



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELCL APPEAL CASE NO. E084 OF 2024**

**STEPHEN KATHUTHU (*Suing as the Legal Representative of the estate of NKUNI M'TURUCHIU - Deceased*).....APPELLANT**

**-VERSUS-**

**THERESA MICHUKI KIUNGA (*Suing as the Legal Representative of the estate of STEPHEN MICHUKI KIUNGA - Deceased*) .....RESPONDENT**

***(An Appeal against the Ruling of the Principal Magistrate Court at Tigania [Hon. E M Ayuka - PM] rendered on 17/10/2024 in Tigania SPMC E & L Case No. 23 of 2014)***

**JUDGMENT**

**Introduction**

- 1.** This appeal challenges the ruling of the Principal Magistrate Court at Tigania [Hon E M Ayuka - PM] rendered on 17/10/2024 in **Tigania PMC E & L Case No. 23 of 2014**. The ruling was rendered on an application by the

appellant, dated 14/5/2024. Through the application, the appellant invited the Principal Magistrate Court to exercise discretion and set aside its ex-parte judgment dated 10/11/2022. The Principal Magistrate Court declined to set aside the ex-parte judgment. One of the key issues to be determined in this first appeal is whether the application dated 14/5/2024 met the criteria upon which a trial court exercises jurisdiction to set aside an ex-parte judgment. Before I analyse and dispose the issue, I will briefly outline the background to the appeal; the grounds of appeal; and the parties' respective submissions in the appeal.

### **Background**

2. Vide a plaint dated 3/3/2014, the late **Stephen Michuki Kiunga** [hereinafter referred to as "**the late Kiunga**"] sued the late **Nkuni M'Turuchiu** [hereinafter referred to as "**the late M'Turuchiu**"] in **Tigania PMC Civil Case No. 23 of 2014**. He sought an order decreeing eviction of M'Turuchiu and his family members, servants and agents from land parcel number **Thau/Mumui/773**, measuring approximately 6.42 hectares [**the suit land**]. He also sought an order awarding him costs of the suit.
3. The case of the late Kiunga was that, he was the first registered proprietor of the suit land, having been registered on 25/2/2004. On 13/10/2012, the late M'Turuchiu and his family members forcibly stormed onto the suit land and planted crops on it while he [Mr Kiunga] was away. He termed the actions as unlawful and a violation of his rights under **Article 40** of the

**Constitution.** He contended that the late M'Turuchiu had ignored his notice of intention to sue.

4. The late M'Turuchiu filed a defence and counterclaim dated 2/4/2014. He contested the late Kiunga's claim. His case was that the late Kiunga sold the suit land and his father [the late M'Turuchiu's father] became owner of the suit land, adding that the late Kiunga had never been in possession of the land since 1971 when him [the late M'Turuchiu] and his father moved onto the land. He averred that the Land Adjudication Officer's decision which awarded the late Kiunga the suit land was challenged through an appeal to the Minister and the appeal to the Minister was still pending determination.
5. The late M'Turuchiu averred that while the appeal to the Minister was pending hearing and determination by the Minister, the late Kiunga fraudulently obtained title number **Thau/Mumui/773** relating to the suit land. He itemized various particulars of fraud.
6. By way of counterclaim, he faulted the late Kiunga's suit against him, contending that the suit had been initiated yet the adjudication register for the section had not been closed. He added that the title held by the late Kiunga had been obtained fraudulently during the pendency of his appeal to the Minister. He prayed for an order decreeing cancellation of the late Kiunga's title.
7. The late Kiunga [the plaintiff] died on 21/11/2018 during the pendency of the suit. He was substituted by **Theresa Michuki Kiunga**, the respondent in this appeal. The date

and year when the late M'Turuchiu died are not clear from the record. What is clear is that both the original plaintiff [the late Kiunga] and the original defendant [the late M'Turuchiu] are deceased and were deceased at the time the ex-parte judgment was rendered.

- 8.** When the suit came up for substantive hearing before the trial court on 21/7/2022, the estate of the late Kiunga was represented by **Mr Mwirigi** while the estate of the late M'Turuchiu was represented by **Ms Mwilaria**. Counsel for the late M'Turuchiu's estate applied for an adjournment and the plea for adjournment was granted. The suit was fixed for hearing on 29/9/2022. Come 29/9/2022, both the late M'Turuchiu's estate and their advocate were absent. Noting that the hearing date had been fixed by consent as between the two parties, the trial court proceeded to hear the late Kiunga's case. The trial court subsequently rendered an ex-parte judgment dated 10/11/2022 in which it dismissed the late M'Turuchiu's counter claim and granted the reliefs that were sought by the late Kiunga.
- 9.** What followed was an application dated 14/5/2024 through which the appellant [the personal representative of the late M'Turuchiu] sought, inter alia, an order setting aside the ex-parte judgement dated 10/11/2022. The application was canvassed through written submissions. The trial court subsequently disposed the application through the impugned ruling dated 17/10/2024. The trial court declined to set aside the ex-parte judgement.

## **Appeal**

**10.** Aggrieved by the ruling of the trial court, the estate of the late M'Turuchiu [the appellant] brought this appeal, advancing the following three grounds:

***1. The Learned Principal Magistrate erred in law and in fact in failing to find that the appellant was condemned unheard for an excusable mistake committed by counsel.***

***2. The Learned Principal Magistrate erred in law and in fact in failing to set aside an ex-parte judgment despite the appellant having shown that the mistake was an oversight attributable only to his counsel and thus causing the appellant suffer the penalty of not having his land case heard on merit by finding that the appellant's and respondents' families were related to each other.***

***3. The Learned Principal Magistrate erred in law and in fact in disregarding the appellant's evidence and submissions.***

**11.** The appellant prayed that the order dismissing their application dated 14/5/2024 be set aside and be substituted with an order setting aside the Lower Court's ex-parte judgment dated 10/11/2022.

#### **Appellant's Submissions**

**12.** The appeal was canvassed through written submissions dated 3/9/2025, filed by **M/s Thuranira Atheru & Co Advocates**. Counsel submitted that the application giving

rise to the impugned ruling was filed under **Order 12 rule 7** of the **Civil Procedure Rules**, adding that the trial court had discretion to set aside the ex-parte judgment.

- 13.** Counsel added that the appellant explained in his supporting affidavit that he had been battling cancer for three years, including the period of the ex-parte proceedings. Counsel argued that the appellant's medical condition impaired his ability to diligently attend court physically and made him rely on his advocate to keep him informed on the progress of the case. Counsel further submitted that the appellant explained that his advocate on record failed to inform him about the hearing date, leading to the ex-parte hearing of the case. Citing the Court of Appeal pronouncement in ***Philip Chemwolo & another v Augustine Kubede [1982 - 88] KAR 103***, counsel submitted that a mistake occurred on part of the appellant's advocate and urged the court not to condemn the appellant to suffer because of the mistake of his advocate.
- 14.** Counsel submitted that despite his medical condition, the appellant remained in touch with his advocate who kept telling him that court proceedings were only proceeding online and that he would keep him apprised, only for him to subsequently learn that the advocate had relocated to Maua. Counsel added that, at that point, the appellant sought the services of another advocate.
- 15.** Counsel added that the appellant's defence and counterclaim raised triable issues, among them, the

question whether the respondent's suit was res judicata by dint of **Meru High Court Petition No. 21 of 2012**; and the question whether the title held by the estate of the late Kiunga was obtained fraudulently.

- 16.** Counsel faulted the trial court for failing to consider the fact that on the day the hearing date was fixed, the Attorney General was absent, hence the ex-parte hearing that proceeded in the absence of the Attorney General was irregular. Counsel added that the respondent stood to suffer no prejudice in the event the ex-parte judgement was set aside. Counsel submitted that the estate and family of the late M'Turuchiu stood to suffer greatly if they were evicted without being heard because they had always been in occupation of the suit land to the exclusion of the respondent. Counsel urged the court to allow the appeal.

### **Respondent's Submissions**

- 17.** The respondent opposed the appeal through written submissions dated 22/9/2025, filed by **M/s Mwirigi Kaburu & Co Advocates**. Counsel submitted that the issue that fell for determination in the appeal was whether the Learned Magistrate erred in law and in fact in failing to find that the appellant was condemned unheard for an excusable mistake committed by his counsel. Citing **Order 12 rule 2** and **Order 10 rule 11** of the **Civil Procedure Rules**; and relying on the pronouncement by the Court of Appeal for East Africa in **Shah v Mbogo (1967) EAR 166**, counsel submitted that the appellant had a duty to explain the delay from the date of delivery

of judgment to the date of making the application dated 14/5/2024. Counsel argued that the appellant had failed to explain the delay.

- 18.** Counsel submitted that the hearing date of 29/9/2022 was taken by consent, adding that the only party who was absent was the Attorney General and that the Attorney General was subsequently served with a hearing notice. Counsel faulted the appellant for “crucifying” his previous advocate yet there was no evidence that he had reported the said advocate to the relevant statutory body for disciplinary action for negligence. Counsel added that even if there was negligence on part of the advocate, the delay on part of the appellant was inordinate. Citing the pronouncement of the Supreme Court of Kenya in ***Mohamed v Diamond Trust Bank Kenya Limited (2025); Application No. E035 of 2024***, counsel argued that the appellant was indolent and had failed to give a satisfactory explanation for his non-attendance, adding that the appellant had similarly failed to account for the lack of follow-up after the ex-parte hearing. Counsel contended that the appellant lacked diligence in the handling of his defence and counterclaim.
- 19.** Counsel further argued that the defence and counterclaim did not raise triable issues that would warrant the setting aside of the ex-parte judgment. Counsel pointed out that the suit land underwent full adjudication process under the Land Adjudication Act and a determination was made by the Adjudication Officer, adding that both the **late Kiunga** and the **late M’Turuchiu** appealed to the Minister under

Section 29 of the Land Adjudication Act and the two appeals were dismissed by the Minister. Counsel added that subsequently, the appellant (sic) filed **Judicial Review Application Number 15 of 2019** which was, similarly, dismissed on 17/3/2021. Counsel submitted that under Section 29 of the Land Adjudication Act, the Minister's decision was final.

- 20.** Counsel pointed out that **res judicata** was not available as a defence because **Meru High Court Petition No. 21 of 2021** was dismissed on technicality - that the petitioner had not exhausted all the legally available remedies before invoking the jurisdiction of the court. Citing the pronouncement of the Supreme Court of Kenya in ***John Florence Maritime Services Limited & another v Cabinet Secretary, Transport & 3 others***, counsel submitted that the essential elements of *res judicata* did not exist.
- 21.** On the allegations of fraud, counsel submitted that the issue of fraud was never raised in the lower court, adding that nothing in the appellant's pleadings spoke to the issue of fraud. Counsel urged the court to reject the appeal and award the respondent costs of the appeal.

### **Analysis and Determination**

- 22.** The court has read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. The court has also considered the relevant legal frameworks and jurisprudence. The following are the two

key issues that fall for determination in the appeal: (i) Whether the ex-parte judgment dated 10/11/2022 was regular/irregular; and (ii) Whether the application dated 14/5/2024 met the criteria for setting aside the said ex-parte judgment. Before I analyse and dispose the two issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

- 23.** The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Keshar shinai (2013) eKLR*** as follows:

***“As a first appellate court our duty of course is to approach the whole evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive to our own independent conclusions.”***

- 24.** The principle was similarly outlined in ***Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*** as follows:

***“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”***

- 25.** Was the ex-parte judgement dated 10/11/2022 regular or irregular? The Court of Appeal discussed the distinction

between a regular and an irregular ex-parte judgment in ***James Kanyiita Nderitu & another v Marios Philotas Ghika & another (2016) eKLR***. The Court of Appeal outlined the criteria to be adopted when exercising jurisdiction to set aside either of the two categories of ex-parte judgements. The Court of Appeal stated the following:

***“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 others. In an irregular default judgment, on the other hand, judgment***

***will have been entered against a defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default judgment is set aside ex-debito justitiae as a matter of right. The court does not even have to be moved by the party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.”***

- 26.** The order fixing the hearing date of 29/9/2022 was made on 21/7/2022 in the presence of counsel for the appellant. Consequently, service of a hearing notice upon the appellant was not necessary. Put differently, as against the appellant, the ensuing ex-parte judgement was regular because the hearing date was taken by consent.
- 27.** Counsel for the appellant contended that the ex-parte judgement should have been treated as irregular and set aside *ex-debito justitiae* because the Attorney General was not present when the hearing date was fixed. The Attorney

General was joined as a Third Party to the suit by the appellant. It was therefore the responsibility of the appellant to serve a hearing notice on the Attorney General if he desired to pursue the third party notice.

- 28.** Secondly, this court has perused the original record of the trial court. On 22/9/2022, the respondent filed an affidavit of service sworn on 20/9/2022 by **Mwirigi Kaburu**. He deposed that he served a hearing notice on the Attorney General on 26/8/2022. Annexed to the said affidavit of service was a notice/letter dated 22/7/2022 addressed to the Attorney General advising the Attorney General that **Tigania PMCC No. 23 of 2014** was scheduled for hearing on **29/9/2022**. The notice/letter bears a receiving stamp of the Attorney General indicating that it was received in the Attorney General's Civil Litigation Registry at Meru on 26/8/2022.
- 29.** What emerges from the foregoing is that the respondent duly notified the Attorney General on the hearing scheduled for 29/9/2022. Consequently, it is the finding of this court that the judgment resulting from the said hearing was a regular ex-parte judgment.
- 30.** Did the application dated 14/5/2024 meet the criteria for setting aside the said judgment? The court has made a finding to the effect that the judgment dated 10/11/2022 was a regular ex-parte judgment. The criteria for setting aside a regular ex-parte judgment has been outlined in one of the preceding paragraphs. The ex-parte hearing which culminated in the ex-parte judgement was conducted on 29/9/2022. The ex-parte judgment was

rendered on 10/11/2022. The application seeking the setting aside of the ex-parte judgment was filed on 15/5/2024. The period in both instances was long.

- 31.** Did the appellant tender a proper explanation for his failure to attend the hearing and for the long period that he took to file the application? The appellant explained that he was not aware of the hearing of 29/9/2022. He had an advocate on record who kept telling him that “everything was happening online” and that he would keep him updated. He further explained that in 2020 he was diagnosed with cancer of the stomach and he was in and out of hospital for a period of 3 years for various surgeries and oncological treatment at all material times. He stated in his further affidavit that his battle with cancer during the Covid 19 pandemic and during the post-Covid 19 period significantly impaired his capacity to physically attend court and do physical follow-ups on his case. He exhibited medical records from various medical facilities, including Nairobi Hospital; Diagnostic & Medical - Legal Laboratory; and Ultra-molecular Diagnostic Ltd. The medical records reveal that, indeed, the appellant was diagnosed with gastric adenocarcinoma (stomach cancer) in 2020.
- 32.** The appellant further explained that as soon as he got better, he visited his advocate’s Meru Office, only to discover that she had vacated the premises. He later learnt that his advocate had relocated to Maua.
- 33.** In the impugned ruling, the trial court did not make any reference to the appellant’s further affidavit and to the

aspect of cancer illness and cancer management at the material time. In my view, the above evidence was relevant to the exercise of discretion by the trial court. Based on the above medical evidence, this court forms the view that the appellant tendered a satisfactory explanation for his failure to physically attend court on 29/9/2022 and for the long period that it took him to know about the ex-parte judgment and to move the trial court for an order setting aside the ex-parte judgment

- 34.** On whether the pleadings raised triable issues, it does emerge that the suit in the Lower Court was filed in 2014 by the respondent before the finalization of the adjudication register [to the extent that there were pending appeals before the Minister]. It is not clear if there was the requisite consent by the Land Adjudication Officer. This is an issue that a trial court would be expected to render itself on because it is a jurisdictional question. As a first appellate court, I would not pronounce myself on the issue without receiving evidence or submissions from the parties.
- 35.** While contending there were no triable issues to warrant the setting aside of the ex-parte judgment, the respondent's counsel submitted that the appellant filed **Meru JR Application No. 15 of 2019** which was dismissed. Contrary to the assertion, the record before court indicates that the late **Stephen Kiunga** is the one who filed both **Meru High Court Petition No. 21 of 2022** and **Meru ELC JR Application No. 156 of 2019**. The petition was rejected for non-exhaustion of the

remedies available under the Land Adjudication Act. The Judicial Review Application did not focus on merit issues. This is not to say that the appellant has a valid defence and valid counterclaim. This merely means that there are issues on the defence and counterclaim which need to be considered, interrogated and disposed by the Lower Court at whatever point the Lower Court deems it appropriate.

- 36.** Lastly, on prejudice, the appellant contends that the late M'Turuchiu and his father have been on the suit land for long. The effect of the expert judgment and decree is that they are to be evicted without the ben. Clearly, eviction without any form of hearing will be prejudicial.
- 37.** For the above reasons, the court comes to the finding that the application dated 14/5/2024 met the criteria for setting aside a regular ex-parte judgment. The trial court erred in rejecting the application dated 14/5/2024.
- 38.** However, because the appellant's agent (advocate) is the one who is alleged to have caused the ex-parte proceedings by failing to attend on the mutually agreed date, the appellant will bear costs of the ex-parte proceedings, assessed at Kshs 25,000. The appellant will also bear costs of the application dated 14/5/2024, also assessed at Kshs 25,000, making a total of Kshs 50,000.
- 39.** Taking into account the above circumstances, parties will bear their respective costs of this appeal.

### **Conclusion and Disposal Orders**

- 39.** Having evaluated the application that was before the trial court; the response to the application; the parties' submissions before the trial court and before this court; and the criteria for setting aside a regular ex-parte/default judgment, the court comes to the finding that the application dated 14/5/2024 met the criteria for setting aside an ex-parte/default judgment.
- 40.** Consequently, the court sets aside the Lower Court's ex-parte judgment dated 10/11/2022 on condition that the appellant pays the respondent throwaway costs of the application dated 14/5/2024 and costs of the ex-parte proceedings, together assessed at Kshs 50,000/-. The said costs are to be paid within 30 days. In default, this order and any consequential decree shall stand vacated and substituted with an order dismissing this appeal with costs. The appeal succeeds and is allowed in the above terms. Parties will bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY  
OF NOVEMBER, 2025.**

**B M EBOSO [MR]**

**ELC JUDGE**