

**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. E007 OF 2024**

**PETER ONSOMU KEBIRO .....**  
**APPELLANT**

**VERSUS**

**SATO ORINA BOSIRE .....**  
**RESPONDENT**

**JUDGEMENT**

1. This appeal arose from the ruling of the Lower Court (Hon. D. W. Mburu, Senior Principal Magistrate, Kitui - as he then was) delivered on 12/3/2024. The focus of the ruling was an application dated 4/9/2024 filed by the respondent - SATO ORINA BOSIRE - seeking, *inter alia*, the setting aside of proceedings and judgement of the lower court.
2. The reasons proffered for setting aside included, *inter alia*, that the lower court proceedings were conducted in absence of the respondent. The counsel on record for the respondent at the time was said to have failed to attend court and had also failed to inform the respondent of the hearing date. The

lower court entertained the application and allowed it on condition that the respondent would pay Kshs. 20,000/= to the appellant within twenty - one (21) days from the date of the ruling.

3. The appellant - PETER ONSEMU KEBIRO - felt aggrieved and filed the appeal now before this court. The grounds of appeal are now set out here under *ipsissima verba*:

(1) That, the *learned Senior Principal Magistrate erred in facts and law by making contradicting findings of facts and law that, the respondent had been afforded all the opportunity and chance to be heard, but, failed to do so, but, ended up again allowing the application, the effect of which was to upset a legitimate judgement in favour of the appellant.*

(2) *That, the learned Senior Principal Magistrate erred in facts and the law in exercising his discretion, by failing to look into and evaluate key factors set out by the appellant in opposition of the application, which factors demonstrated that the respondent did not deserve the discretion of the court.*

- (3) *That, the learned Senior Principal Magistrate erred in facts and the law in exercising his discretion by, failing to look at and evaluate the value of a settlement agreement entered into between the appellant and the respondent during execution proceedings.*
- (4) *That, the learned Senior Principal Magistrate erred in facts and the law, by failing to notice and evaluate the fact that, pursuant to the settlement agreement, the respondent started paying.*
- (5) *That, the learned Senior Principal Magistrate erred in facts and the law, in exercising his discretion, by failing to notice and evaluate the fact that, the respondent had made two other similar applications which were dismissed one way or another.*
- (6) *That, the learned Senior Principal Magistrate erred in facts and the law, in exercising his discretion, by failing to note and evaluate the fact that, the applicant appointed the advocate on record on 12/9/2022 yet, it took a full year to file an application to set aside the judgement in force – an afterthought.*

*(7) That, the learned Senior Principal Magistrate erred in facts and the law, in exercising his discretion, by failing to note and appreciate that, in furtherance to the compromise (settlement) agreement, the appellant followed up an obtained title deed to the disputed land in his favour, an end to litigation.*

4. The appellant would wish to have the ruling of the lower court quashed and/or set aside. He would wish also to have the respondent ordered to pay the costs of this appeal and the costs incurred in the lower court.

5. The appeal was canvassed by way of written submissions. Before delving into the salient aspects of the submissions filed, a synopsis of the lower court matter is necessary for better understanding and contextualization of the appeal: The lower court suit was essentially a dispute between the appellant, as plaintiff, and the respondent, as defendant, over ownership of land parcel No. 376 Kitoo Adjudication Section, which the appellant alleged to have bought and developed before leaving it under the care and custody of the respondent. At the time, it appears that the area was

not yet under land adjudication. It is reasonably clear that the area came under land adjudication after the appellant had already left. The respondent is said to have passed off the property as his own to the adjudicating authority and he was therefore recorded as the adjudicated owner.

6. The appellant later on got to know of these developments and he therefore filed the lower court suit seeking, *inter alia*, to wrest ownership from the respondent. The respondent on his part filed a defence to the lower court matter denying the appellant's claim. In the course of hearing the lower court matter, the respondent's side is shown to have occasioned several adjournments and at the crucial or critical point for purposes of this appeal, the lower court is shown to have proceeded without the participation or input of the respondent. The lower court, at the time presided over by Hon. S. M. Kasera (Senior Principal Magistrate), delivered a judgement in favour of the appellant. That judgement was delivered on 27/7/2021. The judgement was not appealed against. Instead some applications were filed to set it aside.

7. The ruling that gave rise to this appeal related to a motion on notice dated 4/9/2023 which, amongst other things, had sought to set aside the judgement.
8. Having digressed a bit in order to give some back ground to the matter, let me now get on track: I pointed out earlier that the appeal was canvassed via written submissions. The appellant's submissions are dated 28/2/2025. The appellant pointed out that both sides filed submissions before judgement was delivered. According to the appellant, the judgement was therefore not an ex parte one. It was a final judgement.
9. Further, the respondent was said to have filed a post-judgement notice to act in person. Contemporaneously with the notice was also filed an application seeking stay of execution of judgement and setting aside of both proceedings and judgement. That application was dismissed on 14/4/2022 for want of prosecution. On the same day - that is 14/4/2022 - the respondent filed yet another application seeking to reinstate his dismissed application.

10. Meanwhile, the appellant was pushing forward with execution. In this regard, he successfully got the respondent committed to civil jail for failure to pay the decretal sum. With this turn of events, it would appear that the respondent and/or some of his family members sued for peace and a settlement in which the respondent was to settle what he owed to the appellant was reached. The respondent even started paying but it appears that in his heart of hearts, he didn't whole heartedly embrace the settlement. Records show that he later engaged the counsel now on record. Almost one year after retainer, counsel for the respondent filed the application which gave rise to the lower court ruling. It is that ruling which is being contested here.

11. It is clear too that that the appellant, apparently pursuant to the settlement reached, had gone ahead and procured for himself the title deed for the land. Records show that by the time the application was filed, the appellant had been a title holder for the land for over one year.

12. In his submissions, the appellant faulted the lower court for making a decision that did not align well with the flow of its own reasoning. In this regard, the lower court was said to have cited the case of **Jomo Kenyatta University of Agriculture & Technology -vs- Mussa Ezekiel Oebah [2014] eKLR** where setting aside was said to be allowable to avoid injustice or hardship arising from accident, inadvertence or error but not to aid indolence or other blame worthy conduct meant to obstruct or delay justice. The lower court was said to have correctly observed that the respondent had been given an opportunity to be heard but failed to seize or utilize it. That being the position, the lower court was said to have been wrong to afford yet another opportunity to a person who had squandered the earlier one. It was further noted that no appeal was filed against the judgement. The applications filed by the respondent post - judgement were said to be an *“afterthought, misconceived, and an attempt to scuttle justice.”*

13. Ultimately, this court was asked to allow the appeal as prayed.

14. The respondent's submissions are dated 28/4/2025. The submissions start with some prefatory remarks that provided some antecedents and background to the appeal. It was stated in the submissions that the application dated 4/9/2023, which gave rise to the ruling appealed against, had been anchored on Order 12 Rule 7 of the Civil Procedure Rules. That order clothes the court with power to "*set aside or vary the judgement or order*" upon terms that may be just. The courts power to do so is discretionary and unfettered. The only rider emerging from decided case law is that the discretion should be exercised judiciously.

15. The lower court was said to have done justice to both parties as it gave the respondent the opportunity to be heard while at the same time minding the appellant by awarding him costs amounting to Kshs. 20,000/=. Bearing this mind, the averment by the appellant that the lower court was wrong by allowing the application and thus upsetting a "*legitimate judgement in favour of the*

*appellant*” is not correct. There was, it was pointed out, no error disclosed either from a factual or legal perspective.

16. It was further submitted that the lower court correctly observed that the respondent’s defence raised triable issues while appreciating that the matter before it was a land dispute, with the respondent alleging to have invested heavily in the land. The trial court was said to be right in affording the respondent an opportunity to be heard.

17. On the issue of the settlement agreement said to have been entered into between the parties, it was submitted that the respondent acceded to it as he needed to be released from civil jail. It was allegedly a settlement *“obtained under duress as the respondent was arrested outside the court room to prevent him from prosecuting his application.”* The settlement was said to be on costs only and there were pending applications even as it was entered into. The respondent allegedly entered into it to *“secure freedom to enable him pursue his rights.”*

18. The trial court was said to have considered everything before it before making its decision.

19. Ultimately the appeal before the court was said to lack merits and the court was urged to dismiss it with costs to the respondents.

20. I have considered the appeal as filed and the rival submissions. I have also looked over the lower court file. I think the starting point should be an appreciation and understanding of the circumstances that gave rise to the filing of the application dated 4/9/2023 and others before it. I also need to point out at this stage that this is not an appeal against a judgement. It is an appeal against a post-judgement ruling. The case of **Selle & Another -vs- Associated Motor Boat Company & others [1968] EA** is not strictly applicable. That case is about approach to be taken in a matter in which evidence has been taken by the trial court. I am not considering or re-evaluating any evidence here.

21. The court record shows that the matter was heard in court on 25/2/2021 in absence of the defendant. In fact, on that date, the plaintiff's case was heard and closed. The hearing date had earlier been given on 5/11/2020 and the

respondent's side was represented by counsel. Both sides were then directed to file submissions. The respondent's side dragged its feet and on 13/5/2021 that side is shown telling the court that it had not filed submissions as it wanted to contest the hearing that had taken place in its absence. It was even intimated that an application to that effect had been filed. The truth however is that no such application had been filed.

22. When the court was told about an application already filed, it issued an extempore ruling in which it directed the defendant's side to file submission and it rejected the idea of being "*seen to be moving backwards.*" The defendant's side did not contest the ruling and submissions were subsequently filed. It seems to me clear that the judgement that the court later delivered not only considered the input of the appellant but the respondent's defence and submissions as well.

23. Sometime after delivery of judgement, the respondent filed a notice to act in person. He also filed a notice of motion in which he, among other prayers, sought to stay execution

of the decree and certificate of costs and also to set aside the judgement and the proceedings leading to it. The notice of motion was dated 24/3/2022. That application was dismissed for want of prosecution on 14/4/2022 and on that same day, the respondent filed yet another notice of motion seeking to reinstate the dismissed application.

24. The application to reinstate the dismissed application has never been prosecuted. It appears clear that there were supervening circumstances that stalled its progress. More precisely, it is clear that the appellant was proceeding with execution of judgement and in this regard, he had the respondent arrested and committed to civil jail. The two parties are thereafter shown to have engaged each other and an agreement was reached in which the respondent bound himself to pay what he owed. The respondent's dismissed application therefore remained dismissed and has continued to remain so to date.

25. While the dismissed application and the subsequent one brought to reinstate it are shown to have been filed by the respondent in person, it is clear that the respondent later on

retained the services of the counsel now on record for him. What followed after some prolonged period is the filing of the application that gave rise to the ruling which is the subject of this appeal.

26. I have set out this background because the decision I intend to make hinges largely on the incidents and circumstances manifested in what has been stated so far.

27. If the application in the lower court was one filed at the right stage and time, this court would have no problem accepting that it could be allowed. This would be so even if the judgement entered was entirely regular. In **Waiboci & Another -vs- Pashito Holdings Limited & 7 Others: [2004] 2 KLR 415**, Ojwang, J (as he then was) held, inter alia, that an entirely regular judgement can be set aside where the defendant happens to have and places before court a reasonable defence on the merits and an assessment of such merits may be made on the basis of the draft defence.

28. In this matter, the respondent had already filed a defence in the lower court. He had also filed a witness statement. It

would not therefore be difficult to see that the application could be allowed.

29. But as may be discernible in the background already highlighted, this is a matter that speaks to the court in a different way. It is clear that on the day the lower court matter was heard, neither the defendant nor his counsel was present in court. No explanation was proffered to the lower court on that day to explain why none of them was present. This is despite the fact that the hearing date had been given or taken earlier in presence of both sides. It is with this level of awareness that the lower court chose to proceed.

30. Records show that after the plaintiff's case was closed, the matter was to be mentioned for submissions on 25/3/2021. On that mention date, counsel for the appellant had filed submissions while counsel for the respondent was shown to have been asking for time to file submissions. The court then granted the date of 13/5/2021 for the respondent's side to file submissions. On 13/5/2021, the respondent's side had not yet filed submissions. Counsel for the

respondent is shown telling the court that there was already an application filed to set aside or challenge the proceedings that had taken place in absence of the respondent's side on 25/2/2021. Counsel for the respondent's explained the absence as having arisen because the respondent was locked down in Kisumu. This was an obvious reference to the various restrictions imposed by the government to curb or control the spread of Corona Virus Pandemic at the time.

31. The lower court then gave an extempore ruling in which it directed that submissions should be filed. It is necessary to pause now and ask: What options were available to the respondent if he really felt that he needed to be heard? To this court, it is clear that the respondent could have chosen to apply to set aside or review that ruling of the lower court. He didn't do so. He could also have chosen to go on appeal. Again he didn't do so. Instead, the defendant chose to file submissions. The fact that the defendant did not deem it necessary to challenge the court ruling at that appropriate stage shows that he acquiesced in that state of affairs.

When the respondent came up with his own application later seeking to set aside the judgement rendered, it seemed like trying to shoe a horse that had already bolted from the stables. The point here is that the defendant failed to seize the most appropriate opportunity to challenge the proceedings at the pre-judgment stage.

32. A look at the background already given shows that the respondent filed a post-judgement application seeking, *inter alia*, to set aside the judgement rendered and the proceedings leading to it. It is clear too that he failed to appear in court on the date given and that application was dismissed for want of prosecution. It is further clear that this time round, the respondent acted with all due haste and filed an application immediately seeking to reverse the dismissal. That application has never been prosecuted. The dismissal order is still in place even as I write this judgement. It still has the force of law.

33. A question then arises: Was it proper for the respondent's counsel to file an application broadly similar to the one earlier dismissed? In my view, it was not proper to do so

unless the later application also contained a prayer or prayers to set aside the earlier dismissal. In my view too, it was not proper for the lower court to entertain the application and allow it. I say this because by allowing the latter application, the lower court created an incongruous situation where an earlier order declining to set aside a judgement exists side by side with another order this time allowing the setting aside of the same judgement. Both orders are now on record and both presumably have legal force. This seems to me to create a legal conundrum that is not easy to untangle. A situation now exists where the respondent can extract an order and wave it to the whole world to show that the judgement given against him was set aside. Equally, the appellant can also extract an order and wave it to the whole world to show that by an earlier order still in place, the judgement given in his favour still stands.

34. Another question might also arise: In face of these two conflicting orders, which one is binding? The fair conscience of equity would answer as follows: The first in time counts first. The second order could not be given without the first

one being removed or set-aside to give way to its issuance. The earlier dismissal order needed to be vacated in order to obviate a situation where two rival and conflicting orders addressing the same issue exist in juxtaposition.

35. Then there is the issue of delay. Between the time or date counsel now on record for the respondent was appointed and the time or date the application was filed, there is a period of about one year. This seems to me to be unreasonable delay. I wouldn't treat it as such if it was explained but it was not. In **Jaber Mohsen Ali & Another -vs- Priscillah Boit & Another: ELC No. 200 of 2012[2014] eKLR** the court held, inter alia, that what is unreasonable delay is dependent on the circumstances of each case. Even one-day delay could be unreasonable depending on the judgement of the court and any other order given thereafter. In the matter at hand, it seems to be clear that when judgement was delivered, the appellant, being the winner, moved with speed realize the fruits of the judgement. It is clear that he started pursuing not only the issue of payment of his costs but also the issue of

registration of the disputed land as his own. He was fairly successful in his efforts. In absence of a proper explanation as to why the reversal of all these developments was being sought rather belatedly, then it is fair to take the position that the delay attending the application was unreasonable.

36. Further, the record shows that the disputing parties are brothers and when one, the respondent, was committed to civil jail after judgement, a settlement was reached and the respondent started paying the decretal sum. It appears to me that this is the possible reason why the application to reinstate the dismissed application mentioned earlier in the judgement was not pursued. The respondent would have the court believe that he entered into the settlement under duress. But that is not convincing because that is the first thing he should have concerned himself with immediately after being released from civil jail. He should also have embarked on prosecuting his unprosecuted application on record. He did not do any of these things. It therefore looks credible when the appellant alleges that the application later on filed in the lower court was an afterthought. It

seems to me proper to take the position that the settlement reached post judgment was meant to settle everything. But the respondent, for reasons not readily apparent, had a change of mind, hence the belated application that ultimately gave rise to this appeal.

37. I think it's now clear at this point that this court has already taken a position that there is a meritorious appeal before it. Its position is taken in light of the reasons given herein and further also by the fact that litigation must come to an end. The matter before the court was filed way back on 13/1/2014. It is eleven (11) years since then and the parties are still in litigation. The parties are said to be brothers and eleven years in an adversarial contest does not augur well for family harmony.

38. The upshot is that I find merits in the appeal before me. I allow the appeal and order that, as this is a matter between close family members, each side should bear its own costs of the appeal. The costs of the lower court processes should remain as ordered by that court.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **KITUI** this **25<sup>TH</sup> DAY** of **NOVEMBER, 2025**.

Right of Appeal - thirty (30) days.

In the presence of;

Kilonzi A. M. for the Appellant

Kinyua Musyoki for the Respondent

*Court Assistant - Musyoki*

**A. KANIARU**

**JUDGE- ENVIRONMENT & LAND COURT, KITUI**

**25/11/2025**