

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELCL APPEAL NO. E021 OF 2025

ABDALLA SHARIF AHMED OMAR ... APPELLANT/RESPONDENT

VERSUS

MUNIR SKETTY (as Administrator of the estate of Nassor
Mohamed Nahdy (Deceased)

RESPONDENT/APPLICANT

RULING

1. By the Notice of Motion dated 17th October 2025, Munir Sketty (the Respondent/Applicant) prays for an order that this Court sets aside the orders issued herein on 1st October 2025 and that an order be made for a fresh hearing of the Notice of Motion dated 2nd April 2025.
2. The application which is supported by an Affidavit sworn by the Applicant is premised on the grounds that:
 - (i) **On 1st October 2025, the Applicant's Advocate was unable to log into the virtual hearing platform due to a technical hitch;**

- (ii) In any event this Court has no jurisdiction to entertain the Notice of Motion application dated 2nd April 2025 as per the Grounds of Opposition filed herein;**
- (iii) The Appellant has a pending appeal before the Court of Appeal which denies him the right to appeal to this Court;**
- (iv) In any event the application is without merit taking the history of this dispute before the Court; and**
- (v) It is in the interest of justice that this application is allowed.**

3. Abdalla Sharif Ahmed Omar (the Appellant) is opposed to the application. By his Grounds of Opposition dated 5th November 2025, the Appellant objects to the application on the grounds that:

1. The Applicant does not pretend to demonstrate even casually, what technical fault or hitch affected him or his advocate on 01.10.2025, 23rd September 2025 and 23rd July 2025 and why the Applicant has been sloppy in defending this application.

- 2. The issue of whether or not this Court has jurisdiction is not *res integra*, given the provisions of Order 47 Rule 8 and Order 49 of the Civil Procedure Rules.**
- 3. The proceedings of 01.10.2025 do not fall under Order 12 Rule 7.**
- 4. This application is brought with unclean and inequitable hands, and as an afterthought.**
- 5. Setting aside and/or rehearing the Appellant's application *de novo* is neither available, nor the optimal and just remedy against the injunction granted by this Court in appeal.**
- 6. The (Applicant) is guilty of sloppy malingering and delaying tactics, as he was pursuing other remedies before another Court.**
- 7. The (Applicant) has suppressed and failed to disclose the other legal proceedings in which they were collusively involved. He is guilty of material non-disclosure and is not deserving of any**

accommodation, or favourable exercise of discretion by the Court.

4. In addition to the said Grounds of Opposition, the Appellant has filed a Replying Affidavit sworn on 14th November 2025 wherein he avers that this matter came up for hearing on 24th April 2025, 23rd July 2025, 23rd September 2025 and on 1st October 2025 when the Court dealt with it in the absence of the Counsel for the Respondent after being satisfied that they were served.
5. The Appellant avers that the explanation that the Respondent or his Advocate experienced any technical hitch is spurious and incorrect as the Appellant's Advocate always shared the link every time the matter came up and on one else experienced any problem with the link. The Appellant further avers that the fact that he has taken up an appeal against the substantive judgment before the Court of Appeal is no bar to his challenging any interlocutory orders and rulings of the Deputy Registrar of the Court.
6. I have considered both the application and the response thereto. By this application before the Court the Applicant has

urged the Court to set aside the orders issued herein on 1st October 2025 and that an order be made for a fresh hearing of the Notice of Motion dated 2nd April 2025. The application before the Court is premised under Order 12 Rule 7 of the Civil Procedure Rule 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.”

7. As was stated in the case of ***Shah -vs- Mbogo & Another (1967) EA 116:***

“The Court’s 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 not to assist a person who has deliberately sought, (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

8. In ***James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Anohter (2016) eKLR,*** the Court of Appeal stated thus:

“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 others. 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.....”

9. The matter before me was however rather curious. In his application before the Court, the Applicant avers that on 1st

October 2025 when the matter came up in Court, his Advocate on record was unable to log into the virtual hearing platform due to a technical hitch. The nature of that hitch has not been explained by the Applicant and the said Advocate on record has not filed an Affidavit to explain what may have occurred to prevent him from getting onto the virtual platform.

10. According to the Applicant, he had filed Grounds of Opposition dated 30th May 2025, to the application dated 2nd April 2025. Curiously I was unable to find any such Grounds filed either in the physical record of the Court or in the Judiciary Case Tracking System (CTS). There was indeed no evidence that the same had ever been served upon the Appellant.
11. The record herein reveals that when the Appellant filed the Motion dated 2nd April 2025, the Court directed that the same be served upon the Respondent for inter-partes hearing on 12th May 2025. When the matter came up on that date, Mr. S. K. Kimani, Learned Counsel for the Appellant informed the Court he had served the application upon the Respondent but they had omitted to put in an Affidavit of Service. On that account, the Court adjourned the application to 21st July 2025.

12. Again on 21st July 2025, the Respondent did not appear and given the Court's doubt that the Respondent had been served, more so in the absence once again of an Affidavit of Service, the Appellant was again asked to serve the application upon the Respondent for hearing on 23rd September 2025. As it turned out again, on the date fixed for hearing, the Respondent had not appeared. On Mr. Kimani Advocate's insistence that they had uploaded an Affidavit of Service on 19th September 2025 and the Court being unable to confirm instantly if that were the case, the matter was fixed for 1st October 2025 to enable the Court Registry to confirm if indeed there was an Affidavit of Service lodged by the Appellant.
13. As it turned out, on 1st October 2025, the Affidavit of Service sworn on 19th September 2025 was availed to the Court and the Court having been satisfied that indeed there was service, proceeded to allow the Motion dated 2nd April 2025.
14. In the circumstances of this case, it was clear to me that the Respondent was aware about the application but had chosen for some reason not to participate in the proceedings hoping for some different result. If indeed the Respondent had filed

their Grounds of Opposition on 30th May 2025, there was no reason given as to why their Advocate on record did not attend Court on 21st July 2025 and 23rd September 2025 when the application subsequently came up for hearing. That being the case, the allegation that the Respondent's Counsel suffered a technical hitch on 1st October 2025 was nothing but a smoke screen and a position reached as an afterthought after the Appellant's application had been allowed.

15. In the premises herein, I was not persuaded that this is a matter in which I should exercise my discretion in favour of the Respondent whose conduct was clearly aimed at delaying the conclusion of this matter.
16. Accordingly, I was not persuaded that there is any merit in the Motion dated 17th October 2025. The same is dismissed with costs to the Appellant.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 30th day of April, 2026.

.....
J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.

- b) Mr. Kimani S. K. Advocate for the Appellant/Respondent
- c) Mr. Kiprono holding brie for Abubakar Advocate for the Respondent/Applicant

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