

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL APPEAL NO E008 OF 2026**

**FELIX KIPRONO**  
**KIPROP.....APPELLANT**

**VERSUS**

**JENIFFER CHERUIYOT KORIR.**  
**.....RESPONDENT**

***(Being an Appeal against the Ruling/Order dated 7<sup>th</sup> January 2026  
by the Hon. Rodgers Otieno, RM in Eldoret Small Claims Court Civil  
Claim No. E155 OF 2025)***

**Coram: Before Justice R. Nyakundi**  
**M/s Wambua Kigamwa & Co Advocates**  
**M/s C. D Nyamweya & Co Advocates**

**RULING**

1. What is pending before this Honourable Court for determination is a Notice of Motion Application dated 19<sup>th</sup> January 2026 premised under Order 42 rule 6(6) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act in which the Applicant is seeking the following orders:  
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  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this appeal, the Appellant be released from civil jail.
  - d. That pending the hearing and determination of this application in the first instance, the Respondent be restrained by an order of injunction from proceeding with the Execution of the default judgment in

*Eldoret Small Claims Court Civil Suit No. E155 of 2025 Jennifer Cheruiyot Korir Vs Felix Kiprono Kiprop.*

- e. *That pending the hearing and determination of this appeal, the Respondent be restrained by an order of injunction from Executing the decree in Eldoret Small Claims Court Civil Suit No. E155 of 2025 Jennifer Cheruiyot Korir Vs Felix Kiprono Kiprop.*
  - f. *That the costs of this application be provided for.*
2. The Application is based on the grounds on the face of it among others: -
- a. That the Appellant's appeal raises prima facie grounds to warrant a pronouncement by the Appellate Court.
  - b. That damages will not be an adequate remedy for the unlawful and wrongful deprivation of the right to liberty without due process of the law being complied with and in absence of a judgment on merit.
  - c. That the essence of the application and appeal will be defeated unless the Appellant is released from civil jail as he will have served the committal period which has irreversible consequences.
  - d. That the application for an injunction has been made on the basis that the order dismissing the application the subject of this appeal is a negative order.
3. The Application was supported by the annexed affidavit sworn by Felix Kiprono Kiprop, the Appellant/Applicant herein who deponed as follows: -
- a. *That I am the Appellant in this matter.*
  - b. *That I am the Respondent in Eldoret Small Claims Court Civil Suit No. E155 of 2025 Jennifer Cheruiyot Korir Vs Felix Kiprono Kiprop.*
  - c. *That on 6<sup>th</sup> December 2025, I was arrested while at Eldama Ravine and taken to Naiberi Police Station where I was held over the weekend.*
  - d. *That it is when I learnt of the existence of this claim as I had ever been served with any pleading or Court process.*

- e. *That I retained my current Advocate who filed an application to set aside the default judgement and to challenge the execution process.*
- f. *That the Respondent through her advocate filed a Replying Affidavit to the application.*
- g. *That the Application was canvassed by way of oral submissions and a ruling delivered on the 7<sup>th</sup> January 2026 dismissing the same with costs.*
- h. *That upon the dismissal, I was also committed to civil jail for 30 days.*
- i. *That I am aggrieved by the decision of the Adjudicator and I have proffered this appeal.*
- j. *That the grounds as can be discerned from the Memorandum of Appeal raise germane matters that are prima facie arguable and not frivolous.*
- k. *That the validity of the default judgement is in question and the mode execution adopted by the Respondent in executing the same is also irregular,*
- l. *That I stand to suffer irreparable harm that damages would not adequately remedy as my continued detention in civil jail is inconsistent with my right to liberty when due process of the law has not been followed.*
- m. *That this application and the essence of the appeal will be defeated unless the order to release me from civil jail is issued coupled with the injunction as by the time the appeal will have been heard and concluded the maximum prescribed period for committal to civil jail will have elapsed.*
- n. *That also my incarceration while this appeal and application is pending is improper as in the event the appeal succeeds I will have been made to suffer in civil jail while no proper basis existed in the first instance.*

- o. That no prejudice will be suffered by the Respondent in the event I am released from civil jail.*
- p. That I pray that this application be accorded urgent consideration.*
- 4. The Application was opposed vide a Replying Affidavit dated 4<sup>th</sup> day of February 2026 sworn by Jennifer Cheruiyot Korir who deponed as follows:
  - 
  - a. That the instant application is devoid of merit, frivolous, brought in bad faith based on misconceived and malicious allegations.*
  - b. That on 27<sup>th</sup> May 2025, Advocate Bornes holding brief for Advocate Cheronno for the Respondent (Appellant/Applicant herein) appeared and requested for time to enable the Appellant/Applicant to file his response to the claim.*
  - c. That despite being granted time the Appellant/Applicant failed to attend Court on the mention date which had been fixed by consent.*
  - d. Further, the Appellant/Applicant has not filed his response by the said mention date when the judgment in default of defence was entered.*
  - e. That in Eldoret Small Claims No E155 of 2025, Jennifer Cheruiyot Korir Vs Felix Kiprono Kiprop, Hon Rodgers Otieno in his ruling delivered on 7<sup>th</sup> January 2026, found that the Appellant/Applicant was duly served and was aware of the existence of the claim.*
  - f. That I am informed by my Advocates whose advice I verily believe to be true. That all proceedings before the Small Claims Court should heard and determined within sixty days from the date of filing the claim.*
  - g. That the actions of the Appellant/Applicant are malicious and solely intended to waste the Court's precious time and bar the Respondent from enjoying the fruits of the judgment.*
  - h. That the Appellant/Applicant has approached this Honourable Court with inordinate delay and unclean hands he seeks equitable remedies.*

- i. That it is on account of the above that it is the Respondent's position that the application now before the Court is devoid of merit, ill - advised, an afterthought and should therefore be dismissed with costs.*
- j. That I swear this application in strong opposition to the application now before this Honourable Court and pray that the application be dismissed with costs to the Respondent.*

5 The historical litigation in this matter can be traced to the affidavits filed by both the claimant and the Respondent in the Small Claims Court being Civil Case No E155 of 2025. The statement of the claim by one Jenifer Korir as against Felix Kiprono is dated 28.2.2025 with the following case summary: The reasons for the claim arises out of compensation for personal injury which occurred on or about 24.9.2017. The brief circumstances are that on material day the Respondent assaulted the claimant with a panga at a home in Kaptagat. Thereafter she was referred to Moi Teaching and Referral Hospital where she underwent treatment and on recovery Respondent was charged before a Court of Law with a Criminal offence. The claimant in addition later pursued a Civil Claim for an award of damages before the small claims Court in which she was awarded 600,000 general damages with costs. The Judgement debtor was later committed to Civil Jail on 9.1.2026 which read as follows:-

**TO THE OFFICER IN CHARGE**

**ELDORET**

**G. K PRISON**

**WHEREAS FELIX KIPRONO KIPROP** who has been brought before this Court this 9<sup>th</sup> Day of January 2026 under a decree that was issued by this Court on 10<sup>th</sup> day of June 2025 that you should pay the claimant sum of Kshs 688,821,92/=

**AND WHEREAS FELIX KIPRONO KIPROP** the said has neither obeyed the decree nor satisfied the Court that he is entitled to be discharged from your custody. You are hereby commanded and required to take and receive the said **FELIX KIPRONO KIPROP** into your civil prison and keep him imprisoned therein for a period of not exceeding thirty (3) days of until the said decree shall be fully satisfied or the said **FELIX KIPRONO KIPROP** shall be otherwise entitled to be released according to the terms and provisions of Section 42 of the civil procedure Act 1948, and the Court do hereby fix kshs 1800 per diem as the rate of the monthly allowance for subsistence of the said **FELIX KIPROPNO KIPROP** during this confinement under the warrant of committal.

5. This matter arises out of a proceeding in SCCC NO 155 OF 2025 in which the dispute apparently was adjudicated by the learned trial magistrate without the participation of the Applicant before this Court. His argument is to the effect that he was not aware of the existence of the civil process and subsequent Judgement debt obtained by the Respondent on the basis of the alleged injuries which were suffered and putting him at the center of the wrongdoing culminating in him being condemned to compensate the Respondent. From the record he was actually committed to civil Jail under Section 38 & 40 of the Civil Procedure Act. There is no dispute this was an ex-parte judgement which could have been subjected to the provisions of the law on ex-parte judgements. I bear in mind that the proceedings were being adjudicated before the small claims Court in which the primary statute is the small claims Act which sets the timeline of 60 days to initiate and complete the proceedings.
6. The law of service of summons or other Court instruments is now well settled. *“The object of all service is to give notice to the party on whom it is made, so that he may be aware of and may be able to resist that which is sought against him and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him,*

*everything has been done that is required See Encyclopaedia of Forms and Precedents by Lord Atkin Volume 14 Odunga's Digest on Civil Case Law and Procedure page 5750 paragraph f*

7. An ex-parte judgement as known in law is where a Defendant or Respondent having been served with a Plaintiff or summons or claim fails to file a defence within a specified period of time and Judgement in default is passed and it is entered upon him or her over the claim which is liquidated. That is why it is always referred to as an ex-parte judgement. This area of law has been extensively discussed by the superior Courts at various levels. In the case of **Departed Asians Property Custodian Board V Issa Bukenya 1994-1995 HCB 60** in this case the Court entered an ex-parte judgement and the remedies claimed in the plaint awarded. The Appellant claimed that although they did not appear to defend the case, nevertheless the plaint was not in proper order and the remedies awarded were wrong since the special and general damages awarded were not strictly proved.
8. It should be noted that in the event an ex-parte judgement has been passed he or she has a right to file for review under Section 80 of the Civil Procedure Act or Order 45 Rule 1 of the CPR before that very same Court. On the other hand, he or she can file an appeal against the decision to a high Court to seek reinstatement of the case which shall be set down for hearing on the merits. The trial Courts have absolute discretion which shall be exercised judicially in light of the facts and circumstances which led to the entry of an ex-parte judgement. *The Court in **Josphat Muthui Muli 2014 eKLR** stated that the Court's discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.* Similarly in **James Kanyita Nderitu v Maries Philotas Chika & Another** (2016)

eKLR the Court stated that: “ 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 judgement 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 judgement, and will take into account such as the reason for the failure to the defendant to file his memorandum of appearance or defence<sup>3</sup>. As the case may be the length of time that has elapsed since the default judgment was entered, whether the entered defence raises triable issues, the respective prejudice such party is likely to suffer

The Court the stated regarding an irregular judgement that: Judgement will have been entered against a defendant who has not been served or properly served with summons to enter appearance. 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 judgement is irregular, it can set aside the default judgement on its own motion. In addition, the Court will not venture into a consideration of whether the intended defence raises triable issues. Or whether there has been inordinate delay in apply to set aside the irregular judgement. The reason why such judgement 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 decisions is taken against a person is fundamental and permeates our entire justice system

9. Let us assume for a moment that the Applicant was duly served with the Court process but declined to enter appearance or defence. Does he

have a remedy in law? The answer is in the affirmative both within the constitutional imperatives in Article 50 on fair trial rights, Article 10 on National Values and Principles of Governance, Article 27 on equality before the law and non-discrimination and Article 48 on Access to Justice. The general burden of the Courts system is to exercise great judicial powers with that wide domain to ensure the ends of justice are met. Therefore, indeed this primary duty of Courts which is to the Constitution and the law ought to be applied impartially and without fear, favor, or prejudice. It is to be noted from the interpretation of Article 259 of the Constitution that every provision of a statute should be tested within the parameters of constitutionalism.

10. This is what the Court stated in **Dalip Sing Karam v Anderji Nathwani (1949) LRK 49 (a)** *Every judicial or quasi-judicial tribunal must apply the fundamental principles of natural justice and natural justice will not allow a person to be jeopardized in his person or pocket without giving him an opportunity of appearing and putting forward in his case. (b) Subject to the requirements of natural justice tribunals should not be unduly fettered in the manner and method by which they give considerations to the problems brought before them.* In the same vein the Court in *Savings & Loan Kenya Limited v H Odongo and Others* 1987 KLR 294 the learned Judges made the following observations:
- (a) *Where a Court has been moved to hear the parties, the judge is duty bound to hear the Applicants and the Respondents in reply and the failure to hear a party is an error which goes to the moot of the matter and is fatal.*
- (b) *The very foundation upon which our judicial system rests is that a party who comes to Court shall be heard fairly and fully a judge who does not hear a party before him or the party's advocate offends that fundamental principles and it then becomes the duty of the (appellate)*

*Court to tell him so as people come to Court as the last resort and judges are employed to hear them and determine their cases.*

*(c) It is a fundamental principle of justice that parties who appear in Court should be heard and determination of their grievances given so that if there be a right of appeal then the aggrieved party can appeal and the grounds of appeal should attack what is in the record.*

*(d) The principles of natural justice should always be dispensed by the Court, that is both parties must be heard on the applications before a final decision failing which there is a miscarriage of justice as it is wrong for the judge to impose an order on the parties and such order cannot be allowed to stand.*

11. There is no dispute that the Judgement of Kshs 688, 821 92 against the Applicant was obtained ex-parte and therefore its validity and legality is in question given the mandatory due process clauses in Article 50 of the Constitution implicit on adducing evidence to challenge the claim or allegations by the Plaintiff, Applicant. Claimant, or petitioner. What the trial Court did is to adopt exparte judgement as truth indeed capable of being impeached by the Applicant in this matter. As if that is not enough the Applicant was never given a chance even to seek legal representation to facilitate in unlocking the issues at stake between him and the Respondent. The fundamental point is that the learned trial magistrate fettered its discretion and moved to execution and enforcement of the judgement debt without giving the Applicant a hearing. The door for the Applicant to raise any issues of significance was closed by the very umpire duly exercising the powers provided for under Article 50 (1) of the constitution. The Applicant suffered prejudice and injustice for that one stroke of the pen.

12. The right to a fair trial is also protected under Article 6 of the European convention for the protection of the Human Rights and fundamental Freedoms. It is also clear from Article 8 of the American Convention of

Human Rights and Article 7 of the African Charter of Human and People's rights and further it is recognized under the 1948 Universal Declaration of Human Rights and its codification in the fundamental covenant in the civil and political rights. This right to a fair trial in our constitutional dispensation 2010 cannot be derogated from by any Court or tribunal duly constituted as a competent forum to adjudicate disputes under Article 50 (1) of the same constitution. These instruments cited above form part of the International Law applicable in Kenya in terms of Article 2 (5) & 6 of the constitution. This therefore entrenches the right to a fair trial as the foundation to the Rule of law as it seeks to check arbitrary and unaccountable power which should not be the case for the Judges and Magistrates or Chairman of Tribunals in adherence to the oath of office.

13. In conceptualizing the record and operationalization of the right to a fair trial during the hearing in which the Applicant was committed to Civil Jail and in asking on the what and the how before adoption of the order there were many issues which fully remained unaddressed even in consonant with Section 38 & 40 of the Civil Procedure Rules. The foundation of the right to a fair trial was also infringed by just relying on the basic instrument of an affidavit of service. It should be noted that the right of a fair trial is a body of safeguards in the universal scheme for the protection of human rights that can easily be identified as entitling a trial conducted in the open and fairly, adjudication of the dispute by an independent and impartial tribunal or Court, procedural fairness in the proceedings, the inquiry on the need for legal representation, an opportunity for disclosures on material evidence to relied upon by the Plaintiff, Applicant, Petitioner, Applicant or Claimant which in that context must also be challenged by the adverse party.
14. It is in this context that one cannot find prima-facie evidence that the Applicant was given an opportunity to challenge the exparte judgment which had been issued by the trial Court with a colossal sum of Kshs 688,

821.92 under the limb of general damages in favour of the Respondent. All persons are equal before the law as stipulated in Article 27 of the constitution. There could have been no prejudice to the Respondent and any such substantial loss would have been compensated by way of costs incurred in the original litigation and the re-trial involving the two parties. In the call of duties of Judges, Magistrates and Tribunals, or other administrative bodies, justice must be administered in a way that achieves fairness for all regardless of the class defined in Article 27 (4) of the Constitution or the nature of the proceedings itself. It is from the lens of the Public that also have the measure of appreciating and in their review score can precisely state that the process of the Court was fair and certain. This is through a set of minimum of coherent standards applicable across a range of different legal mechanisms at various Courts and quasi-Judicial Forums so as to enable the parties have their day in Court.

15. Given this background of information and the legal principles, this trial was not associated with justice and Human Rights Safeguards underpinned in our Constitution and statute law. Protecting the right to a fair trial is not just about ensuring that the processes leading up to the decision during the pendency of the proceedings there is protection of the fundamental rights of every individual appearing before that forum of adjudication. It is also about ensuring that our legal system and the societies we live in can give a score card that the process was fair, equal and just. In my considered view the order to committal to civil jail the Applicant under Section 38 & 40 of the Civil Procedure Act, that the learned trial Magistrate had not ripened. This is more so that the decree arose from an *exparte* Judgement. It is with this in mind I make a finding that the previous proceedings ought to be set aside and a re-trial be ordered which will involve the Applicant being given an opportunity to file his defence against the statement of claim by the Respondent. This order

on re-trial shall proceed before another learned trial Magistrate other than the one whose impugned ruling has been reviewed, varied and set aside within the parameters of the statute and the provisions of Article 10, 24, 27, 48, and 50 of the Constitution. I make no orders as to costs.

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 2<sup>ND</sup> DAY  
OF APRIL 2026.**

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**R. NYAKUNDI**

**JUDGE**