Owino v Onyango (Environment and Land Appeal E042 of 2024) [2026] KEELC 389 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEELC 389 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL E042 OF 2024

AE DENA, J

JANUARY 29, 2026

BETWEEN

EVANS ACHOKA OWINO .... APPELLANT

AND

ISRAEL OCHIENG ONYANGO .... RESPONDENT

JUDGMENT

1. This appeal is the subject of the ruling of the Senior Resident Magistrate delivered on the 16th October, 2024. The Appellant, aggrieved and dissatisfied with the same filed a Memorandum of Appeal which was amended on 17/04/2025 outlining the following verbatim grounds;-

    1. That the Learned trial Magistrate erred in both Law and in fact by dismissing the Appellant's Application dated 6th December 2017 without considering in totality the grounds in the Application and Supporting Affidavit thereof.

    2. That the Learned Magistrate erred in Law and in fact in unreasonably and unjustifiably dismissing the appellants' subject application by failing to exercise his discretion judiciously and failing to take into account that the prejudiced by appellants' right to be heard and right to a fair hearing as enshrined in Article 47 and 50 of the *Constitution* of Kenya are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to Article 25 of the *Constitution* of Kenya 2010.

    3. That the trial Learned Magistrate erred both in fact and in law by failing to apply to the benefit of the Appellants the provisions of Article 27 of the *Constitution* of Kenya which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law thereby arriving at unjustified, unreasonable and unfair decision.

4. That the Learned Magistrate grossly erred in failing to set aside the default Judgment dated 11th September, 2024 considering the fact that there was sufficient evidence before him that the mistake apparent was not occasioned by the Appellant.

5. That the Learned Trial Magistrate erred both in fact and law for failing to evaluate and to take into account that the appellants risk to be highly prejudiced by being evacuated from parcel No.North Ugenya/ Doho/196 which has been his home for over fourteen (14) years. An eviction without being heard.

2. It is proposed to ask this court for orders that the Appeal be allowed and the Learned Magistrate's Ruling be set aside, quashed and be substituted by this Honourable Court's Orders. Alternatively, the Honourable Court do order a re-trial of the matter for proper determination of the wrongly concluded. Costs of the Appeal be provided for.

Submissions

3. The appeal was canvassed by way of written submissions. The appellants submissions are dated 1/7/2025 and the respondents 6/7/2025. Counsels on record also highlighted orally on 10/7/2025.

Appellants Submissions

4. In relation to grounds 1, 2, 3, 4 and 5 of the appeal and it was submitted that the trial court was legally bound to exercise his discretionary power in accordance with sound and well-established legal principles and above all, the greatest objective to ensure that substantive justice is served without due regard to procedural technicalities.Reliance was placed on article 50 of the *Constitution* and the case Omulele & Tolo Advocates V Mount Holdings Ltd [2018] eKLR and Absolom Opini Mikenye Vs James Obegi [2018] eKLR quoted with approval Mbaki & Others Vs Macharia & Another [2005] E.A 206 the court of Appeal to the effect that "The right to be heard is a valuable right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.",

5. It was submitted that contrary to the well-established legal principles, the trial court hastily closed the doors of justice on the basis of the mistakes of the Appellant's counsel thus prejudicing the Appellant by denying him the solemn opportunity to be heard on merit. That the Appellant herein, sought legal representation from the firm of Onyango, Jonyo & Co Advocates who was granted leave to regularize their representation but, for reasons best known to them, failed to do so to the detriment of the Appellant.The court was referred to Court of Appeal decision in Belinda Murai & 9 Others v Amos Wainaina [1979] KECA 25 (KLR)

6. Referring to page 32 of the Record of Appeal, Counsel urged that it is evident that the trial court concluded that even if the application is allowed, the Appellant's claim over the suit property would not see light of day, a conclusion reached without hearing the appellant.

Respondents Submissions

7. It was submitted that the firm of Ouma Munjal is not properly on record for the appellant for failure to seek leave of the court and serve Notice of Change of Advocates contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That this requirement is mandatory. The court is referred to the case of Chelule & Ano. Vs. Kuria & Ano (2024) KEELC 88 (KLR) and invited to strike out the Appeal.

8. Highlighting the gaps in the applicants application before the trial court it was submitted that in the present application being appealed against the appellant has not demonstrated he would suffer

substantial loss. That the court should not aid the appellant who is hell bent on frustrating the respondent from enjoying the fruits of his judgement.

9. It is further submitted that no constitutional right has been violated as the appellant was given adequate opportunity to defendant himself. His advocates addressed the court without filing a Notice of appointment, were given time to regularise and leave granted for them to come on record post judgement and file submissions and he failed to do so. The judgement of the lower court also considered all documents filed by the defendant appellant therein.

10. It is urged that the respondent will suffer extreme prejudice if the application for stay in the lower court is allowed and case is reopened.

Analysis and Determination

11. I have read the affidavit sworn in support of the application and sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. The main issue commending determination in my view is whether the Appeal is properly before this court and whether it is merited.

12. The court has been invited to strike the appeal for offending the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

13. The rationale for the above provisions was explained by the Court of Appeal in the case of Tobias M. Wafubwa v Ben Butali [2017] eKLR which pronounced itself thus;

> there is no question that the objective of rule 9 is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would be visited upon Mr. Sifuma's client, save to ensure the expeditious and just disposal of justice'.

14. In Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR cited by the Court of Appeal in Tobias M Wafubwa above, the court stated thus:

> where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus; "All in all we are not persuaded that non-compliance with Order 111 rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed, at all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all..."
> Emphasis is mine

15. Applying the above rationale and reasoning and which I agree with I decline to strike out the appeal.

16. Is the appeal merited? The ruling of the trial court that precipitated this appeal is dated 16/10/2024 and the attendant application 20/9/2024. The application is available at page 10-11 of the Record of Appeal. The substantive orders sought were largely stay of execution of the decree and judgement made on 11/9/2024 and to set aside the said judgement and the case to start denovo and the defendant be allowed to defend its case.

18. The application was opposed through the replying affidavit sworn by the plaintiff on 25/9/2025.

19. I have read the ruling of the trial court dated 16/10/2024. The trial court adopted the issues as identified by the applicant who is the appellant herein. The learned Magistrate stated that the determination of the issues would be anchored on the conduct of the defendant and his advocate and based on it whether the same would merit the grant of the orders sought. The trial court enumerated the conduct based on the proceedings that took place on diverse dates being 29/01/2024 when the case came up for the first time on pretrial directions and specifically where the defendant was given leave to file witness statements of the witnesses he had listed by 8/2/2024 which date was also fixed for hearing. On 8/2/2024 when both parties appeared in person indicated they were ready to proceed but later Mr. Onyango advocate informed the court he had been instructed by the defendant to appear for him. The court granted him time to regularise the record and come prepared to proceed on 27/2/2024. On the said 27/2/2024 the defendant was present but the matter was adjourned at the instance of the plaintiff whose counsel sought the last adjournment and the matter scheduled for hearing on 11/07/2024. The defendant and his counsel were absent on 11/07/2024 and the court noting the date was taken in the presence of the defendant proceeded for hearing and defence closed for non attendance.

20. Following the above rendition specifically the trial court noted that the defendant deliberately avoided coming to court as it was clear from the pleadings and submissions that his own father was present in court pointing that it was not possible for the father to be aware of the hearing and for his son not to be aware. The trial court concluded that the defendant had been given ample indulgence to prosecute his case.

21. The trial court further held that the defendant had failed to meet its obligations under section 1A (3) of the *Civil Procedure Act* to comply with the directions of the court. That failure to attend court and indolence cannot be mitigated by article 159(2)(d). That there was no single reason advanced by the defendant for the failure to attend court in spite of the date having been taken by consent. The court further citing the provisions of Order 12 of the Civil Procedure Rules noted the judgement of the court was regular and could only be interfered with under order 12 which was not invoked and that the invocation of order 10 was misplaced.

22. The trial court further held that to allow the application would be to open a pandoras box since the court had already made a finding on grounds for cancellation of a title and the defendants pleadings.

23. It is trite that the powers donated to the court to set aside its own judgement as well as stay of execution are discretionary in nature. I must at the onset state that the issue of whether the court was functus officio ought not to arise as long as the court is mandated in law to set aside its judgement. Tied to this I would fault the courts holding above to the effect that to allow the application would be to open a pandaros box.

24. What I must embark on is whether the discretion was exercised judiciously within the contest of this case and guidance of the courts.

25. I'm aware that as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Mbogo vs Shah (1968) EA at Page 93 where the Court held that:-

> “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on

because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

26. Indeed I note that the application was brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules which deal with consequences of non appearance and default of defence. Clearly the invocation of these provisions were misplaced and I agree with the trial court in this regard. I however note that this was not the basis upon which the court declined to set aside its judgement.

27. I think it is important at this juncture to consider guidelines set out by judicial precedents on what the courts should consider in the exercise of the discretion to set aside own judgement?

28. In the case of Shah Vs. Mbogo & Another (1967) EA 116 the court underscored the importance for an applicant to show sufficient cause. The court stated;-

> “ …the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

29. Was sufficient cause demonstrated to have warranted the exercise of the trial courts discretion in favor of the applicant? The applicant mainly attributes the failure herein to his advocate on record. That the file was misplaced during relocation of offices and by the time the same was found the judgement had been delivered and therefore an application to reopen the case was moot.

30. In my view the above cannot suffice for sufficient cause based on the facts of the matter. The main prayer was to set aside judgement which was pronounced after hearing the plaintiff in the absence of the defendant. There needed to be an explanation on the failure of the defendant and his counsel from attending court on the date the matter proceeded for hearing especially in view of the fact that the defendant was present in court when the date was fixed in his presence. My perusal of the record did not reveal any explanation led by the defendant in this regard.

31. I think it has become the custom for litigants to blame everything on the mistake of their lawyers even where the same would not fit into the puzzle like the present circumstances. Counsels on the other hand seem to find this a soft spot of the courts and readily acquiesce to shoulder the blame. This must come to a stop. For instance, how does the misplacement of the file be cause for failure to attend court and in this day and age when pleadings can easily be accessed through the court online system.

32. In the case of Tana And Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 Others (Civil Appeal No.41 of 2014) KECA 674(KLR) The Court of Appeal had this to say;-

> From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury’s Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court’s expectations this way: ‘….I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned…’ Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in

this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance.’

33. What about justice? The trial court indeed observed that the constitutional right to a hearing was not infringed upon as the defendant had been granted ample opportunity to defend his case. Based on the analysis in regard to this point and my review of the record I must agree with the trial court.

34. I think I have said enough to demonstrate I have found no reason to interfere with the discretion of the court.

35. The appeal is dismissed. I will not make any orders as to costs.

Orders accordingly

DELIVERED AND DATED AT SIAYA THIS 29TH DAY OF JANUARY 2026.

HON. LADY JUSTICE A.E. DENA

JUDGE

29/01/2026

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Ouma for the Appellant

Mr. Ochola for the Respondent

Court Assistant: Ishmael Orwa