



# THE JUDICIARY



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT AT NAROK**

#### **ELC APPEAL NO.E006 OF 2025**

**RICHARD KIPLANGAT KOSKEI.....**  
**....APPELLANT**

#### **VERSUS**

**PHILIP KIPYEGON KOSKEI.....RESPONDENT**

*(Being an Appeal from the Ruling and Orders of H. M. Nyaberi given on the 11<sup>th</sup> March 2025 in Narok CMELC NO.40 OF 2019(Philip Kipyegon Koskei vs Richard Kiplangat Koske).*

#### **JUDGMENT**

1. This is an Appeal arising from the Ruling of **Hon. H. M. Nyaberi(CM)**, which was delivered on **11<sup>th</sup> March 2025**, in **Narok CMELC NO.40 of 2019**, wherein the trial court dismissed the Defendant's (now Appellant's) Application dated **26<sup>th</sup> September 2024**, with costs to the Plaintiff's(Respondent).
2. In the above stated Application, the Appellant as the Defendant in **Narok CMELC NO 40 OF 2019**, had sought for various orders among them being;
  - i) The court be pleased to set aside the exparte judgment of 25<sup>th</sup> April 2023, the consequent decree and any other further order;**
  - ii) That the defendant be granted unconditional leave to ventilate his defence dated 20<sup>th</sup> May**

***2019, and filed on the same date and served upon the Plaintiff(Respondent).***

***iii) That the court grants any other order or orders it may deem necessary to grant in the interest of justice;***

***iv) Costs be provided for.***

3. It was the Appellant's allegations that the said Judgment of **25<sup>th</sup> April 2023**, was obtained **exparte** and a decree was extracted which was in the process of being executed by evicting the Defendant(Appellant) from the suit land, being land parcel No. **Cis Mara- Olposimoru/1785**, wherein he has lived with his mother and other family members since **2004**.
4. The appellant had also averred that despite having filed a defence, and all necessary documents, the case proceeded *exparte* without the Appellant's knowledge, and failure to advance his defence was not deliberate. He claimed that the Plaintiff (Respondent herein) was his father, and they have already mend fences, and have reached a better understanding out of court.
5. It was his further averments that the suit by the Respondent(Plaintiff) was over emotive issue of the appellant as the son of the plaintiff(respondent) demanding his right to use and occupy the family land on behalf of his family and his mother, who is the is wife of the Plaintiff (Respondent).

6. The appellant argued that his father later fell ill, and he is the one who has been taking care of him and they even attempted to record a consent, which attempt did not materialize. That even with the mending of fence with his father, and taking care of him in illness, he is apprehensive that in the event of any eventuality, and the *exparte* Judgment in place, his family and himself can be evicted.
7. He also claimed that there was a genuine reason as to why he did not attend court to give his defence, or the delay in bringing this application to court. He urged the court to allow the said application for the interest of justice, and that the mistake of the advocate should not be visited upon him.
8. This Application of **26<sup>th</sup> September 2023**, was opposed by the Plaintiff(Respondent) herein vide his Replying Affidavit dated **28<sup>th</sup> October 2024**, sworn by **Philip Kipyegon Koskei**, who averred that indeed the suit before the trial court was heard ***exparte***, and concluded vide the Judgment of the trial court dated **25<sup>th</sup> April 2023**, and a decree was served upon the Defendant(Appellant) on **12<sup>th</sup> March 2024**.
9. It was his claim that it was a total of one year and 6 months (**1 year & 6 months**) lapse between the delivery of judgment and the date of the said application, and that the said delay has not been explained, and thus inordinate. He contended that the application is an afterthought, and should be dismissed.

10. The Plaintiff(Respondent) had also contended that the appellant was aware of the existence of the suit and even filed his defence, however he failed to participate in the main hearing, which dates his advocate was aware of. That the Appellant (Defendant) had squandered many opportunities to advance his defence, and thus he was not interested in participating in the matter; was indolent and lacked seriousness until when the execution was imminent. He urged the trial court to dismiss the said application with costs.
11. The above application was canvassed by way of written submissions, and only the Defendant(Appellant) as the applicant thereon filed his submissions dated **11<sup>th</sup> November 2024**, through **J. Martim & Co Advocates**, and urged the trial court to allow his application with costs being in the cause.
12. After consideration of the said application dated **26<sup>th</sup> September 2024**, the Opposition by the Plaintiff through his Replying Affidavit, the trial court while relying on **Order 12 rule 7** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act**, and the case of **Shah vs Mbogo & Another ( 1967) EA 116**, found and held that the Defendant/Applicant thereon, and now appellant moved the trial court after 1 year and 4 Months, and this was a long and unexplained delay, and thus the court could not exercise its discretion in his favour.
13. Further, the trial court observed that the said delay was not a mere mistake of the advocate, but lack of seriousness on the part of the Defendant to conduct his defence. The said

Application was found without merit and was dismissed with costs to the Plaintiff/Respondent.

14. The appellant herein as the Defendant/Applicant in the above referred application was aggrieved by the said Ruling of the trial court, and proffered the instant Appeal through the Memorandum of Appeal dated **27<sup>th</sup> March 2025**.

15. The Grounds of Appeal are;

***a) That the Learned Hon. Magistrate erred in law in failing to properly evaluate the application before him and hence erred in exercising his discretion in favour of the respondent.***

***b) That the learned Magistrate erred in failing to appreciate the reasons for failing to make the application immediately and hence arrived at the wrong finding that the delay in making the application was inordinate and the application was an afterthought.***

***c) That the court erred in law in failing to appreciate the fact that, where payment of damages would be an adequate remedy, denial of right to be heard would not be in the interest of justice.***

***d) That the Hon. Magistrate completely erred in failing to appreciate the circumstance that led to the suit proceeding ex-parte, which denied the Appellant the right to ventilate his already filed defence.***

***e) That the Hon. Magistrate in not making a finding that, the parties are father and son, and by denying the Appellant to ventilate his defence and***

***maintaining the decree which was unfavourable, this confined him(Appellant) to a life of misery as he has nowhere to go after being evicted from the family land where he calls home.***

***f) That the Hon. Magistrate Completely erred in failing to consider the Appellants supporting affidavit and written submission, and hence ended in dismissing the Appellants application dated 26<sup>th</sup> September 2024.***

16. As a consequence, thereof, the appellant prayed for these orders;

***i) The entire ruling and orders of 11<sup>th</sup> March 2024, be set aside;***

***ii) That the appellant application dated 26<sup>th</sup> September 2024, be allowed;***

***iii) That the appellants be granted costs of this appeal;***

***iv) That the court be pleased to grant any further or other orders it may deem fit and expedient in the circumstances.***

17. The Appeal is opposed by the Respondent herein through ***Kiplenge ,Andama & Makau Advocates*** through the written submissions dated ***9<sup>th</sup> December 2025.***

18. The brief facts of this case are; on ***26<sup>th</sup> March 2019,*** the Respondent herein as the plaintiff and father to the appellant, filed a claim against the Defendant(Appellant), and claimed that the Appellant(Defendant) had ***unlawfully interfered*** with his ***occupation*** and ***use*** of his land parcel No ***Cis***

**Mara/Olpusimoru/1785**, which was registered in the name of the Plaintiff(Respondent).

19. He further averred that the Appellant(Defendant) had severally threatened him with violence and prevented him from utilizing the suit land, and threatening his life, and had refused to vacate the said land. The Plaintiff(Respondent) urged the court to enter Judgment in his favour, and issue an **eviction order** against the Defendant(Appellant), issue a permanent injunction to restrain the defendant from trespassing and or interfering with the said land **Cis Mara/Olpusimoru/1785**.
20. The appellant herein as the Defendant thereon opposed the said suit and filed his statement of Defence dated **20<sup>th</sup> May 2019**, and denied that the Plaintiff had ever lived on the said suit land. He did put the Plaintiff to strict proof thereof.
21. Further, the Defendant claimed that the reasons why the Plaintiff(Respondent) wanted to chase him and his family out of the suit land is **malicious** as he intended to sell the said parcel of land without their consents and leave them destitute.
22. After the interlocutory Application for temporary injunction was heard and determined, the trial court held **“... the defendant’s mother has a direct interest on the land seeing that it could well be termed matrimonial home..... permitting the plaintiff exclusive rights by injunction, the defendant may open a door way to the plaintiff to dispose of the land and render the defendant**

***and the family and his mother destitute and destroy the substratum of the suit.”***

23. The above ruling paved way for preparation of hearing of the main suit. From the court record, after several pre-trial conferences, the matter was set down for hearing on **28<sup>th</sup> September 2021**, and a hearing date was fixed for **23<sup>rd</sup> November 2021**. The hearing date was given in the presence of **Mr Mutai** for the Plaintiff and absence of the defendant and his advocate. The court directed a hearing Notice to Issue.
24. On **23<sup>rd</sup> November 2021**, when the matter came up in court, **Mr. Mutai** was present and **Ms. Martim** for the Defendant was also present. It was not clear whether the Defendant was present in court. The hearing was slotted for **12.15pm**.
25. On the same date at **1.37pm**, the court noted that the Defendant and his counsel were absent, though the defendant's counsel was to send another advocate by **1.15pm**. the trial court directed the matter to proceed in the absence of the Defendant and his advocate. The Plaintiff gave evidence, by adopting his witness statement and closed his case.
26. Thereafter, the matter was fixed for defence hearing on **15<sup>th</sup> March 2022**, and a hearing Notice was to be served by the Plaintiff's counsel.
27. On **15<sup>th</sup> March 2022**, **Ms Martim** for the defendant informed the court, that she was not aware of the hearing date, and by

consent, the matter was fixed for hearing on **19<sup>th</sup> July 2022**. However, on **19<sup>th</sup> July 2022**, the matter was adjourned and given a mention date of **25<sup>th</sup> October 2022**, as both advocates and their clients were absent.

28. Come **25<sup>th</sup> October 2022**, a hearing date was set for **31<sup>st</sup> January 2023**, in the presence of both **Mr Mutai** for the Plaintiff and **Ms Martim** for the Defendant. However, on **31<sup>st</sup> January 2023**, the court indicated that it was handling the Election Petitions and adjourned the matter to **11<sup>th</sup> April 2023**, in the presence of **Mr Mutai** for the Plaintiff and **Mr Ombati** for the Defendant, though the Defendant was absent.
29. On **11<sup>th</sup> April 2023**, **Mr Mutai** for the Plaintiff was present, but the Defendant and his advocate were absent. The Defendant's case was marked as closed and date for judgment was given for **25<sup>th</sup> April 2023**. There was no indication on service of the Judgment date or Notice.
30. The trial court delivered its *ex parte* Judgment on **25<sup>th</sup> April 2023**, and allowed the Plaintiff's(Respondents) claim in terms of **prayers No. a** and **b**, with costs to the Plaintiff. This Judgment was delivered in the absence of both the Plaintiff and the Defendant, and their advocates. There is no evidence of whether a **notice** of entry of Judgment was sent to the parties thereon.
31. From the court record, the next activity was the assessment of the bill of costs on **31<sup>st</sup> July 2024**, in the presence of counsel

for the plaintiff and absence of the defendant and his advocate. The said bill of costs was fixed for assessment on **3<sup>rd</sup> September 2024**. On this particular date, the Defendant was present, but his advocate was absent. He sought for adjournment since his advocate was indisposed. Thereafter, the Defendant/Appellant filed the Notice of Motion Application dated **26<sup>th</sup> September 2024**, which was later dismissed by the trial court and thus this Appeal.

32. The above is the brief background of this Appeal. After admission of the Appeal, the court directed the same to be canvassed by way of written submissions. The parties did comply through their respective advocates.
33. The Appellant filed his written submissions through dated **17<sup>th</sup> November 2025**, through **J. Martim & Co Advocates** and urged the court to allow the appeal. The appellant set out two issues for determination being;
- i) Whether the court should tilt its discretion in favour of the appellant;**
  - ii) Who should bear costs of the appeal.**
34. The appellant submitted that it was not deliberate to miss out in court for his defence hearing. He submitted that on the date of defence hearing, his advocate was indisposed, and she gave instructions to **Mr Ombati** to hold his brief. That when the matter was adjourned, **Mr Ombati** did not return the file to his counsel, and therefore, he was not informed what had

transpired in court, and was not aware of the next hearing date for hearing defence.

35. Therefore, since the Defendant/Appellant was not aware of what transpired in court, and he was also busy taking care of the Plaintiff/Respondent, his ailing father, the period of making the necessary application lapsed. That though the trial court held that the reasons for dismissal of the application was **delay** in filing the application, it was his submissions that since the parties had mended fence, he did not see the need to rush, and he was also taking care of the sickly father, the Plaintiff/Respondent and did not know about the judgement, until when he was served with **Notice** for assessment of costs.
36. He relied on the case of the **Court of Appeal at Nairobi Civil Appeal No 27 Of 1982**, where the court held that “**costs would be adequate remedy than denying a party justice in quote**”. He further submitted that his defence raises triable issues and he should be granted a chance to ventilate it.
37. The Respondent filed his written submissions dated **9<sup>th</sup> December 2025**, through **Kiplenge, Andama & Makau Advocates**, who set out the background of the case and identified four issues for determination being;
- i) Whether the trial court erred in holding that the appellant was indolent in his conduct of the matter;**
  - ii) Whether the trial court erred in holding that the delay experienced was inordinate and unexplained;**

- iii) Whether the trial court erred in dismissing the application dated 26<sup>th</sup> September 2024;**
- iv) Who should bear costs of the appeal.**

38. On whether the trial court erred in holding that the appellant was indolent in his conduct of the matter, the Respondent submitted that indeed the trial court erred, since the record shows that the appellant had filed his defence, attended pre-trial conferences, participated in mentions and was aware of the hearing dates. Despite all that knowledge, he failed to attend the hearing of the case and the matter proceeded *ex parte*.
39. Reliance was placed on **Order 12 rule 2** of the **Civil Procedure Rules**, which provided that where the Defendant fails to attend hearing after due notice, the court is entitled to proceed in their absence. He further submitted that a litigant cannot sleep on his right and later accuse the court of an error. He relied on the case of ***Ivita vs Kyumbu 9 1984) KLR 441***, where the court held that litigation must come to an end, and courts should discourage indolence and delay.
40. Reliance was also placed in the case of ***Utalii Transport Company Ltd & 3 others vs NIC Bank Ltd 7 Another (2014) eKLR***, where the court emphasized that it will not aid a party who has deliberately shown lack of diligence in prosecuting or defending a suit.
41. The Respondent argued that the appellant herein failed to attend the hearing of his case, and also failed to take any remedial step for over one year after Judgment, and this is a

classic case of indolence, and the trial court was correct in finding as it did.

42. On whether the trial court erred in holding that **the delay** experienced was **inordinate** and **unexplained**, the respondent claimed that there was **indolent** on the part of the appellant because the judgment sought to be set aside was delivered on **25<sup>th</sup> April 2023**, but the application was filed on **26<sup>th</sup> September 2024**, after a lapse of one year and six months.
43. Reliance was sought in **Sections 1A and 1B** of the **Civil Procedure Act**, which obligates the litigants to assist the court in achieving the overriding objective of the Act; for efficient and expeditious disposal of cases, and that a delay of **18 months** in the absence of any credible explanation, offends this principle.
44. Further reliance was sought in the case of **Bi-Mach Engineers Ltd vs James Kahoro Mwangi ( 2011) eklr**, where the Court of Appeal held that a party seeking the court's discretion must demonstrate;
- (a) reasonable delay;**
  - (b) that the delay is excusable, and;**
  - (c) that the other party will not suffer prejudice.**
45. It was the respondent's submissions that the appellant did not meet the test, and that his excuse that the appellant's counsel failed to diarize the matter and there were negotiations outside the court were not good reasons, and were rejected by the trial court.

46. The respondent relied on the case of ***Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others (2015) ekr***, where the court held; *“litigation is a party responsibility and they must be vigilant in following up on their case.”*
47. Further, that the allegations regarding negotiations was not substantiated and was contradicted by the respondent’s evidence that negotiations ended in **2022**, before the hearing date and the judgement, and therefore the trial court was correct in holding that delay was inordinate and unexplained.
48. On whether the court erred in dismissing the application dated **26<sup>th</sup> September 2024**, it was submitted that the power to set aside *ex parte* proceedings or Judgment is purely discretionary, which are guided by the provisions of law, and the principles set out in the case of ***Shah vs Mbogo & Another( 1967)E.A 116***, where the court held that discretion should be exercised judiciously; to *avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, but not assist a person who has deliberately sought to obstruct or delay the course of justice.*”
49. The Respondent further submitted that after evaluating the evidence, the trial court found and held that the appellant’s conduct was wanting, the delay was inordinate and the explanation was unsatisfactory. For this submissions, the Respondent relied on the case of ***James Kanyita Nderitu & Another vs Marios Philota Ghikas & Aother ( 2016) ekr***,

where the court reiterated that where a court has jurisdiction to set aside *ex parte* Judgment, the party seeking relief must demonstrate good faith, prompt action and satisfactory explanation. That the appellant failed to completely meet this threshold, and the trial court made a sound and reasoned determination on that issue.

50. On who should pay costs of these proceedings, reliance was placed on the case ***of Republic vs Rosemary Munene, ex parte Applicant vs Ihururu Dairy Farmers C-operative Society Ltd***, where the court held;

***“the issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event. It is well recognised that the principle of costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”***

51. Ultimately, the respondent submitted that as a successful litigant, he should be awarded costs of these proceedings and at the lower court.

52. The above are the pleadings herein, the evidence and submissions before the trial court as contained in the ***Record of Appeal***, the ***Memo of Appeal***, the ***impugned Ruling***, and the

rival written submissions, which this court has carefully read and considered, and renders itself as follows; -

53. This being a first appeal from a Magistrate's court to this court, the court has power to **re-examine** and **re-appraise** all evidence adduced before the trial court and then draw its own conclusions, though it must remember it did not see the witnesses first hand. As provided by **Section 65** of the **Civil Procedure Act**, this court is bound to consider both the law and facts in this Appeal. Further **Section 78** of the same Act provides that as an appellant court, the court is mandated to **re-consider, re-assess, re-analyse** and **re-evaluate** the evidence presented before the trial court, and then comes up with its own independent conclusion or determination, while giving deference to the findings of the trial court, and the court acts as a court of law and fact. See the case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**.

54. Further, the court will not just set aside or overturn the findings of the trial court, just because it has been moved in an appeal, and that in its own opinion, it would have held differently, See the case of **Peters vs Sunday Post Limited [1958] EA 424**, wherein the court therein rendered itself as follows:-

***“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised***

***with caution: it is not enough that the appellate court might have come to a different conclusion...”***

55. In the case of ***Mbogo and Another vs. Shah [1968] EA 93*** the Court stated:

***...that this Court will not interfere with the exercise of judicial 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 or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

56. Being guided as above, the court finds the issues for determination are;

- i) Whether the appeal herein is merited;***
- ii) Who should bear costs of this appeal.***

57. It is evident that the suit before the trial court was heard ex parte on ***23<sup>rd</sup> November 2021***, in the absence of the Defendant(Appellant) and his advocates. After the Plaintiff case was heard, the defence hearing was adjourned to ***15<sup>th</sup> March 2022***, and on this ***15<sup>th</sup> March 2022***, the plaintiff and defendant advocates were present, but the matter was adjourned ***19<sup>th</sup> July 2022***. The matter was later adjourned to ***31<sup>st</sup> January 2023***, which did not proceed. The Defendant (Appellant) was

represented by **Mr Ombati**. However, the, matter adjourned to **11<sup>th</sup> April 2023**, and on this **11<sup>th</sup> April 2023**, the defendant failed to turn up in court, and the Defendant's case was closed and an *exparte* Judgment was delivered on **25<sup>th</sup> April 2023**.

58. The Defendant(appellant) alleged that when the suit was adjourned on **31<sup>st</sup> January 2023**, to **11<sup>th</sup> April 2023**, in the presence of **Mr Ombati**, Mr. Ombati did not inform his advocate on what transpired on **31<sup>st</sup> January 2023**, and so the Defendant(Appellant) and his advocate were not aware of the hearing of **11<sup>th</sup> April 2023**. He therefore, sought to have the said *exparte* Judgment set aside through the Application dated **26<sup>th</sup> September 2024**. However, this application was dismissed, and thus this appeal.
59. What is not clear is whether after the ***exparte Judgment*** which was delivered on **25<sup>th</sup> April 2024**, in the absence of the Defendant(Appellant) a ***Notice of delivery of such exparte Judgment*** was served upon the Defendant(Appellant). It is also not clear whether after the Defendant's case was closed on **11<sup>th</sup> May 2023** and a Judgment date was given, the Defendant or his advocate were informed of the said date for Judgment delivery.
60. Though in instances where the defendant entered an appearance and filed a defence but then failed to attend the actual trial hearing, service of a **"*Notice of Entry of Judgment*"** is not mandatory after the judgment the court has to be certain that the defendant was aware of the hearing

Notice on date of Judgment. Was the Defendant herein before the trial court aware of the hearing date of **11<sup>th</sup> April 2023?**

61. The appellant as a defendant had alleged that he was not aware of the Judgment date of **11<sup>th</sup> April 2023**, and only learned about the exparte Judgment when he was served with notice of assessment of costs. The Plaintiff(Respondent) did not inform the court on whether he served the Defendant(Appellant) with a hearing notice for the Judgment delivery after **11<sup>th</sup> April 2023**. No hearing notice was attached to his Replying Affidavit to confirm that a judgment date had been issued.

62. The application before the trial court was brought under **Order 12 rule 7** of the **Civil Procedure Rules**, which provides;

***“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.”***

63. Further, the application was anchored under **Section 3** and **3A** of the **Civil Procedure Act**, which also provides;

**3A.** Saving of inherent powers of court.

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

64. From the above provisions of law, it is evident that the trial court had discretion to set aside the ex parte Judgment and issue orders that are necessary for the end of justice to be met, and such discretion must be exercised judiciously. See the case of ***Pindoria Construction Ltd vs Ironmongers Sanytary ware Civil Appeal No 16 of 1976***, where the court held;

***“It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge’s exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions.”***

65. Since the defendant(appellant) had filed a defence and even participated in the pre-trial conference, and only failed to give his defence, the judgment entered is regular. A regular judgment can be set aside if the defendant missed out court due to an excusable mistake, inadvertence or other sufficient cause, it can also be set aside. The court uses its discretion in such instances to prevent injustice or hardship.
66. In the matter before the trial court, the defendant(appellant) was always represented in the said case by **Ms Martim**. On **31<sup>st</sup> January 2023**, when the case was adjourned to **11<sup>th</sup> April 2023**, a **Mr Ombati** was the one present for the Defendant. The appellant alleged that after the case was adjourned, **Mr Ombati** did not inform or update his advocate what transpired in court on **31<sup>st</sup> January 2023**, and so the appellant was not aware of the defence hearing date.
67. The trial court did not address this issue of whether **Mr Ombati**, really informed **Ms Martim** that on **31<sup>st</sup> January 2023**, the case was adjourned to proceed on **11<sup>th</sup> April 2023**. If the Defendant(Appellant) was not aware of this hearing date, then he would not be punished for the mistake of his advocate. See the case of **Belinda Murai & Another vs Amos Wainaina (1978) LLR 2782(CALL)**.
68. As already stated above, even a regular judgment where the defendant was properly served, **an exparte judgment** can be set aside if the applicant can show that he was prevented from attending court by **'sufficient cause'** such as an **excusable**

**mistake, inadvertence, accident** or other **valid reason**. In such situation, the court would consider on whether the defendant intended defence raises a triable issue. See the case of **CMC Holding Ltd vs Nzioki (2004) Nklr 173**, where the court held;

***“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 among other things an excusable mistake or error. It would ... not be proper use of such a 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 in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”***

69. It is evident that the Judgment entered on 25<sup>th</sup> April 2023, was a regular judgment, since the defendant had filed defence and attended court in many other occasions. The court therefore had discretion to set aside the exparte Judgment under **Order**

**12 rule 7** of the **Civil Procedure Rules**, upon reasonable excuses or sufficient cause.

70. While considering whether to **set aside** or **not to set aside**, the trial court while exercising its discretion ought to have exercised it, while bearing in mind that exercise of discretion was intended to **avoid injustice** and **hardship** resulting from **accident, inadvertence** or **excusable mistake** or **error**, but designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. See the case of **Shah vs Mbogo & Another ( 1967) EA 116**.
71. In his ruling of **11<sup>th</sup> March 2023**, the trial court held that the Judgment was obtained on **25<sup>th</sup> April 2023**, and the application to set it aside was filed on **7<sup>th</sup> October 2024**, which was exactly after one year and 4 months. He further held that prior to **11<sup>th</sup> April 2023**, the Defendant(Appellant) had knowledge of the Defence date, but he went to slumber until when he was served with a decree on **12<sup>th</sup> March 2024**.
72. The trial court also accused the Defendant/Applicant of **indolence** and **lack of seriousness** and that he **should not be rewarded** with favourable court orders at the expense of the plaintiff. That all negotiations and proposals to settle the matter out of court were exhausted in **2022**, wherein the matter was fixed for hearing.
73. **In conclusion, the trial court held that there was a long delay which is unexplained and the defendant was**

***accused of inordinate delay and his application for setting aside was dismissed.***

74. However, the Appellant(Defendant) averred that he was not aware of the hearing date of **11<sup>th</sup> April 2023**, and the subsequent *exparte* judgment; firstly because the counsel who was sent to hold brief did not give a feedback on the next hearing date; and secondly, he had long mended fences with his father the Plaintiff(Respondent) and at some point, they even attempted to record a consent in court. A copy of such consent was annexed to the affidavit in support.
75. It is evident that the ***exparte*** judgment was to the effect that the appellant, as then defendant be evicted from the suit land without hearing his side of the story or without having ventilated his defence. The eviction would indeed cause difficulties and hardship, without having been heard. This would be against the rule of natural justice. See the case of ***R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007.***
76. The said *exparte* judgment was issued without the input of the defendant, and indeed its execution would result in ***injustice*** and ***hardship*** on the part of the appellant. Since he had filed a defence, he ought to have been allowed to ventilate it, and if it is not merited, then the trial court would still enter judgment in favour of the respondent. Consequently, there would be no prejudice occasioned to the Respondent.
77. The Appellant as the Defendant had averred that the counsel who was sent to hold brief by his counsel blundered when he

failed to inform the advocate of the next hearing date. The appellant therefore should not be allowed to face the hardship due to the said blunder. See the case of ***Philip Chemwolo & Another vs Augustine Kubende [1982-1988] KLR 103*** quote;

***“I think a distinguished equity Judge has said: Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits’ .....I think the broad equity approach to this matter, is that unless there is fraud of intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.***

78. Having considered the ***reasons*** advanced by the appellant in his application dated ***26<sup>th</sup> September 2024***, on the failure to attend court, the court finds that there were ***sufficient*** and ***reasonable*** to enable the trial court exercise its discretion in his favour, and proceeds to set aside the exparte Judgment entered on ***25<sup>th</sup> April 2023***. There was no evidence that the appellant was ever served with the hearing notice for date of the Judgment.

79. Since the discretion granted to court by ***Order 12 Rule 7*** of the ***Civil Procedure Rule*** is wide, the main concern of the trial court was to do justice to the parties, but not to impose

conditions or discipline to any of the parties. See the case of ***Patel vs Cargo Handling Services Ltd ( 1974) EA 75,***

80. Even if the appellant had failed to convince the trial court on the reasons as to why he failed to attend court for his defence case, the trial court ought to have considered his defence on record to determine whether it raises triable issues. The appellant having alleged that they have lived on the suit land since 2004, and that the Respondent(Plaintiff) was keen to evict them from the suit land, so that he can sell the land, then that allegation raises triable issue, and the trial court ought to have given the appellant an opportunity to advance his defence.

81. ***In*** the case of ***Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another [2017] eKLR*** the Court of Appeal held;

***“The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the Appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties...There was not even a remote suggestion that the Appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable***

***defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective...”***

82. The Defence with triable issues need not be the one that would succeed at the end of the trial, but one that has been brought to the attention of the court and raises reasonable defence. The trial court was aware of the defence filed by the appellant. See the case of ***Sebei District Administrator vs Gasyali ( 1968) EA 300*** where the court held as follows;

***“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of the court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend.”***

83. On the delay of **18 months** since the exparte Judgment was issued, the appellant alleged and submitted that he was not aware of the judgment until when he was served with **Notice of assessment** of costs. Indeed, there is no evidence that after the judgment was entered on **25<sup>th</sup> April 2023**, in the absence of the defence, his advocate or himself, they were even informed of the entry of the said Judgment.
84. The appellant also alleged and submitted that the parties who are father and son had patched up their differences and had attempted to file a consent and settle the matter out of court. However, the respondent fell unwell, and the appellant has been taking care of him and nursing him at home, and thus the delay in filing the application for setting aside the said exparte Judgment.
85. This explanation was not disputed by the respondent, and this court in its appellate jurisdiction finds the said explanation reasonable, and the trial court **erred** in holding that there was **inordinate delay** in filing an application for setting aside the exparte Judgment of **25<sup>th</sup> April 2023**.
86. Having carefully considered the **Memorandum of Appeal** dated **27<sup>th</sup> March 2025**, and the **Record of Appeal**, and the rival written submissions, and the relevant provisions of law, this court finds and holds that the trial court **erred** in finding and holding that the appellant did not give '**sufficient and reasonable explanation**' for delay in filing the application for **setting aside** the exparte Judgment of **25<sup>th</sup> April 2023**.

87. Consequently, this court as an appellate court after **re-analysing, re-considering, re-evaluating and re-assessing** the available evidence before the trial court, finds and holds that the **Notice of Motion Application** dated **26<sup>th</sup> September 2024**, by the appellant as the Defendant/Applicant thereon is **merited** and the same is **allowed** entirely in terms of prayers No **(1)** of the said Application.
88. Further, the appellant as the defendant before the trial court is directed to set down the Defence hearing within a period of **30 Days** from the date hereof, and the suit to be concluded within a period of **60 Days** after the defence hearing, considering that this is a **2019** matter.
89. On costs, the court will be guided by **Section 27** of the **Civil Procedure Act**, which provides that costs are awarded at the discretion of the court, and are awarded to the successful litigant. The appellant is the successful litigants and is awarded costs of this appeal.
90. On any other order that the court may deem fit to grant, the court notes that the parties herein being father and son, who have allegedly mended fence should attempt to settle this matter out of court through **Alternative Justice System(AJS)** or Court Annex Mediation(CAM), this being a family dispute.
91. In a nutshell, the Appellant's appeal vide his Memorandum of Appeal dated **27<sup>th</sup> March 2025**, is allowed in terms of prayers

**Nos 1, 2 and 3**, with an order that **NAROK CMELC NO 40 OF 2019**, is remitted back **to NAROK CHIEF MAGISTRATES** Court, for hearing of the appellant/ Defendant's defence, which should be heard expeditiously within the next **30 days** from the date hereof.

92. The Defence hearing to be heard and matter concluded within a period of **60 Days** after defence hearing. The said defence to be heard by any other trial magistrate other than **Hon. H. M Nyaberi( CM)**.
93. **Alternative Dispute Resolution(ADR)** mechanism is encouraged as provided by **Article 159(2) (C)** of the Constitution.

***Appeal is allowed accordingly.***

***Dated, signed and delivered virtually at Narok this 12<sup>th</sup> Feb 2026.***

***L. Gacheru  
Judge.***

***12/12/2026***

***Delivered online in the presence of***

***Elijah Meyoki - Court Assistant***

***Mr Naimondu H/B for Ms Martim for the Appellant***

***N/A for the Respondent***

***L. Gacheru  
Judge***

***12/02/2026***