



**Charo & 5 others v Mwaro & another (Civil Appeal E014 of 2023)  
[2025] KECA 1701 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1701 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E014 OF 2023  
SG KAIRU & AK MURGOR, JJA  
OCTOBER 24, 2025**

**BETWEEN**

**EMMANUEL KATANA CHARO ..... 1<sup>ST</sup> APPELLANT  
DANIEL KASENA CHARO ..... 2<sup>ND</sup> APPELLANT  
ONESMUS RIZIKI KAHINDI ..... 3<sup>RD</sup> APPELLANT  
BLANDINA GAMAGHANA MALIMU ..... 4<sup>TH</sup> APPELLANT  
STANLEY M. TSUMA ..... 5<sup>TH</sup> APPELLANT  
MRIMA KITI ..... 6<sup>TH</sup> APPELLANT**

**AND**

**JOHN CHARO MWARO ..... 1<sup>ST</sup> RESPONDENT  
DICKSON KAZUNGU YAA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal against a Ruling and Order of the Environment & Land Court at Malindi  
(Odeny, J.) delivered on 21<sup>st</sup> December 2022 in ELC Case No. 27 of 2018)*

**JUDGMENT**

1. By the Complaint dated and filed on 2<sup>nd</sup> February 2018, the Respondents suing on behalf of the estate of the late Simon Kafadzi Mwaro (deceased) filed a suit against the Appellants jointly and severally seeking for orders that: a) there be a declaration that the purported sale of the parcel of land by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants are irregular, fraudulent and hence null and void; b) a permanent injunction stopping the Appellants either by themselves, their agents or any other persons acting under their names from selling, cultivating, leasing, transferring or dealing with land reference number Kilifi/Ngerenya/303 (the suit land) in any way; c) for the Appellants to be evicted from the



- suit land and the eviction be supervised by the OCS Kilifi; e) General damages for illegal trespass, and costs of the suit.
2. In the suit, the Respondents claimed that the suit land measuring approximately 12 acres belongs to and was registered in the name of their grandfather, (the deceased) who passed away in 1982; that about 20 years earlier, they had welcomed the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, their nephews who were destitute at the time onto the suit land; that the two secretly obtained Letters of Administration for their deceased grandfather and sold portions of the suit land to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants in the period between the year 2012 and 2013. The Respondents filed a suit against them, to which the Appellants neither entered an appearance nor filed a defence.
  3. This matter proceeded by way of formal proof and in a Judgment dated 31<sup>st</sup> August 2021, the trial Judge granted the orders as prayed and further awarded the Respondents general damages of Kshs. 800,000.00 to be paid by all the Appellants jointly and severally as well as the costs of this suit.
  4. Aggrieved, the Appellants filed a Notice of Motion dated 12<sup>th</sup> November, 2021 seeking: i) a stay of execution of the Judgment and decree of the court pending hearing and determination of this application to set aside the judgment and decree; and ii) that the judgment and Decree made on 31<sup>st</sup> August, 2021 and all consequential orders be set aside and the Appellants be granted unconditional leave to file their defence.
  5. The application was brought on grounds that, the Appellants' failure to enter appearance and file a defence was occasioned by the Appellants' former advocate, who for reasons unknown to the Appellants did not enter appearance or file any defence, notwithstanding that the Appellants had paid the legal fees; that they have a reasonable defence against the Respondents' claim but were condemned unheard contrary to the rules of natural justice on account of the mistake of their former advocate; that the Respondents may proceed to execute the decree and demolish the Appellants' houses and evict them from the suit land.
  6. They claimed that the firm of Walter Mayaka & Company Advocates was to represent their interests in the matter; that on 23<sup>rd</sup> October, 2021, they were served with a copy of the Judgment and decree against them dated 31<sup>st</sup> August 2021; that they instructed another advocate to peruse the court file which disclosed that the advocate neither entered appearance nor filed a defence on their behalf.
  7. Annexed to the application was a draft defence in which the Appellants denied the claim and stated that, the suit land is registered in the name of the deceased; that the Respondents were not born on the suit land but elsewhere, and that it is the 1<sup>st</sup> and 2<sup>nd</sup> Appellants who lived on the suit land together with their grandmother, the late Dama Simon Mwaro. They confirmed having sold part of the suit land to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants who remain in physical possession to date; that the Respondents demanded a share of the proceeds of sale, and when the 1<sup>st</sup> and 2<sup>nd</sup> Appellants declined to give them a share, the Respondents threatened to bring this suit out of malice.
  8. The Appellants denied stealing the suit land, but claimed that upon the demise of the deceased, his widow, the late Dama Simon applied for letters of administration intestate and was appointed the administrator of the estate of her late husband; that during Confirmation of grant, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were included as beneficiaries of the deceased's estate together with Dama Simon Mwaro. They asserted that the Respondents had been granted other parcels of land belonging to the deceased situated in Vitengeni village where they resided, but which they subsequently sold and converted the proceeds to their own exclusive use.
  9. They further contended that the Respondents are not entitled to a permanent injunction against the Appellants or to payment of general damages for trespass or for orders of eviction. The Appellants



reiterate that the suit was brought out of malice and bad faith, and that the Respondents have no legitimate cause of action against them.

10. On their part, the Respondents opposed the application on the basis that the Appellants were duly served with the summons to enter appearance but failed to file a defence, and as a result, the matter proceeded for formal proof. In their replying affidavit, they further deposed that there is no proof that all the Appellants instructed an advocate to act for them; that attached to the supporting affidavit of Onesmus Kahindi dated 12<sup>th</sup> November 2021 were receipts that show that only the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants made payment of legal fees to the advocate, and that even then, it is a settled legal principle that a case belongs to the litigant and not his counsel; that there was no tangible proof that showed that they pursued their case for the three years it was pending in court.
11. They further contended that the purported draft defence does not come to the aid of the Appellants as it did not raise any triable issue since all the sales by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to the rest of the Appellants were declared null and void in Succession Cause No. 115 of 2016, and the court also nullified and revoked the Grant of Letters of Administration and Confirmation that had been fraudulently obtained by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants; that no review or appeal has been filed to date, and this application is intended to delay justice for the Respondents.
12. In the alternative, the Respondents contend that should the Appellants be granted leave to file their defence, the same should be on the following conditions: That the Appellants deposit the original title deed of the suit land in court and that the sum of Kshs. 800,000.00 awarded as damages be immediately deposited in a joint interest account of both advocates, failure to which execution to issue immediately; that each Appellant be made to pay thrown away costs of Kshs. 30,000.00 each, payable immediately.
13. Upon considering the application, the trial Judge took the view that though the Appellants blamed their former advocate for neither entering an appearance nor filing a defence, they did not state what steps they took to express their interest in defending the case. The court was not satisfied that blaming counsel was enough reason for failing to file a defence within the stipulated period or for setting aside the *ex parte* Judgment, and declined to exercise its discretion in the Appellants' favour.
14. On whether the Appellants will suffer substantial loss in the event that stay of execution is not granted, the court concluded that the Appellants have not demonstrated in any way what loss they will suffer, and therefore also declined to grant an order of stay of execution. In so finding, the trial Judge dismissed the Appellants' application.
15. The Appellants were once again aggrieved, and filed this appeal on the grounds that; the learned Judge misdirected herself when exercising her judicial discretion and arrived at an erroneous decision, in finding that the Appellants had not given sufficient reasons for the failure to file their defence; in finding that the Appellants had not demonstrated the substantial loss that they will suffer if stay of execution was not granted and that the Appellants had not met the threshold for grant of stay of execution; in finding that there was delay in filing the application and in failing to consider the Appellants draft defence.
16. When the appeal came up for hearing on a virtual platform, learned counsel Mr. Shujaa appeared for the Appellants while learned counsel Mr. Mulemiah holding brief for Mr. Nyongesa appeared for the Respondents.
17. In their written submissions, counsel for the Appellants submitted that the learned Judge failed to consider the reasons advanced by the Appellants for their failure to file the defence within a reasonable time, and also in failing to appreciate the substantial loss that the Appellants stood to suffer if the *ex parte* Judgment was not set aside.



18. Counsel submitted that in their application, the Appellants demonstrated sufficient cause for failing to file the defence, which was that they were not to blame; that upon being served with summons to enter appearance, they instructed an advocate to enter appearance and file a defence; that for unknown reasons, the advocate failed to proceed as instructed; that they had visited their former advocate on several occasions and on each occasion they were assured that he would act on their matter; that furthermore, the learned Judge failed to consider the merits or otherwise of their defence which occasioned an injustice to the Appellants given that they were condemned unheard, which went against the principles of natural justice.
19. On their part, learned counsel for the Respondents submitted that it is not enough for the Appellants to blame their alleged counsel because the suit was pending determination in court for three years before Judgment was entered; that it is trite law that a case belongs to the litigant and not to his counsel, and no tangible proof was presented by the Appellants to show what they did to pursue the prosecution of their case over the three years while the matter was in court.
20. Counsel submitted that the learned Judge was right in concluding that blaming counsel is not enough reason for setting aside the judgment; that the Appellants' defence did not raise triable issues, but set out mere denials; that as a consequence, this was a proper case for dismissal of the appeal.
21. This is a first appeal from the decision of the High Court in its original jurisdiction. This Court's mandate as a first appellate court is as stipulated explicitly in Rule 31(1) of the Court of Appeal Rules, namely, to re-appraise, re-evaluate and re-analyze the record, consider it in light of the rival submissions and draw its own conclusions thereon and give reasons either way. See *Nation Media Group Limited & 2 others v Gulf Energy Limited (Civil Appeal 503 of 2019) [2023] KECA 1268 (KLR)*. It is trite law that this Court will only depart from an exercise of discretion of the trial Judge if the decision reached was not based on evidence on record, or where the court is shown to have acted on the wrong principles of law, or where its discretion was exercised injudiciously. See *Mbogo & Another v Shah [1968] EA 93*.
22. In the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898, Madan, JA. (as he then was)*, stated that this Court can only interfere with a decision where:

“...first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
23. The Supreme Court in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR* held:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir [2010] NZSC 112; (2011) 2 IVZLR 1 (Kacem)* where it was held:

‘In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:

  - (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”



The instant appeal is founded on an application to set aside an *ex parte* Judgment. Order 10 Rule 11 of the Civil Procedure Rules on “Setting aside judgment” provides:

“Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

24. This Court in the case of *James Kanyiiita Nderitu & Another v. Marios Philotas Ghikas & Another* [2016] eKLR discussed the criteria for allowing an application for setting aside a default judgment and stated;

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other “

25. And in so far as the principles for setting aside the judgment are concerned, this Court in the case of *CMC Holdings Ltd v. Nzioki* [2004] KLR 173 was explicit that:

“In an application for setting aside *ex parte* judgement, 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.

.....

The law is now well settled that in an application for setting aside *ex parte* judgement, 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* judgement...

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.”

26. So, was the *ex parte* Judgment delivered by the trial Judge capable of being set aside under Order 10 rule 11 of the Civil Procedure Rules?



27. In the case of *Mohamed & Another v Shoka* [1990] KLR 463 the court set out the criteria that a court should consider in setting aside an interlocutory judgment which are; i) Whether there is a regular judgment; ii) Whether there is a defence that raises triable issues; iii) Whether there is a reasonable explanation for any delay; and iv) Whether there would be any prejudice.
28. With respect to whether the *ex parte* Judgment was a regular judgment, it is not in dispute, and the Appellants have not denied that the summons were served upon them. In point of fact, they accepted that service was properly effected on them and that thereafter, they instructed an advocate to act on their behalf and file the defence. Given that they were served with summons, the *ex parte* Judgment that was delivered by the trial court was regular.
29. But that said, the Appellants' blame their former advocate for failing to enter appearance and file a defence. Indeed, the record discloses that the 2<sup>nd</sup> to 4<sup>th</sup> Appellants paid legal fees to the advocate who then did not file a defence. What becomes evident is that after they instructed him, the Appellants chose to sit back and ignore the court proceedings for three years. Nothing in the evidence demonstrated that they keenly followed the proceedings, or sought updates on the status of their case whilst the suit was pending before the court. As observed by the learned Judge, had the Appellants assiduously pursued their case, they would have noted their counsel's lethargy, whereupon they had three years to appoint other counsel. Instead, they continued with developments on the suit land, and only came to court after the *ex parte* Judgment was entered.
30. In our view, the Appellants' misadventure with their alleged counsel rests entirely on their indolence, which would infer that their application, which was coming too late in the day, was merely intended to obstruct or delay the court process. Having opted to ignore the suit and the ongoing proceedings in court, they can only be described as complicit and indolent litigants, and we find the learned Judge was right in so finding.
31. On whether the defence raises triable issues, it is noteworthy that the trial Judge's ruling did not consider the draft defence or whether it raises triable issues. As stated in *CMC Holdings Limited* (*supra*) the learned Judge's obligation when dealing with the application for setting aside includes examining the draft defence that was filed, in order to decide whether at face value, it raised a triable issue. See also *Kotecha & Sons Limited & another v Amalo & Company Limited* [2025] KECA 65 (KLR).
32. This Court in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR defined triable issue as follows:

“A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
33. Notwithstanding that the trial Judge did not consider the Appellants' draft, having regard to the intervening circumstances which we will address below, we are of the view that nothing turned on this. We say this because, in their draft defence, the Appellants contend that a grant was obtained by their grandmother, and that after gazettment of the Petition for grant, their grandmother included them as beneficiaries of the estate during the confirmation of the grant. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants have not denied selling portions of the suit land to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Appellants, who admit having purchased portions of the suit land and, to being in possession.



- 34. The Respondents’ case on the other hand is that they were born on the suit land and that they allowed the 1<sup>st</sup> and 2<sup>nd</sup> Appellant’s to reside on the land with them; that the two secretly obtained Letters of Administration for their deceased grandfather and sold portions of the suit land to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants. With reference to the Appellants’ grant, the Respondents allege that in Malindi Succession Cause Number 112 of 2012 the High Court has “...nullified and revoked the Grant of Letters of Administration and Confirmation that had been fraudulently obtained by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants...” and with it, the ensuing sale transactions.
- 35. If indeed the 1<sup>st</sup> and 2<sup>nd</sup> Appellants’ grant has since been revoked, it means that the Appellants’ defence is, to a large extent, overtaken. So that having deliberately avoided the court proceedings and instead concentrated on developing the suit land, during its pendency of the suit, their defence seemingly comes too late in the day, owing to developments in the succession causes. Accordingly, we are not satisfied that the defence raises triable issues.
- 36. Against this backdrop, we consider that no useful purpose will be served by setting aside the exparte Judgment. Given the prevailing circumstances, the Appellants’, and more particularly the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants’ redress lies elsewhere, rather than in a suit that has been overtaken by events.
- 37. In sum, we can find nothing that demonstrates that the learned Judge took into account matters that should not have been taken into account, or failed to take into consideration matters that should have been considered. The learned Judge rightly exercised her discretion in declining to set aside the exparte Judgment, and as a consequence, we have no basis upon which to interfere with that decision. Accordingly, the Appeal is without merit, and is dismissed with costs to the Respondents.
- 38. The Judgment is signed under Rule 34(4) of the Court of Appeal Rules (2022), since the Hon. Mr. Justice F. Ochieng, JA ceased to hold office of Judge of Appeal upon death. As Hon. Mr. Justice S. Gatembu, Kairu, JA agrees, the above are the orders of the Court.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025.**

**S. GATEMBU KAIRU, C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

