

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KILGORIS**  
**ELC (LA) E006 OF 2025**

**NELSON**                      **KORIR.....**  
**APPELLANT**

**VERSUS**

**RAHELI**                      **MAINA.....1<sup>ST</sup>**  
**RESPONDENT**

**ALICE**                      **MAINA.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

1. Being dissatisfied with the Judgment and decree of Hon. W.C Waswa delivered on 23<sup>rd</sup> January 2025 in Kilgoris ELC Case NO. E048 of 2023 the Appellant Nelson Korir penned 15 grounds of Appeal vide the Memorandum of Appeal dated 12<sup>th</sup> of January 2025.
2. The Appellant sought for the following reliefs; -
  - (a)The Learned Magistrates Judgment and decree delivered on 23<sup>rd</sup> of January 2025 be set aside and/or quashed.
  - (b)In the result, the Honourable court be pleased to order a retrial before another court.
  - (c)The Appellants Appeal be allowed with costs to the Appellant.
3. The court shall not set out the grounds of Appeal but shall consider all of them in determining this Appeal.
4. Upon admission of the Appeal, directions were issued for the Appeal to proceed by way of written submissions.

**Appellant’s Submissions**

5. Ms. Linda Wekesa Learned Counsel for the Appellant submitted *interalia* that

- (i) That the defence filed by the Appellant as a Defendant raised triable issues and that the Learned Magistrate ought to have set aside the default judgment and allowed the matter to be properly defended.
- (ii) The Appellant submits that the Learned Trial Magistrate erred in exercising his discretion of not setting aside default judgment. She cited the following authorities in support of her case. Patel Vs. E.A Cargo Handling Services, Chemwolo Vs. Kubended, and James Kanyita Nderitu Another Vs. Marios Philotas Ghikas & Another.

### **Respondent's Submissions**

6. The Respondent through Messrs Kiprotich Roberts Advocates submits as follows; -
  - (i) That the Defendant was served with Plaintiff on 19<sup>th</sup> July 2023 but filed the defence in December 2024. The Respondent submits that the Defendant has not demonstrated that the Exparte judgment ought to be set aside.
  - (ii) The Respondent submits that the Appeal is thus not merited since the Defendant has not demonstrated that the trial court misdirected itself in exercise of its discretion so as to arrive a wrong decision so as to warrant interference with that discretion by this court. He cited the decision of Mbogo and Another Vs. Shah (1968) E.A 98.
  - (iii) The Respondent urged the court to dismiss the Appeal.
7. From the Record of Appeal, and the submissions of the parties, it is common ground between the Appellant and the Respondent that; -
  - (i) The impugned judgment herein was an Exparte judgment.
  - (ii) That the Appellant acted in person at the trial court but instructed counsel in the Appeal.
  - (iii) That the Plaintiff was filed on 20.07.2023, an interlocutory application scheduled on 01.08.2023 but heard on 05.12.2023

in the presence of the Defendant/Appellant; hence service had been effected on the Defendant.

- (iv) The Exparte judgment herein was a Regular default judgment as opposed to an Irregular default judgment.
  - (v) Defence was filed without leave of court on 03.12.2024 but the court had on 19.11.2024 certified the matter to proceed as undefended by way of a formal proof.
  - (vi) Hearing was conducted on 03.12.2024 and judgment delivered on 23<sup>rd</sup> of January 2025.
8. Having analysed the Record of Appeal, the submissions of the parties as well as considered the law, the court frames the following as issues for determination.
- (i) Whether there is a competent Appeal before court.
  - (ii) Is the Appeal merited; in deciding this the court shall determine whether the trial court was right and/or erred in exercise of its discretion.
  - (iii) What orders ought to issue.
  - (iv) Who bears the costs of the Appeal.

### **Analysis and Determination**

1. The court has reviewed and analysed “***reconsider the evidence, evaluate it and draw its own conclusion***” in line with its duties as held in the case of in Selle and Another Vs. Associated Motor Boat Limited and 3 Others.
9. In the analysis the court has found that the Appellant herein was a prose litigant before the trial court, he was served and appeared in court severally before filing a defence without leave when the matter had already been scheduled for hearing.
10. This court has found that the judgment herein is a Regular default judgment, as was defined in the case of James Kanyita Nderitu and Another Vs. Marios Philotas Ghikas and Another Civil Appeal No. 6/2015 where the court of Appeal made a distinct

between Regular default judgment and an Irregular default judgment. The court of Appeal in respect of the two stated *inter alia*; ***“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default judgment. Such a defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of Appearance or defence, as the case may be; the length of the time that has elapsed since the default judgment was entered whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among other.”***

11. From the above analysis, an application to set aside a default judgment ought to be made under Order 10 Rule 11 firstly before the trial court, and a Ruling on that decision is what can be appealed against.
12. In this case, the Appellant approached this court in an Appeal against a default judgment, without first approaching the trial court so as it renders itself on the application to set aside and for this court thus to consider whether the exercise of the discretion was proper or not.

13. It follows therefrom that the Appeal as filed is incompetent, as the first port of call was the trial court and there having been no decision on an application to set aside under Order 10 Rule 11.
14. In the result the Appeal is hereby struck out and the court shall not dwell on its merits.
15. Costs of the Appeal to be borne by the Appellant.

Dated at Kilgoris this 5<sup>th</sup> day of March 2026

Hon. M.N. Mwanyale

Judge

**In the presence of**

CA - Sylvia/Sandra/Clara

Mr. Kiprotich for the Respondent

N/A for Ms. Wekesa for the Appellant