



**Murianki v Ngetu (Environment and Land Appeal E003 of 2025)
[2026] KEELC 1147 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 1147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E003 OF 2025**

BM EBOSO, J

FEBRUARY 26, 2026

BETWEEN

PETER MURIANKI APPELLANT

AND

LOYFORD MUGAMBI NGETU RESPONDENT

(An Appeal against the Ruling of the Chief Magistrate Court at Chuka (Hon J. M. Gandani CM), rendered on 11/4/2025 in Chuka CMC E & L Case No. 54 of 2019)

JUDGMENT

Introduction

1. This appeal challenges the ruling dated 11/4/2025 by the Chief Magistrate Court at Chuka (Hon J. Gandani – CM) in Chuka CMC E & L Case No 54 of 2019. The impugned ruling disposed the respondent’s application dated 23/9/2024 in which the respondent sought an order setting aside the orders made on 16/6/2021 dismissing his suit and entering judgment on the appellant’s counterclaim. The application also sought an order cancelling the title that had been issued to the appellant consequent to the exparte judgment of 16/6/2021. The Chief Magistrate Court considered the application and allowed it, noting that the respondent’s suit was erroneously dismissed and judgment on the appellant’s counterclaim was erroneously entered on the date scheduled solely for mention of the case.
2. Aggrieved by the ruling of the Lower Court, the appellant brought this appeal contending, inter alia, that the Lower Court erred in setting aside the dismissal order and the exparte judgment. The two key issues that fall for determination in the appeal are:
 - (i) Whether the Lower Court erred in reinstating the respondent’s primary suit which had been dismissed for non-attendance on 16/6/2021; and



- (ii) Whether the trial court erred in setting aside the *exparte* judgment which had been entered on the appellant's counterclaim on 16/6/2021. Before I analyse and dispose the issues, I will outline, in brief, the background to the appeal.

Background

3. Through a plaint dated 26/9/2019, the respondent instituted Chuka CMC E & L Case No 54 of 2019 against the appellant seeking, *inter alia*, a declaration that he was the legal and rightful owner of land parcel number Meru South/Lower Kandungu/238 (the suit land). He also sought a permanent injunction and general damages. His case was that he was the registered proprietor of the suit land. He was registered as proprietor of the suit land after conclusion of land adjudication. In 2010, the appellant trespassed onto the suit land and started tilling it. The appellant did not heed his plea to him to stop the trespass. He exhibited a title issued to him in November 2014. The title shows that the parcel was registered on 28/1/2014.
4. In response to the claim, the appellant filed a defence and counterclaim dated 8/11/2019. His case was that he was the one in occupation of the suit land. He contended that the suit land was grabbed by a third party and was sold to the respondent. He added that the respondent only occupied a small portion of the suit land. He denied all the averments made in the plaint.
5. By way of counterclaim, he contended that during gathering and consolidation under the [Land Adjudication Act](#), he was allocated the ground position where the suit land is situated. He added that the person who sold the suit land to the respondent, one Loyford Mugambi, did not come from Marima Location and did not do any land gathering in the area. He contended that if the respondent purchased the suit land, the purchase was illegal because the suit land was grabbed from him (the appellant). He added that since the suit land was illegally "alienated" from him, it ought to be transferred back to him. By way of counterclaim, he prayed for an order that the suit land be registered in his name.
6. On 25/11/2020, the trial court (Hon J M Njoroge - CM) fixed the case for hearing on 27/1/2021. On 27/1/2021, hearing did not take place because the respondent was not ready. On that day, the trial court did not fix a hearing date for the case. It instead gave the case a mention date of 10/3/2021. On 10/3/2021, the trial court marked the case "stood over generally." On 12/4/2021, the appellant's representative attended the Court Registry and the Court Registry fixed the case for mention on 16/6/2021. Come 16/6/2021, the matter was listed before J.M. Njoroge - CM. There was no attendance on part of the respondent. A Ms Trizah attended on behalf of the appellant. On that day, without any presentation/submissions from Ms Trizah, the court issued orders dismissing the respondent's suit and allowing the appellant's counterclaim in the following verbatim terms:
- "Notice to withdraw dated 25/1/2021 is set aside as the defendant has complied. The defendant was duly served. The plaintiff's suit is dismissed and the counterclaim to be allowed."
7. What followed was an application dated 29/7/2021 by the appellant, seeking an order directing the Land Registrar to dispense with the production of the original title which was held by the respondent, for the purpose of enforcing the *exparte* judgment. On 15/9/2021, the Lower Court (J M Njoroge-CM) granted an *exparte* order allowing the above application in the following verbatim terms:
- "Application dated 29/7/2021 is *exparte*. The same is allowed as prayed."
8. On 24/1/2022, the appellant filed an application dated 24/1/2022 seeking an order authorizing the Executive Officer of the Court to execute all necessary transfer documents to give effect to the court's



exparte judgment dated 16/6/2021. On 16/2/2022, the Lower Court (J M Gandani - CM) heard the application exparte and granted it in the following verbatim terms:

“Application dated 24/1/2022 is allowed as the same was served and is unopposed.”

9. On 24/9/2024, the respondent filed an application dated 23/9/2024 seeking: (i) an order setting aside the dismissal order dated 16/6/2021 and the exparte judgment that allowed the appellant’s counterclaim on the said day; and (ii) an order reinstating the respondent as the registered proprietor of the suit land. The application was opposed by the appellant. Upon hearing the application, the Lower Court rendered the impugned ruling in which it found that on 16/6/2021 (the date when the respondent’s suit was dismissed and the appellant was granted final judgment without a hearing), the matter was only scheduled for mention and there was no scheduled hearing. Citing Order 12 rule 7 of the Civil Procedure Rules, the Lower Court set aside both the dismissal order and the exparte judgment.

Appeal

10. Aggrieved by the Lower Court’s setting orders of 11/4/2025, the appellant brought this appeal, advancing the following eight (8) grounds of appeal;
 1. That the Learned Magistrate erred both in law and in principle by setting aside the dismissal order dated 16/6/2021 and the judgement dated the same day.
 2. That the Learned Magistrate failed to apply the correct and/or appreciate the law/principles governing setting aside of judgments.
 3. That the Learned Magistrate misdirected herself by holding that the order dismissing the plaintiff’s suit and allowing the counterclaim was irregular yet there was no sufficient cause or reason to warrant setting aside of the same.
 4. That the Learned Magistrate failed to apply the correct and/or appreciate the provisions of Order 17 of the Civil Procedure Rules.
 5. That the Learned Magistrate erred in law and in fact by holding that the Judgement delivered on 16/6/2021 was irregular despite there being overwhelming evidence of proper service.
 6. That the Learned Magistrate erred in law and fact by failing to make a finding that the delay in filing the respondent’s application dated 23/9/2024 was inordinate and inexcusable.
 7. That the Learned Magistrate erred in law and in fact by failing to make a finding that the respondent was an indolent litigant despite there being overwhelming and unchallenged evidence of indolence.
 8. That the Learned Magistrate acted injudiciously, unfairly and unjustly in ignoring and/or dismissing the appellant’s overwhelming and unchallenged evidence on record and submissions without any reasonable cause.
11. The appellant urged this court to allow the appeal and set aside the impugned ruling with costs.

Appellant’s Submissions

12. The appellant filed written submissions dated 10/11/2025 through M/s T. M David & Co Advocates. Counsel for the appellant submitted that the Lower Court erred in setting aside the judgment of 16/6/2021 because it was a regular judgment. Counsel argued that the respondent was properly served



with “all court process” by the appellant, adding that the process server who effected service was neither interrogated nor cross-examined. Counsel faulted the Lower Court for failing to take cognizance of the fact that the appellant was the lawful owner of the suit land and was in occupation of the land. Counsel argued that the impugned ruling was rendered on an application that was “not a substantive motion.”

13. Counsel further submitted that despite the respondent being served with a mention notice for a mention scheduled for 16/6/2021, he failed to attend court, adding that when it became clear that the respondent was not interested in prosecuting the case, the appellant requested for its dismissal as provided under Order 17 of the Civil Procedure Rules.
14. Counsel further argued that the respondent’s contention that he became aware of the dismissal order in 2024 was not a sufficient explanation for the delay in filing the application, adding that the respondent failed to explain why he did not do follow-ups on the case. Counsel urged the court to allow the appeal and award the appellant costs of the appeal.

Respondent’s Submissions

15. The respondent filed written submissions dated 12/11/2025 through M/s L. Kimathi Kiara & Co Advocates. Counsel for the respondent identified the following as the three issues that fell for determination in the appeal:
 - (i) Whether the Lower Court properly exercised its discretion in setting aside the dismissal order and in reinstating the suit;
 - (ii) Whether the reinstatement of the suit occasioned any prejudice to the appellant; and
 - (iii) Whether the appeal discloses any sufficient basis to warrant appellate interference in the exercise of discretion.
16. Counsel submitted that the law granted trial courts wide discretion to set aside orders of dismissal where sufficient cause is shown, adding that the discretion is exercised for the purpose of ensuring that substantive justice is done and that every party is afforded a fair opportunity to be heard on the merits of their case. Counsel added that the respondent tendered an explanation for his failure to attend the mention session of 16/6/2021, hence the order reinstating the respondent’s suit was well-founded.
17. Counsel added that the appellant bore the burden of demonstrating that reinstatement of the suit would occasion him actual and tangible prejudice. Counsel contended that the appellant did not discharge the burden, adding that based on the facts of the case, each party retained the full and equal opportunity to ventilate their respective cases during trial. Counsel argued that it would be a greater injustice to bar a litigant from being heard. Counsel added that the appellant had failed to demonstrate a proper basis to warrant this court’s interference with the discretion of the Lower Court.

Analysis and Determination

18. The court has read and considered the original record of the Lower Court; the record filed in this appeal; the grounds of appeal; and the parties’ submissions. The court has also considered the relevant legal frameworks and jurisprudence. As outlined in the introduction part of this judgment, the following are the two key issues that fall for determination in the appeal:
 - (i) Whether the Lower Court erred in reinstating the respondent’s primary suit which had been dismissed for non-attendance on 16/6/2021; and



- (ii) Whether the Lower Court erred in setting aside the *ex parte* judgment which had been entered on the appellant's counterclaim on 16/6/2021. Before I dispose the above issues, I will outline the principle that guides this court when exercising jurisdiction as a first appellate court.
19. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
20. The principle was similarly outlined in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
21. Did the Lower Court err in reinstating the respondent's primary suit which had been dismissed on 16/6/2021? Did the Lower Court err in setting aside the *ex parte* judgment? The Lower Court was seized of an application expressed as brought under Sections 3 and 3A of the *Civil Procedure Act* and Order 12 rule 7 of the Civil Procedure Rules. The case of the respondent was that 16/6/2021 (the date when his suit was dismissed for non-attendance and the appellant's counterclaim was allowed without any form of hearing) was a day scheduled for mention of the case. It was not a day scheduled for hearing of the case. The relevant part of the record of the lower court has been set out in extenso and it tallies with the respondent's case that both the dismissal order and the order allowing the counterclaim without any form of trial hearing were issued in error. The case was fixed for mention on 16/6/2021. It was not fixed for hearing on that day. The platform for issuing a dismissal order or for allowing the counterclaim was, clearly, not available on 16/6/2021.
22. It is clear from the record that, the respondent's suit was dismissed without him being granted the opportunity to be heard. Similarly, the appellant's counterclaim was granted and the respondent's title cancelled without the respondent being granted the opportunity to be heard. Worse still, the respondent was granted a final judgment in the matter without any form of trial hearing yet the counterclaim was not a liquidated one.
23. Our courts have umpteen times emphasized the centrality of the right to be heard in a civil dispute of this nature. In *James Kanyita Nderitu & another v Marios Philota Ghikas & another* [2016] eKLR the Court of Appeal stated as follows:
- “The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”
24. In *Musila v Thengi & 2 others* (Civil Appeal 607 of 2019) [2025] KECA 750 (KLR) the Court of Appeal stated as follows:
- “... the right to be heard is a basic natural justice concept and ought not to be taken away lightly.”



25. For the above reasons, it does emerge from the court record of the Lower Court that the judgment which the Lower Court handed to the appellant was an irredeemably irregular judgment. It was irregular because non-attendance on a day fixed for mention of a case cannot attract a regular ex-parte judgment. If the appellant wanted a regular ex-parte judgment at that stage, the only avenue available to him was to take a hearing date for the case, serve a hearing notice, file an affidavit of service, attend the scheduled hearing and prosecute his counterclaim. The shortcut of an ex-parte final judgment on an unliquidated claim on a day appointed for mention of a case was clearly not available to him. Similarly, the platform for a dismissal order was not available.
26. What the appellant got was an untenable irregular ex-parte dismissal order and an untenable irregular ex-parte judgment. In *James Kanyita Nderitu & another v Marios Philota Ghikas & another* [2016] eKLR, the Court of Appeal stated the following about the fate of irregular ex-parte judgment:
- “In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.
27. For the above reasons, the court comes to the finding that there was a glaring error on record and that the lower court properly exercised jurisdiction to correct the error. The error on record was that the Lower Court mistook 16/6/2021 for a hearing date yet it was a mention date. Secondly, the Lower Court mistook the unliquidated claim before it for a liquidated claim. Consequently, I do not find any proper reason for faulting the Lower Court’s subsequent ruling dated 11/4/2025 setting aside the orders of 16/6/2021. For the above reasons, it is the finding of this court that the Lower Court did not err in reinstating the respondent’s suit. It is also the finding of this court that the Lower Court did not err in setting aside the ex-parte final judgment that it had entered in favour of the respondent on 16/6/2021 on an unliquidated claim.
28. On costs, the error giving rise to the application that culminated in the impugned ruling was committed by the Lower Court. For this reason, parties will bear their respective costs of this appeal.
29. In the end, for the reasons outlined above, this appeal is rejected and dismissed for lack of merit. Parties are to bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF FEBRUARY, 2026.

B M EBOSO [MR]

ELC JUDGE

In the Presence of:

Appellant - Absent

Respondent - Absent

Court Assistant – Nelly

