

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCLA NO. E003 OF 2025

JAMES KIGATHI NDEGWA APPELLANT

VERSUS

ERIC JACKSON ANANDA..... 1ST RESPONDENT

DANIEL SIMON ANANDA..... 2ND RESPONDENT

*(From the ruling of J. A Agonda PM dated 6th February 2025 in the original
VIHIGA PMC E&L CASE NO. 036/2023)*

BETWEEN

JAMES KIGATHI NDEGWA.....PLAINTIFF

AND

ERIC JACKSON ANANDA DEFENDANT

DANIEL SIMON ANDANDA.....DEFENDANT

JUDGEMENT

Introduction

Vide the Memorandum of Appeal dated 11th February 2025, the appellant appeals against the ruling in VIHIGA MCELC NO. E036 of 2023 dated 6th February 2025 and seeks that the appeal be allowed, the impugned ruling be set aside and an order be made dismissing the respondents’ application in the lower court with costs here and below.

A brief background of the appeal is that the appellant filed the suit (VIHIGA MCELC NO. E036 of 2023) against the respondents vide the plaint dated 5th June 2023 claiming that he had advanced loans of Kshs 315,000/= and Kshs 200,000/= to the respondents respectively for which the respondents gave him title deeds for

land parcel numbers WEST BUNYORE/EBUSIKHALE/2566 and 2567 as security with agreements that failure to repay the loans with accrued interest, the appellant would transfer the lands to his name to recover the loans.

According to the appellant, the respondents defaulted in repaying the loan amount. That consequently, he therefore sought for orders of specific performance and that in the alternative an order of transfer of the suit lands in his favour and an order of exemption for the requirement for consent of the Land Control Board and costs of the suit.

The record shows that the matter proceeded *ex parte* and judgement was entered in favour of the appellant as prayed. The record further shows that subsequently, the respondents filed an application dated 21st October 2024 seeking for orders that; -

- i) the judgement and decree issued on 31/8/2023 be reviewed and set aside *ex debito justitiae*
- ii) the plaintiff be compelled to transfer at his own cost to the defendants title Nos. WEST BUNYORE/EBISIKHALE/2566 and 2567
- iii) The costs of the application be borne by the plaintiff.

The record shows that the application was heard before the trial court which, vide the ruling delivered on 6th February 2025, found that the application had merit and allowed it.

The appeal

Dissatisfied with the ruling dated 6th February 2025, the appellant preferred the appeal herein on the grounds that: -

1. the learned Principal Magistrate erred in law in setting aside a default judgement in the absence of plausible explanation as to why the Defendants

neither entered appearance nor filed defence despite being served as found by the learned Magistrate.

2. the learned Principal Magistrate erred in law in granting leave to file defence in the absence of a prayer for the same on the face of the application before court.
3. the learned Principal Magistrate erred in law in failing to find that the defendants had failed to establish a plausible defence to the suit before court.
4. the learned Principal Magistrate erred in law in granting an interlocutory injunction in the absence of a pending suit by the defendants
5. the learned Principal Magistrate erred in law in failing to find that there were intervening third party interests that were highly prejudiced by the orders given.
6. the learned Principal Magistrate erred in law in granting an injunction and or stay of execution that was overtaken by events.

Submissions

Vide directions given on 10th July 2025, the appeal was heard by way of written submissions.

Written submissions dated 9th October 2025 were filed by Eliakim Owala & Company Advocates for the appellant. Counsel submitted that on setting aside default judgements Order 10 Rule 11 of the Civil Procedure Rules grants the court discretion to set aside or vary judgements upon such terms as are just. That the discretion is unfettered but must be exercised judicially to avoid injustice. Counsel relied on the case of *Shah-vs- Mbogo (1967) EA 116* where it was held that the purpose is to prevent hardship from inadvertence or excusable mistake and not to assist deliberate obstruction of justice.

That, as held in the case of Philip Chemwolo & another vs Augustine Kubende(1982-88) KAR 1036, the applicant must demonstrate a genuine defence with triable issues, provide reasonable explanation for delay and show that no prejudice shall be occasioned to the other party.

That appellate interference with the exercise of the said discretion is limited but if the discretion is exercised capriciously, without regard to established principles, or resulting in injustice the appellate court will interfere.

Counsel submitted that the trial court erred in setting aside the default judgment without plausible defence. That the delay in applying to set aside post execution was inexcusable, appearing deliberate rather than inadvertent. That the discretion was mis exercised, warranting reversal.

Counsel submitted further that the guiding principles for grant of interlocutory injunction were those set in the case of Giella vs Casman Brown & Co Ltd (1973) EA 358. That in the present case no *prima facie* case was established as the respondents' claim lacks merit and execution was complete.

That third-party interests were ignored. That the suit properties are leased to *bona fide* third parties who acquired interests post execution without notice of disputes. That reversing the transfers affects their rights exposing the appellant to breach claims.

That the orders were overtaken by a completed execution. That transfers had been registered, possession taken and leases issued before the application was brought. That setting aside is nugatory. That the ruling caused substantial loss to the appellant including tenancy violations, rendering it unjust.

Counsel urged the court to allow the appeal.

It was submitted on behalf of the respondents vide the written submissions dated 29th January 2026 that the trial court found that the judgement by dint of service was regular and that the court correctly exercised its discretion and set aside the judgment in accordance with the many case law the court cited.

Counsel submitted that triable issues could be found in the Supporting Affidavit sworn on 21st October 2024 namely; - jurisdiction as the suit properties are both valued at a figure of kshs 23,000,000/=, whether the loan of Kshs 315,000 and 200,000/= were specifically pleaded in the plaint and specific relief sought in the plaint, whether the said loans are fully paid and what interest rates the loans attracted and whether the same was pleaded, whether there were over payments.

That the Kshs 7,000,000/= is refundable via lower court proceedings among others.

Counsel submitted further that the trial court correctly exercised its discretion properly and that it did not misdirect itself.

Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence placed before the trial court and draw its own conclusions. In Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123 it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated that

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself

and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

The application that resulted in the ruling the subject matter of the appeal herein was dated 21st October 2024. The grounds upon which the application had been brought were that the judgment dated 31st August 2023 had been entered without the applicants, who are the respondents herein, being served. This was the respondent’s explanation for non-attendance and non-participation in the hearing of the suit. The respondents stated as much in paragraphs 3, 4, 5, 6, 7, 9, 10 and 11 of the Supporting Affidavit by the 1st Respondent sworn on 21st October 2024. The respondents stated

that the numerous times that the mater came up before court as shown on the Case Tracking System (CTS) case activities the defendants were never served.

It was also the respondents’ case that the appellant had gone to court with unclean hands as he failed to disclose that the loans of Kshs 315,000 and 200,000/= had been fully repaid in the sum of Kshs 1,847,000/= and that the court should not be used by the plaintiff (the appellant herein) to extort money from the respondents. That the plaintiff (Appellant) was unjustly enriched by the judgment by being given 100 per cent of the suit properties.

That the value of the suit properties is beyond the pecuniary jurisdiction of the trial court hence the suit ought not have been entertained.

The application had been opposed vide the averments in the Replying Affidavit sworn on 26th November 2024 on the grounds that the defendants had been served but failed to participate in the proceedings and that the property had been realized.

A reading of the ruling shows that the trial court considered the application and found that the court had jurisdiction as there was no valuation report to show that the value of the property was beyond the pecuniary jurisdiction of the court. The court further found that the defendants were duly served (notified of the existence of the suit) as stated in the Affidavit of Service on record.

The trial court also considered that the defendants had filed their defence which the court found raised triable issues and proceeded to set aside the ex parte judgment to allow the defendants opportunity to be heard on.

The trial court concluded that taking into account the respective parties' pleadings, submissions and the case law cited, it was fair and equitable for the defendants to be accorded a fair and reasonable opportunity to ventilate their case and for the court to determine the matter on merit. The trial court however noted that the defendants should however bear the responsibility of causing delays and proceeded to order the defendants to pay thrown away costs within a specified period.

The grounds for setting aside exparte judgment are that the applicant has to explain to the satisfaction of the court the reasons for non-participation in the proceedings that led to the ex parte judgement, demonstrate that there is a good defence that raises triable issues and that prejudice will not be occasioned to the other party if the judgement is set aside.

In CMC Holdings Ltd vs Nzioki [2004] KLR 173 the Court of Appeal held that in an application for setting aside ex parte judgement the court exercises its discretion

in allowing or rejecting the application. That discretion must be exercised upon reason and must be exercised judiciously.

And in *Pandoria Construction Ltd vs Sanytaryware Civil Appeal No 196 of 1996*, it was held that an appellate court will not interfere with the exercise of discretion by the trial court unless it is satisfied that the trial court misdirected itself in the matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion.

One of the issues raised in the Supporting Affidavit sworn in support of the application that resulted in the impugned ruling was that the defendants (respondents) had paid the loan amount in full and that to award the suit lands to the appellant in the circumstances would amount to unjust enrichment. This in my view formed a core issue in the matter and one for which the defendants were entitled to be heard on.

The trial court was faced with a situation that required striking a balance between the respondents' claim of having repaid the debt hence no basis for letting the appellant have the suit lands and the inconvenience to be suffered by the appellant if the ex parte judgement was to be set aside. My assessment is that the trial court exercised its discretion fairly and reasonably by allowing the respondents a chance to prove their claim of having settled the loans and by compensating the appellant by way of costs.

Having carefully considered all the material placed before the trial court and before this court particularly the grounds of appeal and submissions by both parties, I find that the trial court exercised its discretion judicially in setting aside the judgment. I find no reason to interfere with the exercise of discretion.

The appeal is hereby dismissed. Costs to the Respondents.

Orders accordingly.

Judgement dated and signed at Vihiga, delivered virtually this 12th day of February 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi --Court Assistant.

Babu h/b Owala for the Appellant.

N/A for the Respondents.