Rowa & 2 others v Ngorome (Environment and Land Appeal E031 of 2024) [2026] KEELC 1633 (KLR) (18 March 2026) (Judgment)

Neutral citation: [2026] KEELC 1633 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E031 OF 2024

FO NYAGAKA, J

MARCH 18, 2026

BETWEEN

DISMAS OKELLO WILLIAM ROWA ..... 1ST APPELLANT

THOMAS JOSEPH OKELLO ..... 2ND APPELLANT

GREGORY ONYANGO OKELLO ..... 3RD APPELLANT

AND

ANTHONY ODONGO NGOROME ..... RESPONDENT

(Being an Appeal from the ruling of Hon. M. Agutu (PM) in Mbita PMCC E003 of 2023 delivered on the 20th day of June 2024)

JUDGMENT

1. The Respondent, then the Plaintiff filed an Application dated 4th December 2023 seeking the following orders in the trial court;
    1. That this Honourable Court be pleased to strike out the Defendant's Statement of Defence dated 20th June 2023;
    2. That this Honourable Court be pleased to enter interlocutory judgement in favour of the Plaintiff against the Defendants herein accordingly;
    3. That this Honourable Court be pleased to make such other order(s) as the Honourable Court may deem appropriate, just and expedient to grant.
    4. That costs of this application be provided for.
2. He pleaded that the Defendant's Statement of Defence dated 20th June 2023 and filed out of time without leave of this Court, and without payment of any court filing fees. That on 11th January 2023

he filed this suit, together with an application and served Summons to Enter Appearance on the Defendants the same day. The application came up for hearing on 25th January 2023 when the orders sought were granted, Court upon being satisfied that the Defendants/Respondents had been properly served and that the defendants had entered appearance but did not oppose the said application. That the Defendants appointed Counsel who entered appearance on 24th January 2023 before the said orders were issued but did not file any opposition to the said application or defence for the Defendants.

3. He urged that the court directed that the suit be set down for pre-trial directions and despite entering appearance on 24th January 2023, the Defendants completely failed to file any defence in Court or at all, and on 27th July 2023 they purported to file a Statement of Defence. He urged that the defence was filed out of time and without leave. Further, that the delay was inordinate and prayed that the same should be struck off the Court record as they are improperly in court.

4. The Appellant filed a replying affidavit dated 24th January 2024 sworn by the 1st Appellant. He deponed that when he was served with the summons he approached a family friend who advised that he retain the services of an advocate which he did. That counsel entered appearance and sought for time to get proper instructions. That when he finally had a chance to meet the advocate and explain the facts they agreed that she would file pleadings and enter appearance on his behalf as he had no knowledge of the whereabouts of the 2nd and 3rd defendants. He then rushed to Mombasa to trace his sons as he feared that they were among the Shakahola victims. He urged that they had not been served with the summons and therefore the matter was not ripe for hearing as they had not been served properly. That due to issues with the e-filing no invoices were raised for paying filing fees. He urged the court to dismiss the application as he had made an effort and urged that the defence raised triable issues.

5. Upon considering the Application, the trial court struck out the defence and entered judgment in favor of the Plaintiff.

6. Being dissatisfied with the decision of the trial court, the Appellant instituted the present appeal vide the Memorandum of Appeal dated 3rd July 2024 premised on the following grounds;

    1. The Learned Trial Magistrate erred in law and in fact by failing to consider and/or make a determination on whether the 1st Appellant's Defence on record raised triable issues.

    2. The learned trial magistrate erred in law and in fact in reaching a conclusion as she did, that the 2nd and 3rd Appellants herein were properly served with summons to enter appearance so as to be found to be indolent in filing their statement of defence.

    3. The learned trial magistrate erred in reaching the extremely punitive conclusion that there was inordinate delay on the part of the Appellants.

    4. The learned trial magistrate erred in law and in fact in failing to appreciate the glaring fact that no summons to enter appearance had been served upon the 2nd and 3rd Appellants.

    5. The learned trial magistrate made a fundamental error in law by deciding to lock the Appellants out of the seat of justice.

    6. The learned trial magistrate erred in law and in fact by turning a blind eye and completely ignoring the weighty and triable issues raised in the Appellant's Statement of Defence.

    7. The learned trial magistrate erred in law and in fact by denying the 1st Appellant an opportunity to be heard in his defence.

8. The learned trial magistrate erred in law and in fact by ignoring the fact that whereas the delay on the part of the Appellant if any, could be sufficiently cured by an award of a reasonable throw away cost, the loss that would be suffered by the Appellants due to the expunging of the defence and entering interlocutory judgment in favour of the plaintiff would be permanent, painful and not quantifiable in monetary terms at all.

9. The learned trial magistrate erred in failing to fully appreciate the fact that land matters are extremely emotive and thus best determined on merit.

10. The learned trial magistrate erred in law and in fact by failing to consider and/or interrogate the issues of illegality and fraud raised in the 1st Appellant's Statement of Defence dated 20th day of June, 2023.

11. The learned magistrate erred in law and in fact by sanitizing and cleansing the whole fraudulent processes without scrutiny contrary to the interest of justice and fairness.

7. The parties were directed to file submissions on the Appeal. The Appellant filed submissions dated 14th December 2025 through the firm of Messrs. Quinter Adoyo & Company Advocates.

Appellants' Submissions

8. On Whether the learned magistrate failed to consider whether the 1st appellant's statement of defense raised triable issues , Counsel urged that the 1st Appellant filed a statement of defence dated 20th June 2024. He reproduced the contents of the defence and urged that the issues it raised were not only triable but also weighty.

9. Counsel urged that the issues concerning availability of the 2nd defendant was a pertinent issue on service, citing Order 5, Rule 7 of the Civil procedure rules. He reiterated that the statement of defence raised triable issues that should have been comprehensively canvassed by the trial court before issuing a final determination on the merits. Ignoring such weighty issues was an error both in law and in fact. He cited the decision in Fidelity Shield Insurance Co Ltd v Festus Cherop Kiplangat & another [2020] in support of the same.

10. Counsel urged that the learned magistrate erred in finding that there was an inordinate delay. That in her ruling, she stated that she had perused the court file and noted that the defendants failed to file their statement of defence within prescribed time. The court further indicated that it perused the file, found out that there was no statement of defence and granted the defendants leave to file an application seeking to file the defence out of time. The court however stated that a statement of defence was filed without the leave of the court. He cited the case of Ezekiel Onyango v Sheila Sheikh another 2018 KEHC 6911(KLR) on the issue of leave to file statement of defence.

11. Counsel urged that when the matter first came up before the trial court, on 13th July 2023, it allowed Ms. Adoyo to file a statement of Defence and accompanying documents on or before the 27th of July 2023 when the matter would be heard and that this was the very last indulgence for Ms. Adoyo. Counsel detailed the challenges with e-filing and urged that in compliance with the orders of 13th July 2023, Ms. Adoyo filed a memorandum of appearance, statement of defence, witness statements and documents to be relied on as exhibits on or before the 27th of July, 2023 and the counsel for the respondent confirmed being served with bulky documents and that he needed time to study, so as to be able to adequately respond. In fact, it is at the instance of the counsel for the respondent that the matter was adjourned on the 27th July 2023 when it came up for hearing.

12. Counsel urged that somehow, when Ms. Adoyo was filing the new memo of appearance, defence and accompanying documents, she mistakenly raised invoices requiring payment of no money because of the aforesaid challenges of the novel e-filing and the fact that court users were still learning how to go about it, especially in Homa Bay. Similarly, there is no law whatsoever that required opposing counsel to be served with receipts evidencing filing, especially in the era of e-filing when counsel just needs to confirm from the system whether the documents have been uploaded and are in the system or not. To date, the system bears witness that the appellant's documents were filed on the 27th of July 2023.

13. Counsel urged that non-payment of the filing fees cannot in any way be a good reason for denying a willing litigant from being heard especially in the wake of Articles 40, 48 and 50 of *the constitution* of Kenya 2010. Counsel posited that the defence was filed in time and in accordance with the directions of the court and the same should have been considered. He placed reliance on the case of Peter Juma Kuriah TA Scope Designs Systems v Attorney General (Sued on behalf of Ministry of Industrialization another 2016 KEHC 8617 (KLR) in this regard. He urged that the appellants intend to prosecute the suit and should be given an opportunity to be heard by the lower court.

14. Counsel submitted that the 2nd and 3rd defendants left home in 2006 and 2024 respectively and have never returned home whereof the 1st defendant was utterly shocked that here was an agreement executed on the Christmas day of 2018, where the appellants are said to have sold the property to the respondent. To the best of the 1st appellant's knowledge, the 2nd appellant had not been served with summons to enter appearance or the pleadings given the fact that their whereabouts were and are still not known to the 1st appellant.

15. Counsel urged that the trial court did not determine the issues before it on merit and urged the court to allow the appeal as prayed with costs.

Analysis and Determination

7. This is a first appeal. It arises from a decision that the trial court exercised its discretion on. Of discretion, appellate courts have often relied on a number of principles, but the general legal rule is that such courts should not substitute their conclusions with those of the courts appealed from. Again, they do not interfere with the decisions of courts appealed unless wrought with a number of flaws. Thus, in Supermarine Handling Services Ltd V Kenya Revenue Authority [2010] KECA 373 (KLR) the court held as follows:

> " ...Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

7. Also, in Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006) the Court stated:-

> " ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

7. Similarly, in Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR the Court of Appeal held that:

> "...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference."

7. Moreover, in Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

8. Furthermore, in Mbogo and Another v Shah [1968] EA 93 at 96 the court held:

> "For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

7. Also, in Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment), this court stated;

> "As for the instant appeal, it is clear that it arose from the low court's exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong."

7. Also, in Nyaoke & 7 others v Ayaga (Environment and Land Appeal E024 of 2024) [2025] KEELC 7345 (KLR) (28 October 2025) (Judgment) this court held,

> "Again, it is worth of note that this is an appeal that challenges the exercise of discretion by the trial court. The principles that govern the instances that an appellant court may interfere with a decision arrived at by exercise of discretion by a court appealed from are now settled. This court must be cautious in deciding to interfere with the discretion of the trial court. If I must do so, I should not substitute my decision with the that of the trial court. I must consider and find, if I have to overturn that decision, that the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively."

16. The above decisions settle the legal elements appellate consider. They are whether the trial court exercised its discretion judiciously; included or excluded material it should not have included or excluded respectively; or even in the step of doing the right things as noted here before, the decision arrived at was plainly wrong. Therefore, the germane issue for determination is; Whether the trial court erred in striking out the Appellants' Defence

17. The Court's jurisdiction to strike out pleadings is found under Order 2 Rule 15 of the Civil Procedure Rules which provides thus;

> " Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> a. It discloses no reasonable cause of action or defence in law; or
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> b. It is scandalous, frivolous or vexatious; or
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> c. It may prejudice, embarrass or delay the fair trial of the action; or
>
> d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

1. Suffice it to say, it is trite that striking out pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. To put it more succinctly, striking out parties pleadings is a draconian step which ought to be take very carefully, perhaps as the very last resort of a court. This could be only in the clearest of the cases where a plaint or claim, or a defence or response is incorrigibly hopeless that it cannot be salvaged even by way of amendment, or unless it is wrought with a such a fundamental legal flaw, for instance, lack of capacity or standi, that cannot be salvaged. In the case of D.T. Dobie & Company v Muchina, (1982) KLR 1, Madan J.A (as he then was) held as follows with regard to striking out pleadings:

> > " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits [without discovery, without oral evidence tested by cross-examination in the ordinary way]. Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.
> >
> > If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.
> >
> > No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to

act in darkness without the full facts of a case before it." (Emphasis added)

19. When considering what a triable issue is, in the case of Equatorial Commercial Bank Limited vs Jodam Engineering Works Limited & 2 Others (2014) eKLR had the occasion to determine this question. In its decision Kasango J stated as follows;-

> " A statement of defence is said to raise reasonable Defence if that Defence raises a prima facie triable issue."

20. In the case of Olympic Escort International Co. LTD & 2 Others vs Parminder Singh Sandhu & Another (2009) eKLR, the court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:

> " It is trite that, a triable issue is not necessarily one that the Defendant would ultimately succeed on. It need only be bona fide."

21. I have considered the defence which was struck out. Specific defences were raised regarding the claim and more particularly the agreements in issue. These, no one can wish away, more so on whether the said agreement is enforceable or breached. I am satisfied that the Defence raises triable issues with regard to the sale agreement that is the subject of the instant claim.

22. This court is of the humble view that where the party, or defendant did the best he could to present his defence to the court, the trial court could have recalled that it is a fundamental natural and constitutional principle and right respectively that a party should not be condemned unheard, unless he has deliberately and in an abuse of the process of the court failed to utilize the chance given to him/her.

23. In my humble view, the Application did not meet the merits of Order 2 Rule 15 of the Civil Procedure Rules. Additionally, I note that three was no evidence to show that the 2nd and 3rd defendants have ever been served with Summons to Enter Appearance. The affidavit of service sworn by one Edwin Omondi Otieno on 11th January 2023 fell short of the provisions of Order 5 regarding proper service: it was defective. This is because the deponent or process server only stated vaguely that he served the all the Defendants. He stated, at paragraphs 3 and 4, that "on 11/1/2023 I proceeded to Nyabomo in Sindo and with the help of the Plaintiff who directed me to the home of the defendants.... After brief introduction, I explained to them my purpose of me being there and indeed lawfully served them... they each received."

24. I have carefully perused the annexture to the Affidavit of Service. The Summons to Enter Appearance which were indicated as served were only those of the 1st Defendant, now Appellant, (Dismas Okelo Rowa) only. None were for the other two Defendants/ Respondents were attached. Thus, whereas the Process Server purported to have served the latter two, he did not. It was a pure lie that he served, which means the purported 'service' on the 2nd and 3rd Defendant was defective.

25. In any event, the 1st Defendant deposed that the 1st and 2nd Defendants never entered appearance, having disappeared without a trace. It follows that the judgment entered against was irregular because they have never been given an opportunity to be heard, which is an affront to the rules of natural justice.

26. If it had to do with failure to pay filing fees for the document, definitely it meant that indeed there was no document or pleading filed in court to strike out if that was the case. But since the trial court did not address itself on that issue and use it as a determining point, this court will say nothing more that it has stated about there being no document to strike out if no payment is made for a document because it

is not filed. Indeed, if no fees was paid for it, and since this court has found that the Defendants ought to have been accorded chance to have their defense and participate in urging it, they should proceed to pay for the same within fifteen (14) days of this Judgment.

27. One legal point of importance that I need to make a finding on as a parting shot is that the claim in the lower court was for reliefs of injunction, specific performance and general damages. There was none for special damages or a specific sum of money (pecuniary damages). Thus, in terms of Order Rules 10 Rules 6 and 7 of the Civil procedure Rules, this Court is of the view that interlocutory judgment court have been entered in the circumstances or pleadings of the case.

28. The upshot of the foregoing is that the appeal succeeds. I hereby order that;

    i. The ruling of the trial court and the dated 20th June 2024 and the interlocutory judgment given on the same date is hereby set aside.

    ii. The Applicant's statement of defence is hereby deemed as duly filed, on condition that the fees, if not paid for earlier, be paid within fourteen days in default of which the papers would stand expunged from the record, and the matter is to proceed for hearing or for formal proof (whichever will be applicable), before the trial magistrate or a court of concurrent jurisdiction.

    iii. Costs to the Appellants.

29. The original trial court file should be returned forthwith to facilitate the compliance with the above orders. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 18TH DAY OF MARCH 2026.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistant: Ms. Fiona

Trevor Molo Advocate holding Q. Adoyo for the Appellants

Ms. Kibet for the Respondent.