



**Ocheng & another v Lidwa (Environment and Land Appeal
E047 of 2025) [2026] KEELC 417 (KLR) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E047 OF 2025**

AE DENA, J

JANUARY 29, 2026

BETWEEN

FREDRICK OWINO OCHENG 1ST APPELLANT

NORMAN JOSEPH OCHENG 2ND APPELLANT

AND

JOEL AYARO LIDWA RESPONDENT

JUDGMENT

1. Aggrieved by the ruling of the Senior Principal Magistrates Court at Siaya Hon. Lester Simiyu delivered on 24th June 2024 in Siaya Magistrates Court ELC No. 66 of 2019 Ibrahim Ouma Ayako Vs Fredrick Owino Ochieng & 2 Others delivered on 15th November 2024, on their application dated 16th September 2024 the Appellant proffered this appeal vide the Memorandum of Appeal dated 21st November 2024 on the following grounds;-
 1. The Learned trial Magistrate erred in law and fact in failing to sufficiently appreciate that to deny a party a hearing should be the last resort of a court of law.
 2. The learned trial magistrate erred in law and in fact in failing to appreciate the nature of the action which is ownership of a parcel of land.
 3. The learned trial magistrate erred in law in failing to exercise judicial discretion judiciously by locking out the appellants from adducing evidence.
 4. The learned magistrate was misguided when she pronounced the ruling which shut the appellant from filing the statement of defence that on the face value raised triable issues.
 5. The learned magistrate misdirected herself in failing to appreciate the consent of the parties, whereby the Respondent received the throw away cost of Kshs. 20,000/- and agreed to have the Appellants file their statements and the case to begin afresh.



2. On the basis of the above grounds it is proposed to the court to issue the following orders:-
 - a. The appeal be allowed.
 - b. The ruling delivered by the trial court on 13th November 2024 and all orders arising therefrom be set aside.
 - c. The Honourable court to grant the Appellant any other relief it deems appropriate to grant to ensure ends of justice is attained.
 - d. The matter be remitted to the lower court for hearing de novo.
 - e. Costs of this appeal be provided for.
3. I issued directions for filing of submissions so as to dispose of the appeal. Accordingly, Parties filed and exchanged the same.

Appellants Submissions

4. The appellants submissions are dated 28th July 2025 filed by the firm of Omayya & Company Advocates. The same addressed three issues 1) Whether the learned magistrate properly exercised judicial discretion in declining to set aside the ex parte proceedings. 2) Whether the denial of audience violated the Appellants' constitutional right to be heard. 3) Whether the existence of a valid consent and payment of costs warranted a setting aside of the proceedings.

Respondents Submissions

5. The respondents submissions are dated 17th August 2025 filed by Ibrahim Ouma Ayacko. The same addressed two issues namely Whether the Applicant complied with the court orders dated 28th August 2023 and Whether the Applicant is entitled to the Orders sought?

Analysis And Determination

6. I have considered the grounds of appeal, the submissions as well as the law, and I take the view that this appeal can be determined on two questions whether the trial court exercised its discretion judiciously and what orders will commend to issue in this appeal should the answer be in the negative and costs.
7. The responsibilities of the court sitting on first appeal were outlined in the case of Abok James Odera t/a A. J Odera & Associates Vs John Patrick Machira &Co. Advocates (2023). eKLR thus; -

‘This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way’
8. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 as rightly cited by the appellant, which provides thus:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
9. Order 10 Rule 11 is also applicable and largely echoes the above provisions except it lays emphasis on failure to file defence.



10. I'm also aware that a Court sitting on appeal must tread carefully on issues of discretion as guided by *Mbogo & Another v Shah* [1968] EA 93 thus; -

“ A Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”
11. Arising from the law the power donated to the court to set aside its own orders is therefore discretionary. Indeed, the court may set aside its orders by imposing appropriate conditions. It is trite that discretion must be exercised judiciously and not capriciously.
12. In the case of *Shah Vs. Mbogo & Another* (1967) EA 116 referred to by the applicants, the court outlined guidelines for consideration in exercising this discretion and the importance for an applicant to show sufficient cause. Further that the court must aim at avoiding injustice resulting from an accident, inadvertence or excusable mistake or error.
13. In the case of *John Nahashon Mwangi vs. Kenya Finance Bank ltd (in liquidation)* [2015] KEHC 6789(KLR) the court outlined the principles to be considered in exercising the discretion on whether or not to reinstate a case as follows:

“The same test will apply in an application to reinstate a suit, and a court of law should consider whether there are reasonable grounds to reinstate such a suit, of course, after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
14. The main test would be therefore that of sufficient cause and or reasonable ground. It is submitted by the appellant that the trial Magistrate did not properly exercise its discretion in declining to set aside the *ex parte* proceedings.
15. The ruling the subject of this appeal is available at page 55 – 58 of the Record of Appeal. The ruling was the subject of the application dated 16/9/2024 where the applicant sought to set aside the trial court *ex parte* proceedings of 29/5/2024 together with all consequential orders, a fresh hearing and determination and admission of the applicants statement of defence.
16. The record reveals that the said date of 29/5/2024 was fixed by the court on 27/3/2024. On 29/5/2024 Mr. Kobimbo appeared for the defendants and made an oral application for more time to file a defence owing to late service. The application was opposed by counsel for the plaintiff on the basis that judgement reverted because costs were not paid, defence never filed. He prayed that the application is dismissed.
17. The learned trial magistrate pointed that the orders of the court in its ruling dated 2/11/2022 (sic 2023) were clear and agreed with the plaintiff that the judgement had reverted. The trial court dismissed the application dated 25/8/2023 for want of prosecution and ordered that execution should proceed and marked the file closed.
18. But how had judgement reverted? The record reveals that interlocutory judgement was entered whereupon the matter proceeded for formal proof. However, the same was set aside. As per the trial court proceedings the orders were granted in the ruling dated 2/11/2023.



19. The above ruling reveals the trial court had found that the defence raised triable issues and exercised its discretion to set aside the judgement. The same was conditional upon filing defence within 14 days and payment of costs of Kshs.20,000 to the plaintiff within 14 days. In default of filing and serving defence or payment the order setting aside the judgement and decree was to revert and the plaintiff was to proceed with execution without reference to the court.
20. It would appear that the defendant subsequently allegedly remitted the costs as ordered as explained in the supporting affidavit to the application dated 16/9/2024. They deponed that the delay was due to financial constraints and their lawyer had now filed the defences. The defendants also stated that the plaintiffs were agreeable to setting aside the proceedings of 29/5/2024 by signing a consent dated 3/6/2024 a copy of the same was annexed. That the defence had merit, the matter revolves around land issues and they should be given a chance to be heard. That they would suffer irreparable loss and damage were the judgement to be executed.
21. The application was opposed by the plaintiff who disowned the consent stating it was not signed by him and was a forgery. That the applicant had not shown seriousness in having his matter heard interparty and urged the court to dismiss the application.
22. The trial court held that there was no reason advanced for failure to file defence and pay costs. That the applicant did not endeavour to vary the order of the court or to extend time within which to comply. That he did not defend the allegations made on the consent and that he had been given sufficient opportunity to be heard on his defence which he squandered. The court found no just cause to set aside the orders and dismissed the application.
23. Was there sufficient cause to set aside the orders which would effectively reinstate the suit and allow the defendants to be heard? It is true the record reveals that an opportunity had been given to the defendants to prosecute their defence as explained hereinbefore through the ruling dated 2/11/2023. And I must add that the discretion therein was exercised judiciously.
24. Coming to the ruling the subject of this appeal the trial court was largely being called upon to yet again exercise its discretion. The main reason given for failure to comply with orders of the court was that the applicant was impecunious but sought the help of relatives to raise the costs which were paid. It is alleged that parties signed a consent in this regard but a doubt was cast on its veracity which the trial court found the applicant did nothing to prove otherwise.
25. It is trite that forgery which is a fraud must be proved at a slightly higher standard than that of a balance of probabilities. As it is the plaintiff who alleged the said forgery did also not lead any evidence but called on the court to order forensic investigations. As it is this issue has not been resolved.
26. I have noted counsels' submissions invoking article 159(2)(d) of *the Constitution* calling on the courts to render substantive justice rather than focus on technicalities ostensibly referring to the aspect of failure to apply for extension of time to comply with the orders of the court. But I think the main issue here was compliance to the orders of the court even if no application was filed for extension of time.
27. I think for me justice has to be seen to be done for both parties. The trial court had already found that Kshs. 20,000/- would compensate the plaintiff adequately. The respondent states he will suffer irreparable loss if the orders sought are granted. I have seen the decree whose effect is to cancel the title of the 1st defendant. Cancellation of title is a grave matter no wonder the pleas that the appellant will suffer irreparable harm. I have also seen the proposed Defences. A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"...."



28. I have perused the trial court proceedings and indeed I have noted the delay in the prosecution of this case largely attributed to the defendant appellant. The respondent plaintiff is justified to a large extent on the delay and I sympathise. But I must choose justice and let the parties cases be weighed on the scales of justice. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as persuasively enunciated in *Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR*.
29. I'm further emboldened by the Supreme Court of Kenya position in the case of *Hassan Nyanje Charo v. Khatib Mwashetani & 3 others [2014] eKLR* that:
- “In the emerging jurisprudence, the concept of “timelines and timeliness” is generally upheld, as a vital ingredient in the quest for efficient and effective governance under *the Constitution*. However, even as we take due account of that context, we remain cognizant of the Court’s eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.”
30. The upshot of the foregoing is that the appeal succeeds and is allowed on the following terms,
1. The ruling delivered by the trial court on 13th November 2024 and all orders arising therefrom be and is hereby set aside.
 2. The judgement and decree in the trial court proceedings is hereby set aside.
 3. The Defendants defences to be deemed as duly filed upon payment of the requisite fees in the trial court.
 4. The appellant shall pay costs of Kshs. 20,000/- to the plaintiff within 45 days of this order and submit to the trial court proof thereof.
 5. The matter be remitted to the lower court for hearing de novo on priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED 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. Oyugi Holding Brief for Mr. Omayo for Appellants

Ibrahim Ouma Ayacko respondent

Court assistant: Ishmael Orwa

