

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL APPLICATION NO. E008 OF 2025**

**MAUREEN BONARERI NYABUTO .....**  
**APPLICANT**

**=VERSUS=**

**ERICKSON GWARO MATUNDURA .....**  
**RESPONDENT**

***(Being an Appeal from the Ruling delivered on the 25<sup>th</sup> day of July  
2025 at the Small Claims Court at Eldoret, SCCOMM No. E907 of  
2025)***

**Coram: Before Justice R. Nyakundi  
Ms Wangari Wanjiru Advocate  
Mr. Mwaka Advocate**

**JUDGMENT**

- 1.** This appeal originates from the Ruling of the Small Claims Court in Civil Suit No. E907 of 2025 in which the Appellant approached the Court vide an application dated 25<sup>th</sup> May 2025 premised on the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 22 Rule 22 and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
- 2.** The gist of that ruling was that the default judgment which was entered against the Respondent and who was unrepresented be varied and set aside so that she can have her day in Court. The learned Magistrate considered the notice of motion and ruled as follows:

*“The Applicant seeking for a remedy for their indolence is bad in law and an afterthought, since the Court rightfully exercised its discretion in issuing judgment in default of filing a defence. The upshot of the foregoing is that the Applicant’s application is dismissed with costs to the Respondents.”*

**3.** It is from this decision the Appellant is aggrieved and sought leave of this Court to entertain an appeal based on the following memorandum of appeal premised on the following grounds:

*(a) That the learned Adjudicator erred in law when she failed to direct her mind properly on all the principles governing established on setting aside judgment entered in default of appearance.*

*(b) That the learned Adjudicator erred in law when she failed to direct her mind to the central legal principle for setting aside judgment entered in default of appearance, which is that there is defence attached to the Appellant's Application.*

*(c) That the learned Adjudicator erred in law by failing to properly analyze, contextualize and appreciate the legal arguments advanced by the Appellant with regards to the legal principles for setting aside a judgment entered in default of appearance.*

*(d) That the learned Adjudicator erred in law by failing to be guided by the spirit and provisions of Article 159(2)(d); sections 1A, 1B &3A of the Civil Procedure Act, and section 3 of the Small Claims Court Act.*

*(e) That the learned Adjudicator erred in law by failing to be guided by Article 50 of the Constitution of Kenya; the principles of Natural Justice and the Overriding Objectives, while respectfully attempting to ensure justice is administered expeditiously failed to direct her mind on other legal principles and consequently resulted in a denial of the Appellant's right to be heard.*

*(f) That the Learned Adjudicator erred in law when she failed to rule on whether or not the Appellant met the legal threshold for setting aside a judgment entered in default of appearance yet proceeded to dismiss the Application without giving sufficient reasons for her Ruling.*

*(g) That the Learned Adjudicator erred in law when she arrived at her decision; while there were varying judicial options less harsh in the circumstances.*

**4.** Reasons whereof the Appellant prays for judgment:

*(a) That the Ruling of Hon. T. W. Mbugua delivered on 25<sup>th</sup> July 2025 in SCCCOMM No. E907 of 2025 Erickson Gwaro Matundura V Maureen Bonareri Nyabuto and all consequential orders thereon be set aside.*

- (b) *That the Judgment in default entered in SCCCOMM No. E907 of 2025 Ericks Ongwaro Matundura V Maureen Bonareri Nyabuto be set aside and the decree arising therefrom be quashed/set aside.*
- (c) *That the Appellant be granted leave to file her Response to Statement of Claim out of time in SCCCOMM No. E907 of 2025 Erickson Gwaro Matundura V Maureen Bonareri Nyabuto.*
- (d) *That SCCCOMM No. E907 of 2025 Erickson Gwaro Matundura V Maureen Bonareri Nyabuto be heard and determined by an Adjudicator other than Hon. T. W. Mbugua.*
- (e) *That the Respondent bears the costs of this Appeal.*

5. This Court gave directions that the appeal shall be canvassed by way of written submissions of both parties which are herein summarized as follows:

### **Appellant's Submissions**

- (a) The Appellant was represented by learned Counsel Wangari Wanjiru and in her written submissions dated 12<sup>th</sup> September 2025 she urged the Court to bear in mind the following constitutional and legal imperatives which go to the root of this appeal; Thus:
- i. *The Constitution guarantees the right to be heard and this right has through statute and judicial precedence been interpreted to extend to excusing inactions of a defendant who judgment in default of appearance has been entered against;*
  - ii. *It is in the wider interest of justice to have a dispute resolved on merit;*
  - iii. *Consequently, the major consideration on whether to set aside an ex-pare judgment is the draft defence attached to the Application to set aside;*
  - iv. *Where the Applicant has a prima facie defence that should go to trial, the court should exercise its discretion and prevent the defendant being condemned unheard;*
  - v. *The Honorable Adjudicator in dismissing the Appellant's Application however failed entirely to appreciate the constitutional, statutory and binding judicial precedence principles governing such an application;*

vi. *The Honorable Adjudicator further failed to address the legal arguments raised by the Appellant in her pleadings and submissions given that the principles applicable to such an application addressed in the Appellant's pleadings were entirely not considered in the Ruling, nor a reason given why the court chose to disregard them.*

6. The Learned Counsel for the Appellant submitted and argued that the Adjudicator erred in law by failing to consider the principles governing setting aside an ex-parte judgment. It is for these reasons the Appellant Counsel invited the Court in her submissions that Section 38 of the Small Claims Court gives her locus standi to approach this Court premised as follows:

**38. Appeals**

*"1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.*

*2. An appeal from any decision or order referred to in subsection (1) shall be final."*

7. It was further learned Counsel's view that this Court is clothed with jurisdiction under Order 10 of the Civil Procedure Rules which stipulates as follows:

**11. Setting aside judgment [Order 10, Rule 11]**

*Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.*

8. In this appeal, learned Counsel for the Appellant further submitted that this Court places reliance on the following authorities which basically set out the yardstick of the unfettered discretion to review the impugned decision so that the Appellant can be given an opportunity to be heard in so far as the subject matter is concerned. Thus in: *Patel vs East Africa Cargo Handling Services Ltd [1971]*, *Shah v Mbogo & Another [1976] EA*, *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR*, *Patel v E.A. Cargo Handling Services Ltd. [1975] EA 75*, *Chemwolo & Another v Kubende [1986] KLR 492*, *CMC Holdings v Nzioki [2004] 1 KLR 173* and *Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR*.

- 9.** From the strength of the arguments and the principles elucidated in the above case law that learned Counsel strongly submitted that the impugned decision ought to be reviewed and set aside as of right.
- 10.** The above submissions have been contradistinguished by learned Counsel Mr. Mwaka for the Respondent who in the first instance urged the Court to strike out the application dated 31<sup>st</sup> July 2025 for want of merit. Learned Counsel similarly delved into the second issue as whether the appeal should be varied or set aside. He was of the view that the law as it is does not support the arguments by the Appellant starting with Order 36 Rule 1 & 2 of the Civil Procedure Rules. In the view of the Learned Counsel the Appellant appeared virtually before the Adjudicator but failed and/or refused to file a statement of claim. That is how a final judgment was issued by the Court. Learned Counsel further contended that varying the judgment or allowing the appeal will be tantamount to depriving the Respondent of his constitutional rights under Articles 25(c) and 50(1) of the Constitution. In Learned Counsel's view, there are no bonafide triable issues to subject the cause of action for a retrial between both parties. In essence learned Counsel argued and submitted that there is no varied appeal on the justiciable issues raised before the Adjudicator. He placed reliance on the following cases to agitate for the dismissal of the appeal: *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd and Michael Rono [2015] eKLR, Ali Abdi Mohammed v Kenya Shell and Company Limited (2017) eKLR, Timoney and King v King 1920 AD 133 at 141 & County Government of Migori v Hope Self Help Group (2020) eKLR.*
- 11.** In a nutshell, learned Counsel submitted that the Respondent proved his case as required by law and it was the Appellant/Respondent at the trial Court who breached the said contract occasioning substantial loss as appreciated from the decision of the Adjudicator.
- 12.** The memorandum of appeal, both Counsels' submissions and the trial Court record forms the bedrock of this appeal. The predominant question is whether the Appellant was given an opportunity to challenge the statement of claim by the Respondent. What comes out clear from the record is that the response to the statement of claim seems to have been filed after the fact of the ex-parte judgment and a decree of Ksh 407,000/= with costs.

## **Decision**

- 13.** The Courts and Tribunals are established to adjudicate cases within the constitutional framework under Article 50 (1) as further premised on the fair trial rights. In the decision-making process Judges and Magistrates or Chairman of Tribunals are bound by Article 10 of the same Constitution. The additional guidance to this appeal is how the Court approached the legitimate expectation of the Appellant who though belatedly filed a response to the statement of claim which could have been subjected to the provisions of Article 50(2)(c) and (k) which expressly states as follows in *pari materia* that she had the right to have adequate time and facilities to prepare her defence. In addition, the Appellant had a right to choose and be given an opportunity to retain an Advocate of her own choice. It is through fulfilment of this condition precedent and on advisory by his legal Counsel she should have been allowed to adduce and challenge evidence on this romantic gratuitous loan agreement.
- 14.** In all legitimate expectation cases whether substantive or procedural, three practical questions arise. *The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do. This formulation of the questions is we think a more helpful way of approaching the problems in this type of case than the fivefold question adopted during argument*". (See **R. (on the application of Bibi) v Newham LBC (No. 10 [2001] EWCA Civ 607)**).
- 15.** The Constitution of Kenya is a product or expression of the spirit of the people and it is necessary to interpret and construe the circumstances and the spiritual background that took many years including bloodshed in the streets for the citizens could not be patient any longer for the promulgation of a new Constitution. This is what led to the drafting of the document at Bomas and thereafter by the Committee of Experts and in 2010 the Supreme Law of the land was born. It remains the lifeline and the soul of this nation. The core ideal of the rule of the law is that in the administration of justice Courts must be able to point to some basis for the actions that is regarded as valid and relevant in our legal system.
- 16.** Put at its simplest form Article 50 of the Constitution on fair trial rights cannot be derogated from so that that right can be limited within the provisions of Article 24 of the same Constitution. The limitation test in

our Constitution requires a law that restricts a fundamental right to do so for reasons that are acceptable to an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose.

**17.** The law is now settled on applications to set aside an ex-parte judgment. *The Court exercises its discretion in allowing or rejecting the same. That discretion must be Judiciously. On appeal from that decision, the appellate Court would not interfere with the exercise of the same discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. See Mugunga General Stores vs Pepco Distributors [1987] 2 KAR 89. It is a matter of law as to under what circumstances a Court should exercise its discretion and what was the intention of the law in giving the Court such discretionary powers.*

*In law the discretion that a court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial Magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex-parte and hence it would appear was true and not if true, the effect of the same on the ex-parte judgment was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned Magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what might have well amounted to an excusable mistake visited upon the appellant by its advocate.*

**18.** *The second disturbing matter which arises from the decision of the learned Magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial Magistrate does not appear to have considered whether or not the*

*defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. See Tree Shade Motors Limited v D T Dobie & Company (K) Limited & Joseph Rading Wasambo, Civil Appeal Number 38 of 1998; Patel Handling Services Ltd. [1974] EA 75. (See Odunga's Digest on Civil Case Law and Procedure Pg 7099-7100).*

**19.** In the determination of civil rights and obligations under our adversarial system, everyone is entitled to have his or her day in court. It must be acknowledged that although ignorance of the law is no defence to be raised by a litigant but many of our citizens are of low legal literacy levels on how courts work both procedurally and substantively. The right to a fair trial in civil cases in Kenya is a fundamental aspect of the rule of law primarily derived from the principles of natural justice and constitutional guarantees even though the explicit mention of fair trial under Article 50 of the Constitution is more commonly associated with criminal proceedings. In civil matters like in the instant appeal this right ensures that disputes between private parties or between a citizen and the State are resolved impartially, within a reasonable time and in a transparent manner.

**20.** This impugned ruling by the trial court is also impeachable under the doctrine of equality of arms in civil cases. This doctrine requires that each party is given a reasonable opportunity to present his or her case including evidence under conditions that do not place him or her at a substantial advantage against his or her opponent. It is a fundamental principle of a fair trial.

**21.** In the instant appeal, the learned Adjudicator in her ruling ordained herself as follows:

*The Court has had an opportunity to peruse the respective parties' submissions and finds that the service of process was valid and remained uncontroverted and the current status of the matter is solely because of the Applicant's indolence in filing its response to*

*the statement of claim precipitating the subsequent consequences stipulated under the law. The fundamental conclusion is that there has been no excusable mistake and/or compelling reason that has been presented before this Court to warrant the orders prayed for in the Application. The maxim of equity states that, equity aids the vigilant and not the indolent. The Applicant seeking for a remedy for their indolence is bad in law and an afterthought, since the Court rightfully exercised its discretion in issuing judgment in default of filing a defence. The upshot of the foregoing is that Applicant's application is dismissed with costs to the Respondents.*

**22.** These reasons when weighed with Articles 10 on National Values and Principles of Governance, 27 on equality before the law and non-discrimination, 48 on Access to Justice and 50 on fair trial rights there was inflexibility on the part of the trial Court rendering the decision to be a violation of the constitutional rights protected and guaranteed in favor of the Appellant.

**23.** The approach on the common law duty to give reasons identified the following factors influencing the test of fairness with the broader rule of law requirement for transparency and accountability by the Judges, Magistrates and Chairman of Tribunals when considering such weighty matters on protection and guarantees within the right to a fair hearing. The persuasive decision in **R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242** emphasized the following factors to be the guiding yardstick as essential elements of good administration of justice:

- *The nature of the decision and its impact on the individual.*
- *Whether reasons are necessary to enable effective exercise of rights of appeal.*
- *The statutory context and scheme*
- *The legitimate expectation of the parties.*
- *Whether the decision appears aberrant or controversial.*

**24.** In this matter the trial court had wide discretion to set aside the *ex parte* judgment. It is clear from the record that there was a defence as at the time when the parties appeared before that court however belatedly filed by the Applicant/Appellant. The same ought to have been considered and a decision made on the merits. Therefore, certain matters

in the defence to the statement to claim were never considered at all and hence a decision could be made without the input of the Appellant. I am further inspired in this appeal the decision in **Philip Chemwolo and Another v Augustine Kubende [1986] KLR 492; (1982-88) KAR 1036** in which the Court held that:

*Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud of intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.*

**25.** For avoidance of doubt the learned Adjudicator misdirected herself in the ruling delivered on 25<sup>th</sup> July 2025 and as a result arrived at a wrong decision occasioning a miscarriage of justice on the part of the Appellant. As such, the exparte judgment and subsequent decree is therefore null and void for it to be set aside to give an opportunity to the Appellant to canvass her response to the statement of claim by the Claimant. In this respect this order shall be served to the Chief Magistrate Eldoret Law Courts to allocate the case for a retrial before another learned Adjudicator than the one who handled the case which has been the subject of this appeal. I make no orders as to costs of this appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 13<sup>TH</sup> DAY OF APRIL  
2026.**

.....

**R. NYAKUNDI**

**JUDGE**