

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC APPEAL NO. E036 OF 2024

ISAIAH ROTICH APPELLANT

VERSUS

ROBERT LANGAT 1ST RESPONDENT

JOSEPH KIPTONUI MOSONIK 2ND RESPONDENT

(Being an appeal from the ruling dated 19th day of June 2024 delivered by Hon. Priscah Nyotah (SRM) in Nakuru Chief Magistrate’s Court ELC No. E104 of 2021)

JUDGMENT

1. This appeal arises from a ruling delivered on 19th June 2024, by Hon. Priscah Nyota (SRM) in **Nakuru CM ELC No. E104 of 2021**. The Appellant being aggrieved by the said ruling filed a Memorandum of Appeal dated 18th July, 2024, and listed the following grounds:

- 1) ***THAT the learned Hon Magistrate erred in fact and law by failing to consider that the action/inaction of an advocate should not be visited upon the innocent litigants.***
- 2) ***THAT the learned Hon Magistrate erred in fact and law by failing to consider that the dispute that prompted the initial action was never addressed.***
- 3) ***THAT the learned Hon Magistrate erred in fact and law by finding that the application dated 23rd day of August 2023 was filed as per the instructions of the Claimant, whereas it***

is the sworn averment of the Claimant that this was not the case.

- 4) ***THAT** the learned Hon Magistrate erred in fact and law by finding that the judgement of the court in the Criminal Court Case CR 5326/2021 on charges of malicious damage, where the Appellant was exonerated, was not sufficient to demonstrate triable issues as it involved the same parties.*
- 5) ***THAT** the learned Hon Magistrate erred in fact and law by placing reliance on the application dated 23rd August 2023 whereas the same had been disowned by the Claimant.*
- 6) ***THAT** the learned Hon Magistrate erred in fact and law by failing to consider that the finding of the court in CR 5326/2021, which stated that the proceedings were immature, directly affected this matter.*
- 7) ***THAT** the learned Hon Magistrate erred in fact and law by finding that the Applicant had failed to demonstrate entitlement to an order of setting aside the judgement, whereas the Claimant had provided sufficient grounds.*
- 8) ***THAT** the learned Hon Magistrate erred in fact and law by not considering the material evidence and submissions presented by the Appellant, which demonstrated significant issues that merited a different ruling.*

- 9) ***THAT the learned Hon Magistrate erred in fact and law by misinterpreting and misapplying the legal principles applicable to the facts of the case.***
- 10) ***THAT the learned Hon Magistrate erred in fact and law by issuing a ruling that was against the weight of the evidence presented before the court.***
- 11) ***THAT the learned Hon Magistrate erred in fact and law by failing to recognize that the Appellant was not given a fair opportunity to present his case, thereby violating the principles of natural justice.***
- 12) ***THAT the learned Hon Magistrate erred in fact and law by failing to consider the Appellant's right to a fair hearing, as enshrined in Article 50 of the Constitution of Kenya, 2010.***
- 13) ***THAT the learned Hon Magistrate erred in fact and law by making a ruling that was biased and prejudicial against the Appellant.***
- 14) ***THAT the learned Hon Magistrate erred in fact and law by failing to properly evaluate and analyze the evidence and submissions presented by the Appellant.***

15) ***THAT*** the learned Hon Magistrate erred in fact and law by failing to take into account relevant precedents and legal authorities cited by the Appellant.

16) ***THAT*** the learned Hon Magistrate erred in fact and law by failing to provide sufficient reasons and justification for the ruling delivered.

2. The Appellant therefore, seeks the following orders:

- a) ***That this Honorable court be pleased to allow the appeal herein with costs be borne by the Respondents.***
- b) ***That this Honorable court be pleased to set aside and quash the Ruling and all consequential orders made on the 19th day of June 2024, in NAKURU CHIEF MAGISTRATE’S COURT ELC NUMBER E-104 OF 2021.***
- c) ***That this Honorable court be pleased to set aside and quash the Ruling and all consequential orders made on the 19th day of June 2024, and the Appellant be granted unconditional leave to defend the suit (NAKURU CHIEF MAGISTRATE’S COURT ELC NUMBER E104 OF 2021)***

3. A brief background to this appeal is that the Respondent filed a suit against the Appellant vide a Plaint dated 21st May 2021 seeking the following orders:

- a) An Order of eviction to issue against the defendant and removal of a boundary illegally erected by the defendant on the Plaintiff's parcels of land known as NJORO/NJORO BLOCK 4/63 9BELBUR) and NJORO /NJORO BLOCK 4/66 (BELBUR)*
- b) General damages for loss of user*
- c) Interest on a and b above*
- d) Any other relief that this court may deem fit and just to grant.*

4. The 1st Defendant in the lower court filed a defence and counterclaim, and further that the Plaintiff's suit abated as his name was not substituted following his death. The 2nd Defendant Isaiah Rotich, never entered an appearance therefore the 1st Defendant proceeded with the counterclaim against the 2nd Defendant and a judgment was delivered in the 1st Defendant's favour on 24th March 2023.

APPELLANT'S SUBMISSIONS

5. Counsel for the Appellant filed submissions and submitted that the suit in the lower court was grounded on allegations of trespass and malicious damage to property arising from a boundary dispute. It was counsel's submissions that the matter was prematurely litigated without proper boundary determination and that the Appellant was never afforded an

opportunity to defend himself on merit. He further stated that the Appellant only fully became aware of the consequences of the Judgment upon the proclamation and execution.

6. Counsel listed the following issues for determination:

- a) Whether the learned Magistrate properly exercised judicial discretion in refusing to set aside the ex-parte judgment;*
- b) Whether the learned Magistrate erred in law by visiting the mistakes and omissions of counsel upon the Appellant;*
- c) Whether the learned Magistrate failed to appreciate and evaluate the existence of triable and weighty issues deserving a full hearing;*
- d) Whether the learned Magistrate improperly relied on an application dated 23rd August 2023 which the Appellant had expressly disowned;*
- e) Whether the ruling violated the Appellant's constitutional right to a fair hearing under Article 50 of the Constitution.*

7. On the first issue as to whether the learned Magistrate properly exercised discretion in refusing to set aside the ex-parte judgment, counsel submitted that the learned Magistrate correctly cited the general principles guiding the exercise of discretion, still the application of those principles to the facts was fundamentally flawed, as the court placed

overwhelming emphasis on the alleged service of summons and treated that fact as nearly conclusive.

8. On the second issue on the mistake of counsel visited on the Applicant, counsel stated that the Appellant had deponed that his former advocate filed an application without proper instructions, as the application did not reflect his intention to challenge the judgment, and further that he never instructed counsel to pursue a payment plan or to concede liability.
9. On the third issue whether the learned Magistrate failed to appreciate that the existence of triable issues, counsel submitted that the Appellant demonstrated several triable issues, including, the existence of a boundary dispute, a criminal court finding in CR No. 5326 of 2021 that the proceedings were premature due to an unresolved boundary issue; and the fact that land boundary disputes require technical and administrative processes before liability can properly attach.
10. Counsel faulted the learned Magistrate on the reliance on the application dated 23rd August 2023, which the Appellant had filed but later disowned on the ground that he had not instructed the advocate who filed it. Counsel further stated that the Appellant was denied his right to a fair hearing under Article 50 of the Constitution, and urged the court to allow the appeal as prayed.

RESPONDENT'S SUBMISSIONS

11. Counsel for the Respondent filed submissions dated 11th December 2025 and listed the following issues for determination:

- a) *Whether the ruling and all consequential orders made on 19th June 2025 should be set aside and or/quashed.*
- b) *Whether the Appellant should be granted leave to defend the suit NAKURU CHIEF MAGISTRATE’S COURT ELC NUMBER E104 OF 2021.*
- c) *Who bears the costs of the Appeal?*

12. Counsel submitted that the suit in the lower court was heard and determined the Appellant having been served with summons to enter appearance but did not defend the suit. Counsel relied on the cases of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, **CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 143 (KLR)**, **Shah vs Mbogo & Another 1967 EA 116**, **Patel Vs E.A Cargo Handling Services Ltd (1974) EA 75**, and submitted that the Learned Magistrate exercised her discretion properly when she refused to allow the application to set aside the judgment.

13. On whether the Appellant should be allowed to defend the suit on merit, counsel relied on the case of **James Kanyiita Nderitu & another vs Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, and urged the court to dismiss the appeal with costs as the Appellant had been given an opportunity but did not defend the suit, but only woke up when the execution process started.

ANALYSIS AND DETERMINATION

14. The Appellant listed 16 grounds of Appeal, which in essence can be summarized into two issues, as they were repetitive. The issues for determination are whether the Learned Magistrate erred in fact and law in dismissing the Appellant’s application for setting aside the ex-parte judgment and whether the Appeal has merit.
15. The Appellant faulted the learned Magistrate on the use of her discretion in not allowing the application to set aside the ex-parte judgment even after applying the principles guiding applications for setting aside ex-parte orders and judgments.
16. The court has discretionary powers to set aside ex-parte orders as was held in the case of **Patel Vs E.A Cargo Handling Services Ltd (1974) EA 75**, that:

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”
17. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause to warrant the setting aside of the ex-parte order was held in the case of **Wachira Karani v Bildad Wachira (2016) eKLR** where the court held that:

“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances

in the case at hand. There cannot be a strait-jacket formula of universal application....”

18. The Appellant who was the 2nd Respondent in the lower court filed a Notice of Motion dated 23rd August 2023, seeking stay of execution of the judgment and to be heard on merit on the issue of settlement of the decretal sum.
19. The court gave orders in respect of the application on 13th December 2023, whereby the Applicant was allowed to settle the decretal sum by payment of Kshs.100,000/= by close of business on 21st December 2023, and further monthly instalments of Kshs.50,000/= until payment in full.
20. The Applicant further filed a Notice of Motion dated 9th May 2024, seeking stay of execution of the ex–parte judgment dated 24th March 2023, and all consequential orders and be granted unconditional leave to defend the suit.
21. The court heard the application, and vide a ruling dated 19th June 2024, the court dismissed the application as it lacked merit, which is the subject of this appeal.
22. The Appellant, upon knowing that judgment had been entered against him, he should have filed an application to set aside the ex-parte, judgment. He instead filed an application for stay of execution and be given time to settle the decretal sum by instalments which the court granted.

23. The Appellant cannot fault the Learned Magistrate for dismissing the application, which was filed after hitting a brick wall when he was not able to comply with the order of the court, which was granted upon his request to pay by instalments.
24. In the case of **John Mukuha Mburu –v- Charles Mwenga Mburu [2019] eKLR**, the Court held that:
- "It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another —versus Shoka [1990] 1KLR 463"*
25. From the application and the ruling appealed against, the Appellant did not explain the reason for the delay in filing an application for setting aside the judgment as he had made a detour first with an application for stay of execution and leave to settle the decretal sum by instalments.
26. It is noted that he did not pray for setting aside the judgment, which the court highlighted in the ruling. If he were desirous of setting aside the judgment, then that would have been the first application that he could have filed. There was inordinate delay in filing the application.
27. In the case of **James Wanyoike & 2 others v. CMC Motors Group Ltd & 4 others (2015) eKLR** the court held that:

“...The principles and tests for setting aside an ex-parte judgment can be summarized as follows:-

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgment.

2. That the tests for setting aside an ex-parte judgment are:-

a. Whether there is a defence on merits?

b. Whether there would be any prejudice to the plaintiff?

c. What is the explanation for any delay?”

28. I have considered the record of Appeal, the submissions by counsel and find that the Learned Magistrate properly applied the principles for setting aside ex-parte orders and came to the right conclusion that the Appellant had not shown sufficient cause why the court should exercise its discretion in his favour. The Appeal is therefore dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH
DAY OF FEBRUARY 2026.**

**M. A. ODENY
JUDGE**