

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELCA NO. E006 OF 2024

KENYA FOREST SERVICE.....
APPELLANT

VERSUS

ESTHER RUTO.....
.....RESPONDENT

(Being an appeal arising from the ruling of Hon. Japhet Bii delivered on 25th April, 2024 in Kericho CM ELC Case No. 028 of 2021)

JUDGEMENT.

INTRODUCTION.

1. By an Amended Memorandum of Appeal dated 27th June, 2025 the Appellant challenges the decision of **Hon. Japhet Bii** in Kericho CM ELC Case No. 028 of 2021.

FACTUAL BACKGROUND.

2. In the subordinate Court, the Respondent filed a suit vide a Plaint dated 5th May, 2021. The suit was instituted against

the Appellant who was the 1st Defendant and one **Joel Koech** who was the 2nd Defendant. The Respondent sought the following orders;

a. A declaration that the Plaintiff is the legal proprietor of land parcel LR No. Kericho/Kipkelion/Chepseon Block 11 (Sitian) 17.

b. A declaration that the intended eviction from all that parcel of land known as LR No. Kericho/Kipkelion/Chepseon Block 11(Sitian) 17, is illegal.

c. A declaration that the 1st Defendant, their servants and/or agents or otherwise howsoever be restrained from interfering howsoever with the Plaintiff's quiet enjoyment, use, possession and occupation of the suit property. (sic)

d. A permanent injunction restraining the 1st Defendant from forthwith ever initiating any further evictions on the parcel of land known as LR No. Kericho/Kipkelion/Chepseon Block 11 (Sitian) 17.

e. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit.

f. Any such other or further relief as this Honourable Court may deem appropriate.

3. On 22nd March, 2023 the Court delivered a ruling and issued following orders;

a. That the Plaintiff is the legal proprietor of land parcel LR No. Kericho/Kipkelion/Chepseon Block 11 (Sitian) 17.

b. That the intended eviction from all that parcel of land known as LR No. Kericho/Kipkelion/Chepseon Block 11 (Sitian) 17 is illegal.

c. That a permanent injunction restraining the 1st Defendant from forthwith ever initiating any further evictions on the parcel of land known as LR No. Kericho/Kipkelion/Chepseon Block 11 (Sitian) 17 is hereby issued.

d. That the cost of this suit together with interest thereon at such rate and for such period of time is hereby issued to the Plaintiff.

4. After delivery of the said ruling, the Appellant filed an application dated 14th May, 2023 and sought the following prayers;

a. That this Honourable Court be pleased to certify this matter urgent and fit to be heard ex parte in the first instance.

b. That there be stay of execution of the ruling issued by the Honorable Principal Magistrate B.R Kipyegon (PM) on the 22nd March, 2023 herein and all consequential orders emanating therefrom pending the hearing and determination of this application.

c. That the Honourable Court be pleased to set aside the ex parte proceedings in the suit as well as the ruling issued on 22nd March, 2023 and all consequential orders emanating there from.

- d. That the Defendant/Applicant be granted leave to file defence and to defend this suit unconditionally. (sic)***
- e. That the costs of this application be provided for.***

5. In response to the said application, the Respondent filed a Replying Affidavit sworn on 20th June, 2023.
6. The Learned Trial Magistrate delivered a ruling on the said application on 25th April, 2024 which ruling had the effect of dismissing it.
7. The Appellant being aggrieved by the said ruling approached this Court by way of Appeal.
8. The appeal was admitted for hearing on 11th July, 2025 and the Court issued directions that it be heard by way of written submissions.

9. The appeal was mentioned severally to confirm filing of submissions and on 2nd December, 2025 it was reserved for judgement.

THE APPEAL.

10. The grounds of appeal are as follows;

1. That the Honourable Learned Trial Magistrate erred in law and in fact by not taking cognizance of the fact that the Appellant was never served with summons to enter appearance as required by law.

3. That the Learned Magistrate erred in law and fact by failing to take cognizance of the fact that the Court did not dispose off the Amended Notice of Motion application dated 25th May, 2021 which the Appellant had substantively responded to before proceedings with the main suit or issue directions. This denied the Appellant the opportunity to

point out the inadequacy of the Respondent's claim.

4. That the Learned Magistrate erred in law and fact by failing to consider that a ruling was delivered instead of a judgment granting the Respondent all the prayers in the Plaint without the knowledge of the Appellant who was desirous of defending the matter.

4A. That the Learned Magistrate erred in law and fact by failing to consider that the Appellant had entered appearance on 25th June, 2021 and provided the address for service but service was never effected through the provided email address.

4B. That the Learned Magistrate erred in law and fact by failing to consider that the ex parte hearing proceeded without the Appellant being issued with hearing notice.

7. That the Learned Magistrate erred in law and fact by failing to take into consideration that pre-trial conference (sic) was not conducted before the suit was certified for hearing as required under Order 11 of the Civil Procedure Rules.

8. That the Learned Magistrate erred in law and in fact by failing to take cognizance that the Appellants filed a merited defence a draft defence (sic) with triable issues seeking to safe guard a gazetted forest land being part of South Wester (sic) Mau Forest.

9. That the Learned Magistrate erred in law and fact by failing to take cognizance of the injustice and prejudice likely to be suffered by the Appellant in the instance it is denied the right to be heard.

10. That the Learned Magistrate erred in law and in fact by failing to analyze

the evidence and submissions rendered by the Appellant herein.

11. The Appellant prays for orders that;

a. That the appeal be allowed with costs.

b. That the Honourable Court does set aside the ruling of the Senior Resident Magistrate Court at Kericho ELC E028 of 2021 the ex parte proceedings and all consequential orders.

c. That this Honourable Court do make such further orders as may be just and expedient.

ISSUES FOR DETERMINATION.

12. The Appellant filed submissions on 5th September, 2025 while the Respondent filed submissions on 17th November, 2025.

The Appellant's Submissions.

- 13.** The Appellant submits that the Respondent commenced proceedings in Kericho CM ELC Case No. E028 of 2021 vide a Plaint dated 5th May, 2021.
- 14.** The Appellant also submits that the Respondent contended that her deceased husband one **Jeremiah Kipkirui Ruto** was the owner of land parcel No. **Kericho/Kipkelion/Chepsoen Block 11 (Sitian) 17.**
- 15.** The Appellant further submits that the Respondent contended that on 9th February, 2021, she was issued with a notice to vacate the suit parcel of land on the ground that the land belonged to the Appellant.
- 16.** It is the Appellant's submissions that the matter proceeded *ex parte* and the Court made a final determination in the ruling delivered on 22nd March, 2023.

17. It is also the Appellant's submissions that it filed an application dated 10th May, 2023 seeking to set aside the said ruling.

18. It is further the Appellant's submissions that the Learned Trial Magistrate delivered a ruling on 25th April, 2024 where he dismissed the Appellant's application.

19. The Appellant then submits on the following issues;

a. Whether the trial Court erred when it failed to consider that the Appellant was never served with Summons to enter appearance as required by law.

b. Whether the trial Court erred when it failed to consider that the Appellant was not properly served with a hearing notice.

c. Whether the trial Court erred when it failed to consider that a pre-trial conference was not conducted as

required under Order 11 of the Civil Procedure Rules.

d. Whether the trial Court erred when it failed to consider that the Court never disposed of the Amended Notice of Motion application dated 25th May, 2021.

e. Whether the trial Court erred when it failed to consider that the Court issued final orders vide a ruling instead of a judgement, without hearing the Appellant's case.

f. Whether the trial Court erred when it failed to consider that the Appellant filed a meritorious defence in response to the suit.

g. Who shall bear the costs of the suit.

20. On the first issue, the Appellant relies on the judicial decision of **James Kanyiita Nderitu & another versus Marlos Philotas Ghikas & another [2016] KECA 470 (KLR)** and submits that it is trite law that a judgement that has been

entered against a party who was not served with summons to enter appearance should be set aside as a matter of right.

21. The Appellant relies on the judicial decision of **Lee Mwathi Kimani vs National Social Security Fund & another [2014]**

eKLR and submits that the Respondent did not produce any affidavit of service that showed that it was served with Summons to enter appearance.

22. It is the Appellant's submissions that the Learned Trial Magistrate erred in failing to set aside the ruling delivered on 22nd March, 2023 as a matter of right as the Respondent failed to serve summons to enter appearance.

23. On the second issue, the Appellant relies on **Article 50** of the Constitution of Kenya, the judicial decision of **Attorney General vs Small Wonder Ltd [2015] KECA 122 (KLR)** and submits that it was not served with the hearing notice.

- 24.** The Appellant also submits that it entered appearance on 21st June, 2021 and provided its email address which is cl.kisumu@ag.go.ke.
- 25.** The Appellant further submits that the Respondent however served the hearing notice through the email info@ag.go.ke which email was not provided by it.
- 26.** It is the Appellant's submissions that it was not properly served with the hearing notice as required by law and the Learned Magistrate erred in not setting aside the said ruling.
- 27.** On the third issue, the Appellant submits that the trial Court proceeded to hear and determine the suit without conducting a pre-trial conference.
- 28.** The Respondent relies on **Order 11** of the **Civil Procedure Rules**, the judicial decisions of **Stephen Omondi Juma vs Sprocer Awuor Rabote [2022] KEHC 785 (KLR)**,

Mansukhalal Jesang Maru vs Frank Wafula [2021]

eKLR and submits that a perusal of the proceedings before the trial Court shows that the matter proceeded for hearing without a pre-trial conference.

- 29.** It is the Appellant's submissions that the Respondent never served it with the framed issues and the Learned Trial Magistrate ought to on that basis set aside the said ruling.
- 30.** On the fourth issue, the Appellant submits that the Trial Court proceeded to hear and determine the suit without first disposing off the Respondent's Amended Notice of Motion application dated 25th May, 2021 that was pending.
- 31.** The Appellant relies on **Order 40 Rule 5** of the Civil Procedure Rules and submits that the suit was heard prematurely and it was denied the opportunity to canvass the issues raised in the said application.

- 32.** On the fifth issue, the Appellant submits that the trial Court erred in issuing the prayers sought in the Plaint in a ruling instead of a judgement.
- 33.** The Appellant relies on **Sections 25 & 99** of the **Civil Procedure Act, Order 21 Rule 1** of the **Civil Procedure Rules**, the judicial decision of **Joshua Akeyo Ogendo vs David Rawland Matended & another [2017] KEELC 1556 (KLR)** and submits that it is trite law that a suit can only be dispensed with vide a judgement.
- 34.** On the sixth issue, the Appellant submits that it attached to its affidavit in support of the application filed before the trial Court, a draft Statement of Defence that raised triable issues.
- 35.** The Appellant also submits that it raised issues that sought to safeguard the suit property which forms part of the South Western Mau Forest that was gazetted as a forest reserve

vide Legal Notice No. 174 of 1964 and proclamation No. 44 of 1932.

- 36.** The Appellant further submits that it contended in its Statement of Defence that the Respondent acquired the suit parcel of land illegally.
- 37.** It is the Appellant's submissions that the Learned Trial Magistrate erred in dismissing the said application as it failed to consider the issues that had been raised in its draft defence.
- 38.** It is also the Appellant's submissions that it is trite law that no one can claim title to forest land. The Appellant relies on the judicial decision of **Clement Kipchirchir & 38 Others vs Principal Secretary Ministry of Lands Housing and Urban Development & 3 Others [2015] KEELC 692 (KLR)** in support of its submissions.

39. The Appellant relies on the judicial decision of **Jasbir Singh Rai & 3 others vs Tarlochan Sign Rai & \$ Others [2014] eKLR** and urges the Court to allow its appeal with costs.

The Respondent's Submissions.

40. The Respondent submits on the following issues;

a. Whether the appeal is merited.

b. Who should bear the costs of the appeal.

41. On the first issue, the Respondent relies on the judicial decision of **Shah vs Mbogo & anor [1967] EA 116** and submits that the Appellant was served with the pleadings and the Summons to enter appearance.

42. The Respondent also submits that the Appellant entered appearance and the Memorandum of Appearance is at page 27 of the Record of Appeal.

- 43.** The Respondent further submits that it would be a travesty of justice if the Court sets aside an *ex parte* judgement on the ground that Summons were not officially issued and yet the Appellant actively participated in the proceedings.
- 44.** It is the Respondent's submissions that it was only after the Attorney General opened an office in Kericho that the Forest conservator developed interest in the suit land and yet the title was issued on 19th July, 1999.
- 45.** The Respondent relies on **Order 5 Rule 2 (7)** of the Civil Procedure Rules, the judicial decision of **Paulina Wanza Maingi vs Diamond Trust Bank Limited & another [2015] KEHC 548 (KLR)** and reiterates that the Appellant entered appearance and participated in the proceedings.
- 46.** It is the Respondent's submissions that even though the Appellant entered appearance, it failed to file a Statement of

Defence and also failed to participate in the hearing of the suit.

47. It is further the Respondent's submissions that the issue of failure to serve Summons to enter appearance is an afterthought and an attempt to cover up the failure to file a Statement of Defence.

48. The Respondent submits that the Appellant was served with a hearing notice through the registered email from the Attorney General's website.

49. The Respondent also submits that the said email is info@ag.go.ke.

50. The Respondent further submits that the Appellant has raised a new issue in its Amended Memorandum of Appeal.

51. It is the Respondent's submissions that before the trial Court, the Appellant did not attach the Memorandum of

Appearance filed and neither did it bring to the attention of the Court that the email address that was to be used to effect service was cl.kisumu@ag.go.ke.

- 52.** It is also the Respondent's submissions that the Court should therefore not consider this aspect of the Appellant's submissions as it was not brought to the attention of the Learned Trial Magistrate.
- 53.** It is further the Respondent's submissions that the Appellant's counsel was aware of the present proceedings and yet they failed to appear in Court on 23rd September, 2021, 13th October, 2021, 19th January, 2022, 9th March, 2022, 18th May, 2022, 10th August, 2022 and 5th December, 2022.
- 54.** The Respondent submits that the Appellant has faulted the trial Court for making a final determination of the main suit without first dispensing with the amended application dated 25th May, 2021.

- 55.** The Respondent also submits that the said application does not form part of the present appeal.
- 56.** The Respondent further submits that the said amended application might have been dispensed with as she did not seek for an injunction pending the hearing and determination of the suit.
- 57.** It is the Respondent's submissions that the Appellant was indolent as it failed to participate in the hearing of the suit before the trial Court.
- 58.** It is also the Respondent's submissions that when the matter came up for hearing, the Appellant were present in Court but they failed to inform Counsel to attend Court.
- 59.** It is further the Respondent's submissions that the Court was informed that service was effected and after the trial Court

was convinced that **Order 12 Rule 12** of the **Civil Procedure Rules** was complied with, proceeded to hear the suit.

- 60.** The Respondent submits that the Appellant did not include a Counterclaim in its Draft Defence to challenge her deceased husband's title.
- 61.** The Respondent also submits that there is no actual dispute over the validity of the title of the suit parcel of land and any allegations that the suit parcel forms part of the South Western Mau forest is unfounded.
- 62.** The Respondent further submits that the area where the suit parcel of land is located is habitable and there are people living there.

- 63.** It is the Respondent's submissions that the Appellant is only challenging her title to the suit parcel for its own selfish ambition.
- 64.** It is also the Respondent's submissions that the officials of the Appellant are aware that her husband is deceased and they are therefore taking advantage of her vulnerability to forcefully take her land.
- 65.** It is further the Respondent's submissions that the Respondent filed succession cause No. 143 of 2007 and adds that the Court issued a Certificate of Confirmation of Grant dated 12th March, 2014 and the issuance of title in her favour is pending before the land registrar.
- 66.** The Respondent also submits that the suit parcel of land is still registered in the name of **Jeremiah Kipkirui Ruto** (deceased) who was registered as the owner on 19th July, 1999.

67. The Respondent further submits that the Appellant does not therefore have a defence that raises triable issues.

ANALYSIS AND DETERMINATION.

68. The issues that arise for determination are as follows;

a. Whether the Learned Trial Magistrate erred in failing to find that the Appellant was not served with Summons to enter appearance.

b. Whether the Learned Trial Magistrate erred in failing to consider that a pre-trial conference was not undertaken and the suit certified ready for hearing as provided for under Order 11 of the Civil Procedure Rules.

c. Whether the Learned Trial Magistrate erred in failing to consider that the Respondent's Amended Notice of Motion application dated 25th May, 2021 was not disposed of before the main suit proceeded for hearing.

d. Whether the Learned Trial Magistrate erred in failing to find that the suit proceeded without service of the hearing notice upon the Appellant through the provided email address.

e. Whether the Learned Trial Magistrate erred in failing to consider that the Court delivered a ruling instead of a judgement.

f. Whether the Learned Trial Magistrate erred in failing to consider that the attached draft defence raised triable issues.

g. Who should bear costs of the appeal.

A. Whether the Learned Trial Magistrate erred in failing to find that the Appellant was not served with Summons to enter appearance.

69. This question for determination addresses ground (1) of the Amended Memorandum of Appeal.

70. Before I delve into it, I am reminded that the role of the Appellate Court, as stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**, is as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

71. In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held 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 reanalyse 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.”

- 72.** The Appellant submits that it was not served with Summons to enter appearance and that as a consequence of this omission, the Learned Trial Magistrate erred in failing to set aside the judgement as of right.
- 73.** The Respondent on the other hand submits that the Appellant entered appearance and therefore the issue whether or not it was served with Summons to enter appearance is an afterthought.
- 74.** A perusal of the ruling delivered on 25th April, 2024 shows that the Learned Trial Magistrate did not address the issue

whether the Appellant was served with Summons to enter appearance.

75. In the judicial decision of **Royal Oilfield Logistics Services and Supplies Limited v Jothan Sahenya Wafula [2019] KEELRC 1891 (KLR)** the Court held as follows;

“In the case of Uncle Sam’s Githurai Ltd & Another versus Samuel Mureithi Muriuki & 3 others the Court held as follows;

‘...the purpose of summons to enter appearance is to bring to the notice of the Defendant of the fact of the institution and to require them to respond to the plaintiff’s claim. Where therefore the Defendants on their own motion file appearances and defence to the claim, it becomes superfluous to still insist that summons should be served upon them...’

(Emphasis mine)

- 76.** In the above cited judicial decision, the Court relied on **Uncle Sam's Githurai Ltd & Another versus Samuel Mureithi Muriuki & 3 others** (citation not given) where the Court held that the purpose of service of Summons to enter appearance is to bring to the attention of a Defendant of the institution of a suit and it requires the Defendant to file a response to the suit.
- 77.** The Court also held that it is superfluous for a Defendant who has entered appearance and filed a Statement of Defence to insist that they should be served with Summons to enter appearance.
- 78.** In the present case, the Appellant admits at paragraph 3 of the Affidavit in support of the application dated 10th May, 2023, that it was served with the pleadings filed before the trial Court.

- 79.** The Appellant also admits to have entered appearance and even filed a response to the Respondent's Amended Notice of Motion application dated 25th May, 2021.
- 80.** It is evident that the Appellant had notice of the suit and it cannot therefore be insistent that it was not served with summons to enter appearance.
- 81.** Therefore, this ground of Appeal fails.

B. Whether the Learned Trial Magistrate erred in failing to consider that a pre-trial conference was not undertaken and the suit certified ready for hearing as provided for under Order 11 of the Civil Procedure Rules.

- 82.** This question for determination address ground (7) of the Amended Memorandum of Appeal.

- 83.** The Appellant submits that the trial Court erred in failing to consider that a pre-trial conference was not conducted as required under **Order 11** of the **Civil Procedure Rules**.
- 84.** The Respondent only mentioned the ground under consideration in her submissions but she did not submit on it.
- 85.** In the ruling delivered on 25th April, 2024, the Learned Trial Magistrate did not address this issue.
- 86.** A perusal of the trial Court record shows that the Court fixed the suit for mention for directions on 13th October, 2021.
- 87.** On 13th October, 2021 the Learned Trial Magistrate was away and the suit was therefore fixed for hearing on 19th January, 2022.

88. On 19th January, 2022, again, the Learned Trial Magistrate was away and another the hearing was rescheduled to 9th March, 2022.

89. On 9th March, 2022, the hearing did not proceed and it was, again, rescheduled to 18th May, 2022.

90. From the Court record it is evident that a pre-trial conference was not undertaken.

91. In the judicial decision of **Mbugua & 4 others v Mwangi & another** [2025] KEELC 3180 (KLR) the Court held as follows;

“I find that Order 11 rule 1 of the Civil Procedure Rules makes pre-trial directions and conferences mandatory in all cases governed by the Civil Procedure Act. The only exception to this is in relation to small claims or such other suits as the Court may exempt from the pretrial conference.” (Emphasis mine)

92. In the above cited judicial decision, the Court held that it is mandatory under **Order 11** of the **Civil Procedure Rules** for a pre-trial conference to be held.

93. In **Mbogo v NCBA Bank Kenya & 2 others** [2025] KEHC 6065 (KLR) the Court held as follows;

“...failure to strictly comply with Order 11 of the Civil Procedure Rules was a technicality which is curable pursuant Article 159 [2] [d] of the Constitution of Kenya , 2010 hence not fatal to the proceedings as long as parties who had filed their pleadings and documentary evidence were allowed to participate in trial.” (Emphasis mine)

94. In the above cited judicial decision, the Court held that failure to comply with **Order 11** of the **Civil Procedure Rules** is a technicality and therefore not fatal to proceedings

provided that parties who had filed their pleadings are allowed to participate in the trial.

95. It is my view that even though it was mandatory for the trial Court to conduct a pre-trial conference, failure to do so cannot be the basis upon which a judgement is set aside.

96. That being the case, this ground of appeal fails.

C. Whether the Learned Trial Magistrate erred in failing to consider that the Respondent's Amended Notice of Motion application dated 25th May, 2021 was not disposed off before the main suit proceeded for hearing.

97. This question for determination addresses ground (3) of the Amended Memorandum of Appeal.

98. The Appellant contends that the Learned Trial Magistrate erred in failing to consider that the Respondent's Amended Notice of Motion application dated 25th May, 2021 was not disposed of before the main suit was heard.

99. The Respondent submits that the said application may have been dispensed with since she did not seek any injunction orders pending the hearing and determination of the suit.

100. The Learned Trial Magistrate did not address this issue in the ruling delivered on 25th April, 2024.

101. Under issue (a) above, I have made the finding that the Appellant had notice of the present proceedings. The judgement that was delivered by the Court was therefore a regular one.

102.In the Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another** [2016] KECA 470 (KLR) held as follows;

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 judgment 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 judgment, and will

take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment 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 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.” (Emphasis mine)

103. In the above cited judicial decision, the Court of Appeal held that a Court should take into account the following factors when considering whether it can set aside a regular default judgement;

- a. The reason for the failure of the Defendant to file his memorandum of appearance or Defence.***
- b. The length of time that has lapsed since the default judgment was entered.***
- c. Whether the intended Defence raises triable issues.***
- d. The respective prejudice each party is likely to suffer.***
- e. Whether on the whole it is in the interest of justice to set aside the default judgment.***

104. It is evident that the issue whether or not there was a pending application on the Court record at the time of

delivery of judgment is not one of the issues that the Court should take into consideration in determining an application seeking orders to set aside a regular default judgement.

105. That being the case, ground (3) of the appeal therefore fails.

D. Whether the Learned Trial Magistrate erred in failing to find that the suit proceeded without service of the hearing notice upon the Appellant through the provided email address.

106. This question for determination addresses grounds (4A) and (4B) of the Amended Memorandum of Appeal.

107. The Appellant submits that it entered appearance on 25th June, 2021 and provided its email address for purposes of service.

108.The Appellant also submits that the email it provided was cl.kisumu@ag.go.ke.

109.The Appellant further submits that it was not served with the hearing notice through the provided email address.

110.It is the Appellant's submissions that the Respondent alleged to have served it with the hearing notice vide info@ag.go.ke which was not the email address that it provided.

111.It is also the Appellant's submissions that the Trial Court erred in not making that finding.

112.The Respondent on the other hand submits that the issue of the email address was not raised before the trial Court and the Appellant cannot therefore raise it on appeal.

113.The Respondent nonetheless submits that it served the Appellant through info@ag.go.ke which email address it found on the Attorney General's website.

114.A perusal of the ruling delivered on 25th April, 2025 shows that the Court did not address this issue.

115.A perusal of the application dated 10th May, 2023 which was subject of the ruling delivered on 25th April, 2024 shows that the Appellant contended that it was not served with the hearing notice.

116.In its submissions filed before the Trial Court on 13th February, 2024, the Appellant submitted on the issue of the email address used for service of the hearing notice. It contended that it ought to have been served vide the provided email which was cl.kisumu@ag.go.ke and not through info@ag.go.ke.

117. It is therefore evident that this issue was not first raised on appeal as alleged by the Respondent.

118. A perusal of the Memorandum of Appearance filed on 25th June, 2021 shows that the email provided by the Appellant was cl.kisumu@ag.go.ke.

119. That being the case, the Respondent ought to have served the Appellant through the email address provided in its Memorandum of Appearance instead of serving it through the email on the website.

120. However, it is important to note that the Appellant was at all times aware of the proceedings before the trial Court. The Appellant was therefore under a duty to follow up and find out the progress of the suit.

121. It is therefore my view that the Learned Trial Magistrate did not err in failing to consider the issue that the Appellant was

not served with the hearing notice vide the provided email address.

122. This ground of appeal therefore fails.

E. Whether the Learned Trial Magistrate erred in failing to consider that the Court delivered a ruling instead of a judgement.

123. This question for determination addresses ground (4) of the Amended Memorandum of Appeal.

124. The Appellant contends that the Learned Trial Magistrate erred in failing to consider that the Court delivered a ruling instead of a judgement.

125. The Appellant submits that the trial Court issued final orders in a ruling instead of delivering a judgement.

126. The Appellant also submits that the impugned decision was fatally defective and ought to be set aside.

127. The Respondent did not address this issue in her submissions.

128. At page 2 of the ruling delivered on 25th April, 2025 the Learned Trial Magistrate held as follows;

“...The ruling contains the testimony of the witnesses and the documents that were produced, refers to decided cases and then makes a determination as hereunder; ...

For all intents and purposes, the “Ruling” of 22nd March, 2023 is actually the Judgement of the Court, and is what the 1st Defendant seeks to be set aside.”

129. The Learned Trial Magistrate at paragraph 2 of page three of the ruling delivered on 25th April, 2024 also held as follows;

“The 1st Defendant’s major contention is that the Ruling made on 22nd March, 2023 gave final orders in this matter. As I have stated, the matter proceeded to hearing and a determination was made. In my view, the 1st Defendant’s reason for seeking the setting aside of the ruling, which in essence is a judgement are not tenable in the circumstances.”

130. From the trial Court record it is evident that on 22nd March, 2023 the trial Court delivered a “*Ruling*” wherein it granted prayers **(a), (b), (d) & (e)** of the Plaint.

131. In the judicial decision of **Joshua Akeyo Ogendo v David Rowland Matende & another [2017] KEELC 1556 (KLR)** the Court held as follows;

“On ground 1 of appeal, I am in agreement with the submission by the Appellant that the lower Court fell into error by rendering a ruling instead of a judgment after substantively hearing the suit. By rendering a ruling instead of a judgment, the Court acted contrary to the Provisions of Section 25 of the Civil Procedure Act and Order 21 rule 1 of the Civil Procedure Rules 2010. That said, I have noted that the decision of the lower Court was in all material respects a judgment. The Court considered the pleadings, the evidence that was tendered, the issues which arose for determination and determined the same in favour of the Respondents. The lower Court found the Appellant’s case not proved and dismissed the same with costs to the Respondents. The error that the lower Court fell into was in the heading of its decision which it referred to as “Ruling” instead of

“Judgment”. I am of the view that this was an accidental slip which could be corrected by the Court under section 99 of the Civil Procedure Act. Since the error did not go to the jurisdiction of the Court and did not affect the decision of the Court in any material respect, it does not render the decision of the Court fatally defective as submitted by the Appellant. Section 79A of the Civil Procedure Act bars this Court from reversing or varying a decree on account of any error, defect or irregularity in any proceedings in the suit which does not affect the merit of the case or jurisdiction of the Court.” (Emphasis mine)

132. Similarly, in the present appeal, it is evident that the ruling delivered on 22nd March, 2023 was in all respects a judgement. The trial Court considered the pleadings filed by the Respondent, the evidence adduced during the hearing before granting prayers **(a), (b), (d)** and **(e)** of the Plaintiff.

133. In my view the fact of the Learned Trial Magistrate titling the decision as a “*ruling*” instead of a “*judgement*” is akin to an accidental slip as was held in **Joshua Akeyo Ogendo v David Rowland Matende & another [2017] KEELC 1556 (KLR)** (supra). The Court further held that the said error does not go to the jurisdiction of the trial Court and does not also materially affect the decision of the trial Court and added that the said error does not render the decision of the trial Court fatally defective.

134. Taking the foregoing into consideration, I find that the Learned Trial Magistrate did not err in failing to find that the Court delivered a ruling instead of a judgement for the reason that the decision delivered on 22nd March, 2023 was erroneously titled “*Ruling*” instead of “*Judgement*”.

135. This ground of appeal therefore fails.

F. Whether the Learned Trial Magistrate erred in failing to consider that the attached draft defence raised triable issues.

136. This question for determination addresses ground (8) of the Amended Memorandum of Appeal.

137. The Appellant submits that the Learned Trial Magistrate erred in failing to consider that the attached draft defence raised triable issues.

138. The Appellant also submits that it raised the issue that the suit parcel of land forms part of the South Western Mau Forest and that this is a triable issue.

139. The Respondent on the other hand denies that the suit parcel of land forms part of the South Western Mau Forest and instead submits that her deceased husband was issued with a title deed on 19th July, 1999.

140. The Respondent also submits that the Appellant did not file a Counterclaim to challenge the root of the title of the suit parcel of land.

141. The Learned Trial Magistrate did not address this issue in the ruling delivered on 25th April, 2024.

142. In **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another (supra)** cited above, the Court of Appeal held that the Court should take into consideration the following factors when determining whether or not to set aside a regular default judgement;

a. The reason for the failure of the Defendant to file his memorandum of appearance or Defence.

b. The length of time that has lapsed since the default judgment was entered.

c. Whether the intended Defence raises triable issues.

d. The respective prejudice each party is likely to suffer.

e. Whether on the whole it is in the interest of justice to set aside the default judgment.

143. From the ruling delivered on 25th April, 2024 it is evident that the Learned Trial Magistrate did not consider the above listed factors.

144. The trial Court delivered judgement on 22nd March, 2023 and the Appellant filed the application dated 10th May, 2023 on 11th May, 2023 seeking that the said judgement be set aside. This was after a period of one month and seventeen days had lapsed. It is my view that there was no inordinate delay in the filing of the said application.

145. It is apparent that the Appellant has not given any reasons for the failure to file a Statement of defence within time but it is evident that its intended defence raises triable issues i.e

that the suit parcel of land forms part of the South Western Mau Forest.

146. The judicial decision of Patel Vs EA Cargo Handling Services

Ltd (1974) E A 75 was cited in **John Mukuha Mburu v Charles Mwenga Mburu [2019] KEELC 4676 (KLR)**

where it was held as follows;

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a ‘triable issue’.”

147. In John Mukuha Mburu v Charles Mwenga Mburu (supra) the Court held as follows;

“It is the Court’s view that whether the defence has merit is best left to the trial Court to test its veracity at the hearing of the case. However, the Court is persuaded

**that the Applicant has a defence
that raises triable issues.”**

[Emphasis mine]

148. In the present appeal, it is evident that the Appellant’s intended defence raises triable issues. The Learned Trial Magistrate therefore erred in failing to consider whether the Appellant’s draft Statement of defence raised triable issues.

149. This ground of appeal therefore succeeds.

G. Who should bear costs of the appeal.

150. The general rule is that costs shall follow the event. This is in accordance with the provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

DISPOSITION.

151.In the result, the ruling delivered on 25th April, 2024, Judgment delivered on 22nd March, 2023 in Kericho CM ELC Case No. E028 of 2021 and all consequential proceedings and orders are hereby set aside.

152.The Appellant shall have costs of the appeal.

153.It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 16TH DAY OF APRIL, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Mr. Ojwang for Chepkemoi for the Appellant.

Mr. Kemboi for the Respondent.

Court Assistant; Mr. Joseph Makori.

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