



**Koech v Mutai (Environment and Land Appeal E011 of 2024)
[2025] KEELC 6564 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E011 OF 2024**

CK NZILI, J

OCTOBER 1, 2025

BETWEEN

ALBERT KOECH APPELLANT

AND

ESTHER MUTAI RESPONDENT

*(Being an Appeal from the Ruling delivered from the CM Court at Kitale
by Hon. S.N. Makila (PM) dated 15/05/2024 in Land Case No.130 of 2024)*

JUDGMENT

1. Through a memorandum of appeal dated 28/5/2024, the appellant, who was the defendant at the lower court, faults the lower court decision rendered on 15/5/2024, which declined to set aside the ex parte judgment in favour of the respondent, who was the plaintiff.
2. The appellant sets out 12 grounds of appeal in the memorandum of appeal. In a nutshell, the appellant says that he was condemned unheard, that the draft annexed defence to his application for setting aside the ex parte judgment had raised triable issues, it was against the rules of fair hearing, the same amounted to a travesty of justice for allowing execution of a stale decree, from the defunct Land Disputes Tribunal and where the suit was res judicata.
3. Apart from the grounds of appeal, the appellant relies on a record of appeal dated 2/12/2024, containing the pleadings by the respondent, the interim application by the respondent and the annexures thereto, the application and supporting annexures as well as a replying affidavit, leading to the impugned ruling, certified copies of the proceedings, rulings, judgment and the decree, all set out in pages 1-126.
4. The appellant further relies on written submissions dated 11/9/2025. Briefly, the appellant submits that the suit at the lower court proceeded ex parte, and he had not been served with the court processes before the hearing. Further, the appellant submits that efforts to set aside the ex parte judgment were



- unsuccessful. The appellant also submits that the trial court erred in law and in fact in exercising its discretion; otherwise, his draft defence had raised triable issues, which should have necessitated being granted an opportunity to be heard and for the matter to be heard on the merits.
5. The appeal is opposed through written submissions dated 11/9//2025. The respondent submits that the appellant was served with court process and afforded all opportunities to participate in the hearing, but opted not to defend the suit or attend court. The respondent submits that the trial court after considering all the available evidence on service of court processes, was right in holding that there was proper service of court processes, hence the judgment was regularly entered, guided by the case law of *Tree Shade Motors Ltd -vs- DT Dobie Ltd* C No. 38 of 1998 and *Job Kilach -vs- National Media Group Ltd & Others* [2015] eKLR.
 6. The respondent submits that the trial court had carefully and properly analyzed the draft defence and found no triable issues. Reliance is placed on *Mugunga General Stores -vs- Pepco Distributors Ltd* [1986] [1987] KLR 150. The respondent submits that the role of this court applies only where the trial court misapplied the law, or its principles; if it applied irrelevant consideration, and or ignored relevant consideration, and or plainly reached a wrong conclusion. Reliance is placed *Mbogo & Another -vs- Shah* [1969] EA 93, *David Kiptanui Yego & Others -vs- Benjamin Rono & Others* [2021] eKLR, *Nicholas Kiptoo Arap Salat -vs- IEBC* [2013] KECA 113 [KLR].
 7. The role of an appellate court of the first instance is to re-evaluate the evidence afresh and to draw its own conclusion. In *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the court held that an appellate court is not bound by the findings of a trial court and that an appeal is like a retrial, where the evidence is considered afresh.
 8. The trial court was faced with the question of whether or not the ex parte judgment made on 20/12/2023, should be set aside through an application dated 24/1/2024. According to the ruling delivered on 15/5/2024, the trial court was not convinced that the appellant deserved the relief sought.
 9. It is trite law that a court has unfettered discretion to set aside an ex parte judgment.
 10. In *Shah -vs- Mbogo & Another* (supra), the court held that the discretionary power to set aside an exparte order is intended to avoid injustice and hardship resulting from an accident, inadvertence or excusable mistake or error, but is not designated to assist a person who has deliberately sought to obstruct or delay the course of justice, whether by evasion or otherwise.
 11. In *CMC Holdings Ltd -vs- Nzioki* [2004] 1 KLR 173, the court held that the discretion must be exercised upon reasons and in a judicious manner. The court said that it would not be a proper use of discretion if the court were to turn its back on a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident, or error.
 12. In *Banco Arabe Espanol -vs- Bank of Uganda* [1990] 2EA 22, the court observed that the administration of justice normally requires that the substance of all disputes be investigated and decided on their merits; otherwise, errors or lapses should not necessarily debar a litigant from the pursuit of his rights.
 13. In *Patel -vs- E.A. Cargo Holding Services Ltd* [1974] EA 75, the court held there are limits or restrictions on the judges' discretion, the main concern being to do justice to all parties. Setting aside, however, is not a matter of right to a party, but an equitable remedy which applies only where the party deserves such an order. In *Patel -vs- E.A. Cargo* (supra), the court said that where there is a defence on merits, whether or not it will succeed, such a matter should go on trial. See *Stephen Wanyee Roki -vs- K-Rep Bank Ltd & Others* [2018] eKLR.



14. The nature of the action should also be considered. The question of whether or not the plaintiff can be reasonably compensated by way of costs for any delay occasioned is also a factor. Reason for the delay must also be factored in. The distinction of a regular and an irregular judgment was set out in *James Kanyita Nderitu & another -vs- Marios Philotas Ghika & another* (2016) eKLR.
15. Where there is evidence of proper service of summons to enter appearance, but for one reason or another, there is an entry of appearance, such a defendant has a right to apply for the setting aside and seek leave to defend the suit. In such a case, the court will look into the reasons for the delay, the length of the delay, if the draft defence raises triable issues, and the prejudice to each party likely to suffer. See *Chemwolo & another -vs- Augustine Kubende* [1986] KLR 4932.
16. The right to be heard before an adverse possession decision is made against a person is fundamental and permeates the judicial system.
17. Applying the foregoing case law to the instant appeal, what was before the trial court was an exercise of discretion on whether or not to set aside the ex parte judgment.
18. The parameters to apply were set out in *Mbogo & Another -vs- Shah* [1968] EA93. It was held that a court will not interfere with an exercise of judicial discretion by an inferior court unless it is satisfied that the decision is clearly wrong, the court misdirected itself, or acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration or it arrived at the wrong conclusion.
19. In the application before the trial court, service of summons was disputed. The issue of res judicata had been raised. A draft defence said to have been raising arguable facts had been attached to the supporting affidavit of the application dated 24/1/2024, including Kitale HC Civil Suit No. 96 of 2017 and LDT No. 54 of 1996, and Kitale CMCC No. 54 of 1996.
20. In the replying affidavit of the respondent, sworn on 1/2/2024, 20 acres out of Title No. Saboti/Sikhendu Block 2/Bukwet/21, belonging to the applicant, as well as the existence of a decree of the Lands Disputes Tribunal, is admitted.
21. Further, the creation of parcel Nos. Bukwet 86 and 87 is admitted, though the respondent termed the draft defence as distorting some facts.
22. The parties relied on written submissions dated 22/3/2024 and 12/4/2024 addressing the trial court on both service of the summons to enter appearance and whether the draft defence had raised triable issues.
23. In the impugned ruling, at paragraphs 10, 11, and 12, the trial court seemed to have established the draft defence as raising some triable issues. A defence raising arguable issues need not succeed. It requires being subjected to a hearing by the trial court. See *Farmers Choice Co. Ltd -vs- Dorleen Anyango Wesonga & Another* [2015] eKLR and *Patel -vs- E.A. Cargo Holding Services Ltd* (supra).
24. Even where a judgment is valid, a court can still set aside the judgment if there is an arguable or reasonable defence. See *Tree Shade Motors Ltd -vs- D.T. Dobie* (supra) and *Python Waweru Maina -vs- Fluke Mugiria* [1983] eKLR.
25. In *James Wanyoike & Others -vs- CMC Motor Ltd & Others* [2015] eKLR, the court said that the tests of setting aside an ex parte judgment are:
 - (1) Whether there is a defence on merits.
 - (2) Whether there would be prejudice to the plaintiff.



(3) Explanation for the delay.

26. In the impugned ruling, the trial court only dwelt on the issue of service and the draft defence. The court is there to do justice to the parties. Substantive justice is what should guide courts. I think the trial court should have considered all relevant parameters, other than just the two factors, before reaching its conclusion. The draft defence needed interrogation by way of viva voce evidence. The trial court seems to have considered its merits in its ruling and dismissed it in limine, without allowing the appellant to ventilate it at the hearing.
27. On those reasons, I agree with the appellant that the trial court acted on wrong principles and or failed to consider all relevant principles, hence reached the wrong conclusion. See United Millers Ltd -vs- The Kenya Bureau of Standards & Others, Nairobi Civil Appeal No. 273 of 2019.
28. The upshot is that I find the appeal meritorious. It is hereby allowed with costs.
29. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT
AT KITALE ON THIS 1ST DAY OF OCTOBER 2025.**

In the presence of:

Court Assistant - Dennis

Mr. Kaosa for the appellant present

Miss Nafula for the respondent present

HON. C.K. NZILI

JUDGE, ELC KITALE.

