespective of status;
  - (b) justice shall not be delayed;
  - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
  - (d) justice shall be administered without undue regard to procedural technicalities; and
  - (e) the purpose and principles of this Constitution shall be protected and promoted.”

Section 1A of the [Civil Procedure Act](#) provides as follows:

#### 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

Section 1B of the [Civil Procedure Act](#) provides as follows:

#### 1B. Duty of Court

For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.

39. In so far as a court of law is able to do so, it should hear each and every case on its merits. It has been time and again stated that no man has any vested interest in procedure and that procedural rules are simply handmaidens of justice. It is substantive justice that matters in the final end. In allowing the filing of the defence and counterclaim and in issuing the supplemental orders that she gave on 11/7/2023, the learned trial Magistrate was emphasizing this aspect of the rules of procedure. I therefore think that



on the strength of the material before her, the trial Magistrate did not err in allowing the application and that her decision went embodied the spirit of the articles of *the Constitution* set out herein above as well as those of the *Civil Procedure Act*.

40. I therefore find that the learned trial Magistrate did not err in law and in fact in granting the application dated 23/8/2022.
41. The upshot of the foregoing is that the present appeal lacks in merit and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 17<sup>TH</sup> DAY OF JUNE 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

