

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E074 OF 2025

SOJPAR LIMITED..... APPELLANT

VERSUS

**FREDRICK ODHIAMBO OUMA (Suing as next
friend of NICHOLAS ODHIAMBO..... RESPONDENT**

**(An appeal from the ruling of Hon. J.P Mkala(Adjudicator) delivered on
19/9/2025 in Siaya SCCOMM No. E198/2025)**

BETWEEN

**FREDRICK ODHIAMBO OUMA (Suing as next
friend of NICHOLAS ODHIAMBO..... CLAIMANT**

VERSUS

JUDGMENT

1. The appeal arises from the ruling of Hon. J.P. Mkala (Adjudicator) dated 19/9/2025 in Siaya SCCOMM No. E198/2025 wherein he dismissed the Appellant’s application dated 6th August 2025 seeking to set aside an exparte judgment.
2. The Appellant was aggrieved and filed memorandum of appeal dated 25/9/2025 where it raised the following grounds of appeal:
 - i) That the learned trial adjudicator erred in law by dismissing the Appellant’s application dated 6/8/2025 without considering in totality the grounds in the application and the supporting affidavit thereof.
 - ii) The learned trial adjudicator erred in law by unreasonably and unjustifiably dismissing the Appellant’s subject application by failing to exercise his discretion judiciously.
 - iii) That the learned trial adjudicator erred in law by failing to consider that the Appellant’s right to be heard and right to a fair hearing as enshrined in

the constitution are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to Article 25 of the Constitution.

- iv) That the learned adjudicator erred in law by misdirecting himself that the Appellant had not made a meritorious case which justify setting aside a judgment of the court.
- v) That the learned trial adjudicator erred in law by misapplying the principles in setting aside judgment.
- vi) That the learned trial adjudicator erred in law by failing to find that the draft response to the claim filed by the Appellant raised triable issues.

The Appellant therefore prays that the appeal be allowed and the ruling dated 19/9/2025 be reviewed and/or set aside and that the Respondent to bear the costs of the appeal.

3. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd &**

Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).

4. The record reveals that the Appellant had filed and application dated 6/8/2025 wherein it had sought principally for an order to set aside the *ex parte* judgment entered against the Appellant as well as an order for stay of execution to the decree and finally that the Appellant be granted unconditional leave to defend the suit out of time and that the draft statement of defence attached thereto be deemed as duly filed and served. The application was supported by the affidavit of Caren Manyonge sworn on even date as well as grounds set out thereunder. The Appellant's gravamen was *inter alia*; that an *ex parte* judgment was entered on 29/7/2025 against Appellant; that the pleadings and summons had been served upon the Appellant who transmitted them to their insurers Geminia Insurance Company Limited who were expected to appoint an advocate to act for them; that due to a system upgrade at the company, the summons and pleadings got lost in circulation and hence no appearance was entered for the Appellant leading to the entry of an interlocutory judgment; that upon fixing the system they forwarded the summons

and appointed the firm of Wachira Wekhomba to file statement of defence to the claim; that the failure to file the defence and enter appearance was not deliberate but due to pleadings getting lost in circulation; that the Appellant has a viable defence against the claim which raises triable issues; that it would be in the interest of justice for the Applicant to be granted leave to defend the suit; that the claimant would not suffer any prejudice as costs would be sufficient if the interlocutory judgment is set aside and the case heard on merits; that the court has wide discretion to set aside *ex parte* judgment in the interest of justice.

5. The Claimant (Respondent) filed a replying affidavit where he averred principally that the Respondent has not given compelling reason to warrant setting aside of their default judgment since the Respondent has been duly served with the pleadings. The Claimant therefore urged the court to dismiss it with costs.
6. The learned adjudicator considered the rival averments and found that the Respondent did not present sufficient reasons to warrant the setting aside of the *ex parte* judgment and proceeded to dismiss it with costs to the Claimant. This therefore precipitated this appeal.
7. The appeal has been canvassed by way of written submissions. Both parties complied.

8. The Appellant's submissions are dated 18/11/2025.
9. The Appellant raised one issue for determination namely whether the learned trial adjudicator erred in law by misapplying the principles in setting aside *ex parte* judgment.

It was submitted that it is trite law that the court has unfettered discretion to set aside *ex parte* judgments and that the discretion must be exercised judiciously in a way that ensures the ends of justice are met. Reliance was placed in the case of In **Patel Vs. E.A Cargo Handling Services Ltd (1974) EA 75** it was held as follows:

***“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 will not impose conditions on itself to fetter the wide discretion given it by the rules.*”**

Also, in **Shah v. Mbogo & Another [1967] EA 116** it was held as follows:

***“This discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident,*”**

inadvertence or excusable mistake or error but is to designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. It was submitted that the issue of service of pleadings is not disputed by the Appellant since it did receive the same and forwarded them to the insurer. However, it turned out that there was a system upgrade at the time which led to the loss of document and that further it was submitted that the Appellant needed to allow the insurer to take up the matter on their behalf pursuant to the contract of the insurance and hence the delay was not deliberate. Reliance was placed in the case of **Farmers Choice Company Limited v Dorleen Anyango Wasonga & Another (2015) eKLR**, Justice R. E. Aburili held:

“the Insurance Company has an interest in the case like the one herein, noting that it undertook the risk of compensating third parties for any loss or damage occasioned by the motor vehicle of its insured, the Appellant. The Appellant was therefore not expected to have filed an appearance or defence without first contacting the Insurance Company.”

11. As regards the issue of whether the Appellant had a defence which raised triable issues, it was submitted that indeed the Appellant's defence raised triable issues and merited to be considered for trial. Reliance was placed in the case of **Sheilesh Patel t/a Energy Co. of Africa - Vs- Kessels Engineering Works Pvt Ltd & 2 Others [2014] eKLR** where it was held that a defence need not be one which must succeed. Learned counsel pointed out that the Appellant had annexed a draft of its defence to the Application and that the Appellant had blamed the Respondent for the accident and which was a germane issue for trial. Further reliance was placed in the case of **A.K Avdulgani v Geoffrey Nzioka Ndumbu [2016] eKLR** where the court held that:

...The draft defence in my view, raised triable issues which the trial magistrate ignored. He did not examine the justice of the case for the Appellant and whether there was any triable issue to be considered and accord the Appellant an opportunity to ventilate its challenge to the claim by the Respondent, subject to being penalized in costs, of course, so that the matter could be properly reviewed on merit.

Also, in the case of **Murtaza Hassan & Another v Ahmed Slad Kulmiye [2020] eKLR** where it was held that:

.....The Appellant has specifically demonstrated in his draft defence denials to the allegations of negligence which he intends to prove at the earliest opportunity. In the event his court exercises discretion to enlarge time and admit the intended draft defence. This point is important because it resonates with principle in *Multiscope Consulting Engineers v University of Nairobi & Another (2014) eKLR* where Aburili J observed:

“This court further employs the principle that a right to a hearing and therefore fair trial is enshrined in Article 50 of the Constitution is a fundamental Human Rights and the cornerstone of the rule of Law. It also up with the right to access justice under Article 48 of the Constitution. It is the court’s duty to accord or ensure every person who has submitted to the jurisdiction of the court is accorded an opportunity to ventilate their grievances.

Also, in ***Richard Murigu Wamai v Attorney General & Another [2018] eKLR*** it was held thus;

“....However, I do appreciate that every person has a constitutional right to be heard and that parties should not be

deterred from approaching the seat of justice.....”

12. It was finally submitted that the Appellant is entitled to a fair hearing and that the parties before the trial court had mutually agreed to set aside the ex parte judgment but the trial court decline to adopt the consent which had compromised the application and therefore the Appellant deserves to be given an opportunity to ventilate his case on merits.

13. The Respondent’s submissions are dated 14/12/2025.

14. The Respondent raised two issues for determination namely; whether the judgment delivered on 29th July 2025 can be set aside and whether the appellant had a defense on merits.
15. As regards the first issue, it was submitted that the expert judgment should not be set aside because the Appellant admitted that it was duly served with the pleadings which they forwarded to their insurer and that the reason of misplacement of the documents by the insurer is not reason enough and compelling as an excuse to warrant setting aside the judgment. Reliance was placed in the case of **Mungai versus Gachuhi & another** [2005]e KLR cited with approval in the case of **Signature Tours & Travel Limited –vs- National Bank of Kenya Limited** where it was held;

"A court's decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their presentations concluded unless they elect to forego the opportunity".

It was also submitted that the Appellant herein chose to forego the opportunity to be heard by failing to enter appearance and file their pleadings in time despite being served with pleadings and summons to enter appearance and that they acknowledged service of the documents

but failed to offer any reasonable explanation for failure to enter appearance.

16. As regards the second issue, learned counsel sought reliance in provisions of Order 12 Rule 7 of the Civil Procedure Rules which provides as follows;

"Where under this order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just".

Reliance was also placed in the case of **John MukuhaMburu –versus- Charles MwengaMburu [2019]e KLR** where the court held:-

"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]KLR 463".

It was submitted that the Appellants draft statement of response attached in their application raises no triable

issues and that the same is fatally defective both in form and in substance as the same is a mere denial.

17. It was further submitted that the Respondents will be prejudiced if the judgment of 29th July 2025 is set aside, as this is a Small Claims matter that is guided by strict time lines and if the said Court would allow every person to come and set aside judgments regularly entered by Court then the same would defeat the purpose the same Court was established.
18. It was also submitted that the purported justification now given for the instant application for setting aside the said judgment is based on grounds that are insufficient to found a basis for the reliefs sought.
19. It was finally submitted that the instant application is unmerited, unjustified, and appears to be an attempt to prolong the life of this case which appears to disclose no cause of action at all, to the prejudice of the Respondent, in this unending litigation whose purpose, unless explained, appears to be meant to delay and embarrass the fair and legitimate expectations of the Claimant who continue to incur costs and remain in anxiety over the outcome of the suit after such a long time. Learned counsel urged the court to find that the trial adjudicator correctly directed his mind in arriving at the conclusion that he did, therefore this court should not

disturb the findings and the decision of the trial court and that the appeal be dismissed with costs.

20. I have considered the record of appeal and the rival submissions. I find the issue for determination is whether the appeal has merit.

21. As the matter relates to the setting aside of ex-parte judgement, it is trite law that the court has unfettered discretion to set aside such a judgment and that the discretion must be exercised judiciously in a way that ensures the ends of justice are met. In the case of In **Patel Vs. E.A Cargo Handling Services Ltd (1974) EA 75** it was held as follows:

***“There are no limits or restrictions on the judge’s discretion to set aside or vary an exparte 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 will not impose conditions on itself to fetter the wide discretion given it by the rules.*”**

Also, in **Shah v. Mbogo & Another [1967] EA 116** it was held as follows:

***“This discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident,*”**

inadvertence or excusable mistake or error but is to designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

22. As noted from the record of appeal, the Appellant had lodged an application to set aside an *ex parte* judgment. The burden lay with the Appellant to explain as to why it was able to enter appearance and file defence within the stipulated period. Indeed, the Appellant confirmed that it had received the pleadings and forwarded them to the insurer. The Appellant went on to explain that there was a system upgrade at the time which led to the loss of document and that further the Appellant needed to allow the insurer to take up the matter on their behalf pursuant to the contract of insurance and hence the delay was not deliberate. Reliance was placed in the case of **Farmers Choice Company Limited v Dorleen Anyango Wasonga & Another (2015) eKLR**, Justice R. E. Aburili held:

“...the Insurance Company has an interest in the case like the one herein, noting that it undertook the risk of compensating third parties for any loss or damage occasioned by the motor vehicle of its insured, the

Appellant. The Appellant was therefore not expected to have filed an appearance or defence without first contacting the Insurance Company.”

23. As regards the issue of whether the Appellant had a defence which raised triable issues, it is noted that the Appellant’s defence which had been annexed to the supporting affidavit raised triable issues and merited to be considered for trial. In the case of **Sheilesh Patel t/a Energy Co. of Africa - Vs- Kessels Engineering Works Pvt Ltd & 2 Others [2014] eKLR** where it was held that a defence need not be one which must succeed. Learned counsel pointed out that the Appellant had annexed a draft of its defence to the Application and that the Appellant had blamed the Respondent for the accident and which was a germane issue for trial. Further reliance was placed in the case of **A.K Avdulgani v Geoffrey Nzioka Ndumbu [2016] eKLR** where the court held that:

...The draft defence in my view, raised triable issues which the trial magistrate ignored. He did not examine the justice of the case for the Appellant and whether there was any triable issue to be considered and accord the Appellant an opportunity to ventilate its challenge to the claim by the Respondent, subject to being

penalized in costs, of course, so that the matter could be properly reviewed on merit.

Also, in the case of **Murtaza Hassan & Another v Ahmed Slad Kulmiye [2020] eKLR** it was held that:

.....The Appellant has specifically demonstrated in his draft defence denials to the allegations of negligence which he intends to prove at the earliest opportunity. In the event his court exercises discretion to enlarge time and admit the intended draft defence. This point is important because it resonates with principle in Multiscope Consulting Engineers v University of Nairobi & Another (2014) eKLR where Aburili J observed:

“This court further employs the principle that a right to a hearing and therefore fair trial is enshrined in Article 50 of the Constitution is a fundamental Human Rights and the cornerstone of the rule of Law. It also up with the right to access justice under Article 48 of the Constitution. It is the court’s duty to accord or ensure every person who has submitted to the jurisdiction of the court is accorded an opportunity to ventilate their grievances.

Also, in **Richard Murigu Wamai v Attorney General & Another [2018] eKLR** it was held thus;

“....However, I do appreciate that every person has a constitutional right to be heard and that parties should not be deterred from approaching the seat of justice.....”

24. The Appellant has claimed that it had reached a consent with the Respondent over the setting aside of the ex-parte judgement only for the trial court to reject it. I find that the Appellant was entitled to be given an opportunity to present its case for consideration by the trial court and that the parties before the trial court as the parties had mutually agreed to set aside the exparte judgment but the trial court declined to adopt the consent which had compromised the application and therefore the Appellant deserved to be given an opportunity to ventilate his case on merits.

25. An analysis of the entire record of appeal and the rival submissions, it is clear that the learned trial adjudicator appears to have misapplied the clear principles guiding the setting aside of ex-parte judgements as enunciated in the cases of Patel Vs E.A Cargo Handling services and Shah Vs Mbogo (supra). Indeed, the Appellant had given a plausible explanation for the failure to enter appearance and file defence within the stipulated period. The Appellant also

went out of its way and engaged the Respondent and secured a consent to set aside the said ex-parte judgement only for the trial court to shoot it down and decline to endorse it as an order of the court. It was erroneous on the part of the court to decline to accept the consent of the parties. Justice demanded that each of the parties ought to be given their day in court. In any event, the Respondent would not suffer great prejudice as he would be cushioned by an award of costs. Hence, the order of the learned adjudicator was made in error and must be interfered with.

26. In the result, it is my finding that the appeal has merit. The same is allowed. The ruling by the learned trial adjudicator dated 19/9/2025 is hereby set aside and substituted with an order allowing the Appellant's application dated 6/8/2025 as prayed with costs to the Respondent. Each party to bear their own costs of this appeal.

Orders accordingly.

Dated and delivered virtually at Naivasha this 24th day of March 2026.

D. KEMEI

JUDGE

In the presence of:

Oduor.....for Appellant

M/s Atieno.....for Respondent

Maurine.....Court Assistant