

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL NO. E021 OF 2025

CHARLES

NYAGA

WACHIRA.....APPELLANT

VERSUS

PATRICK WANJOHI MUGWE.....
RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling and Order delivered on 27.3.2025 by Hon. Ismael Stanley, Resident Magistrate in Nyeri SCC COMM. No. E017 of 2025.
2. Vide the application dated 30.5.2025, the Appellant also sought stay of execution of the impugned order and default judgment. The said application is subsumed in this appeal as the issue shall turn on whether the default judgment should be set aside. If the default judgment is set aside, the issue of the execution will be moot and if the default judgment is not set aside, execution will have to continue.
3. The Appellant filed this appeal and preferred 11 grounds in the Memorandum of Appeal dated 10.6.2025. The grounds are

argumentative, unseemly and do not please the eye. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**
- (2) (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”**

4. The Court of Appeal had this to say in regard to rule 86 (which is *pari materia* with Order 42 Rule 1) in the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -**

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict

compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues

5. Repetitiveness of the memorandum of appeal is such a waste of judicial time. In **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR**, the Court of Appeal observed that : -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the Kenya Ports Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the

Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

6. The appeal raised only two grounds that the learned magistrate erred in law and fact in denying the Appellant the right to be heard by declining to set aside default judgment when evidence showed that the Appellant was not served with notice of the claim, and that the Appellant had a meritorious defence which was not considered.

Pleadings

7. By way of the Notice of Motion application dated 13.3.2025, the Appellant sought stay of execution of the default judgment, the setting aside of the default judgment and that leave be granted for the Appellant to defend the suit.
8. The application was grounded on the assertion that no proof of service by WhatsApp was produced in court and that there was no service at all so that the Appellant was condemned in the default judgment unheard.

Analysis

9. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 38 of the Small Claims Court Act which provides as doth:

(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.

10. An appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of **Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR**: -

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: **Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR**).”

11. Then what constitutes a matter of law? In **Twaher Abdulkarim Mohamed v Independent Electoral and**

Boundaries Commission (IEBC) & 2 others, (2014)

eKLR, the court stated as doth: -

“4. Although the phrase ‘a matter of law’ has not been defined by the Elections Act, it has been held in *Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA)* of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney (1947) 1 All ER 126*. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M’inoti & Sichale, JJA)* of 23.01.2014 following *AG vs David Marakaru (1960) EA 484.*”

12. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a matter of law. In *Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA)* of 13.02.2014, the Court of Appeal held as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would

not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence - with the caveat that the appeal court did not see the witness demeanour - is an issue of law.”

13. A matter of law is similar to a preliminary point of law but has a broader meaning. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of **Oraro vs Mbaja** [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

14. I agree with the holding of the Supreme Court of India which stated in **Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664, at 711** cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR that:

[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

15. The way I understand default judgments is that they may be set aside so as to give the defendant an opportunity to be heard. That was the essence of the Respondent's application in the lower court. In **Wachira Karani vs. Bildad Wachira (2016) eKLR** as was quoted in the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR, the Court held that:-

"The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties

should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

16. The court can set aside default judgment in these ways:
- (a) Suo moto
 - (b) When the judgment is irregular ex debito justiae, as of right.
 - (c) When the judgment is regular but there is a defence that raises triable issues.
17. In **Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976** it was held that:

It is a common ground that it is a matter for discretion whether or not to set aside a judgment under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgment. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against

him he has to be penalised to some extent in view of his somewhat dilatory actions.”

18. I am also persuaded by the reasoning of Odunga J, (as he then was) in **Mureithi Charles & another v Jacob Atina Nyagesuka** [2022] eKLR

28. In considering whether or not to set aside a judgment, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have

a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgment would be that in view of the defence, there is *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* judgment. See *Bouchard International (Services) Ltd vs. M'mwereria* [1987] KLR 193; *Evans vs. Bartlam* [1937] 2 All ER 647.

19. Clearly, setting aside a default judgment is an exercise of judicial discretion. Judicial discretion is unfettered. It must be exercised in accordance with the law. I am fortified by the passage constituting the reasoning of the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173** as follows:

In an application for setting aside *ex parte* judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who

clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgment was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex

parte judgment. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the ex parte judgment was to ignore her judgment on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgment so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

20. The court stated that there was evidence that the Appellant was served but failed to answer the claim. The rules of procedure bespeak the path to substantive justice. The exercise of discretion as did the lower court, was based on no

evidence. Acting on no evidence is a matter of law. There must be a correlation between the certificate of service and the Appellant. Without establishing a co-relation, there can be no service. A matter proceeding without service is null and void *ab initio*. In the case of **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

21. The court did not also consider the draft response by the Respondent which clearly showed that there were tenancy negotiations between the Appellant and the Respondent. I note that the issues related to failure to give vacant possession for rental premises and alleged obtaining money by false pretenses. The English nomenclature in the claim related to matters under Section 13 of the Environment and Land Court Act or criminal law.

22. Jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not

have jurisdiction. Nyarangi JA, immortalised these words, in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] eKLR as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court

or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

23. On the issue of jurisdiction, the court cannot assume jurisdiction it does not have nor eschew jurisdiction it has. In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in *the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

24. In this case, the lower court erred not only in shutting the Appellant out of the trial process when he was not served with the notice of suit but also proceeding to delve into and give

default judgment in a matter it clearly had no jurisdiction. The power to set aside can also be exercised *suo motto* where the proceedings are a nullity or an affront to justice and morality or where the proceedings are fraudulently undertaken.

25. The net effect is that I allow the appeal, setting aside the *ex parte* judgment and in lieu thereof, make an order striking out the claim in the small claims court.

26. Two issues arise, that is, whether the court is to award costs in the small claims court and in this court. In the small claims court, the costs are governed by Section 33 of the Small Claims Act:

(1) The Court may award costs to the successful party in any proceedings.

(2) In any other case parties shall bear their respective costs of the proceedings.

(3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.

(4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.

27. There was no success in the Small Claims Court. Each party shall bear their own costs in that court.

28. In regard to the costs in this court, the same are governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

29. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs

either partially or wholly from a successful party for good cause to be shown.

30. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

31. Although there is eminent good sense in the basic rule of costs - that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered

opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

32. In the circumstances of this case, the Appellant is entitled to costs, which I duly award. A sum of Ksh. 55,000/= will suffice.

Determination

33. In the upshot, I make the following orders: -

- (a) The appeal is allowed. I set aside the *ex parte* judgment and in lieu thereof, make an order striking the Statement of Claim dated 20.1.2025 in the Small Claims Court for want of jurisdiction.
- (b) Each party to bear its own costs in the small claims court.
- (c) The Appellant shall have costs of Ksh 55,000/= for the appeal.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **7th** day of **October, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Muiruri for the Appellant

Respondent in person

Court Assistant - Michael

ORIGINAL